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Buddy O.H. Herring

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## ARTICLES

# DIVISIBILITY OF ADVANCED DEGREES IN EQUITABLE DISTRIBUTION STATES

BUDDY O.H. HERRING\*

### INTRODUCTION

August 5, 1968 was a warm summer day in Denver, Colorado. It was a perfect day for a wedding. Anne had met Dennis while she was an airline stewardess and he was a student. The parties agreed that after the wedding Dennis would finish school and Anne would support the family unit.

Over the next three and one-half years, Anne continued working for the airline while Dennis completed his studies. He received both his bachelor's and master's degrees. During this time, the parties' resources were devoted entirely to day-to-day living expenses, with little accumulated in the way of traditional marital property.

On February 4, 1974, Dennis and Anne Graham filed for divorce in Boulder County. Anne asked that she be awarded a portion of the marital property the parties had acquired.<sup>1</sup> She contended that Dennis' M.B.A. degree was marital property and, therefore, subject to division under Colorado's equitable distribution law.<sup>2</sup> Unexpectedly, Anne's assertion that the advanced degree constituted marital property raised what was to become "the raging issue in matrimonial law."<sup>3</sup>

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\* B.A. Wake Forest University 1968; J.D. *cum laude*, Wake Forest University 1981. The author is currently a Professor of Law at Wake Forest University. During the time this article was prepared, he was a Visiting Professor of Law at Pepperdine University. He is also of counsel to the law firm of Tirola, Herring, Pober and Lazo in Westport, Connecticut.

1. *In re Marriage of Graham*, 194 Colo. 429, 431, 574 P.2d 75, 76 (1978).

2. *Graham*, 194 Colo. at 430, 574 P.2d at 76.

3. The Nat'l L. J., Nov. 28, 1983 at 1 col. 2. See generally Moore, *Should A Degree Be Considered a Marital Asset Upon Divorce?*, 15 AKRON L. REV. 543 (1982); Krauskopf, *Recompense for Financing Spouse's Education: Legal Protection for the Marital Investor in Human Capital*, 28 KAN. L. REV. 379 (1980); Pinell, *Divorce After Professional School: Education and Future Earning Capacity May Be Marital Property*, 44 MO. L. REV. 329 (1979); Comment, *The Interest of the Community in a Professional Education*, 10 CAL. W.L. REV. 590 (1974) (suggesting a formula for computation of value).

Anne had worked hard to support the family unit during the period that Dennis was acquiring his degrees. Now, she was faced with the probability of leaving the marriage financially strapped, having expended a large sum of money over the last six years. The only fair solution would be to award her an interest in the newly acquired degree. The trial court agreed with Anne and valued the M.B.A. degree at \$82,836, awarding her \$33,134 to be paid in \$100 per month installments. Dennis appealed to the Colorado Supreme Court on the grounds that the degree was not property and, therefore, not subject to the equitable distribution law. The Supreme Court accepted Dennis' theory and reversed the lower court.<sup>4</sup>

*In re Marriage of Graham* was the first decision in a string of cases to attempt to deal with what has become an increasingly common problem. One spouse makes significant contributions to the education of the other spouse and then the marriage dissolves before the parties realize any return on the investment of time and money in the newly acquired degree. Because the parties' resources have been used to 'pay day-to-day living expenses and educational costs, there remains very little, if any, traditional marital property: no home, no stocks, no saving accounts—only an advanced degree. Consequently, absent the traditional marital property, equitable distribution laws or community property laws provide little direction. Clearly, to follow the lead of the Colorado Court<sup>5</sup> is highly inequitable. Even though such a course may adhere to traditional property definitions, it is nonetheless unfair in that the spouse who has worked and supported the student spouse will not receive some remuneration for his or her efforts. The purpose of this paper is to examine how the various jurisdictions, which have equitable distribution or community property laws, have addressed this problem and ultimately, to propose the fairest solution to this dilemma.

More specifically, this article will first examine how the various states have treated the non-degree-earning spouse's claim to a share of the newly acquired degree. It will limit its inquiry to the status of the degree itself, and not to the status of the practice which may result from the acquisition of the degree.<sup>6</sup> Second, the paper will

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4. *Graham*, 194 Colo. at 430, 574 P.2d at 76.

5. *Id.*

6. *In re Marriage of Nichols*, 43 Colo. App. 383, 385, 606 P.2d 1314, 1315 (1979). Professional practices that can be sold for more than the value of their fixtures and accounts receivable have salable goodwill. A professional, like any entrepreneur who has established a reputation for skill and expertise, can expect his patrons to return to him, to speak well of him, and upon selling his practice, can expect that many will accept the buyer and will utilize his professional expertise. . . .

*Id.* This limited marketability distinguishes professional goodwill from the advanced educational degree, which, because it is personal to its holder and is non-transferable, was held not to be property in *Graham*. See also *Slater v. Slater*, 100 Cal. App. 3d

address the advantages and disadvantages of each solution. Finally, a model solution for all states which have equitable distribution laws will be proposed.

### STATES' TREATMENT OF THE ADVANCED DEGREE-AN OVERVIEW

Most states' equitable distribution statutes do not deal directly with the subject of advanced degrees. In most cases, the statutes deal with the license or the practice which results from the acquisition of the degree, not the degree itself. Additionally, some statutes consider each spouse's contribution to the other's education as a factor in the division of the marital property.<sup>7</sup> These approaches are unsatisfactory when there is no established practice and little or no divisible marital property, which is usually the case if the divorce is sought shortly after the degree is obtained.

Indiana is one state which has dealt specifically with the problem in its equitable distribution statute. It provides that if there is minimal or no divisible marital property, then the non-degree-earning spouse may receive an award for his or her financial contributions to the education of the other spouse.<sup>8</sup> Most states, however, have chosen not to follow Indiana's lead, thus forcing the courts to decide the issue. Although many of the cases dealing with this subject are traditionally settled before trial, an increasing number of them are being adjudicated at both the trial and appellate level.<sup>9</sup>

There is little uniformity in the courts' treatment of advanced degrees obtained during marriage. Rather, the courts apparently have become divided into four distinct groups. First, some state courts hold that the advanced degree is not property within the meaning of their equitable distribution statute and, therefore, is not subject to any division upon divorce.<sup>10</sup> Another group of states hold

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241, 160 Cal. Rptr. 686 (1979) (goodwill and portion of medical accounts receivable of a medical partnership); *In re Marriage of White*, 98 Ill. App. 3d 380, 424 N.E.2d 421 (1981) (professional dental corporation acquired after marriage); *Heller v. Heller*, 672 S.W.2d 945 (Ky. Ct. App. 1984); *Hurley v. Hurley*, 94 N.M. 641, 615 P.2d 256 (1980), *overruled*, 637 P.2d 566; *In re Marriage of Goger*, 27 Or. App. 729, 557 P.2d 46 (1976) (corporation's goodwill). See generally 53 A.L.R. 3d 447.

7. See, e.g., ILL. REV. STAT. ch. 40, § 504 (1983); IOWA CODE § 598.21(1)(e) (1981); N.C. GEN. STAT. §§ 50-20(b)(3), 50-20(c)(7) (1984).

8. IND. CODE ANN. § 31-1-11.5-11(b)(1) (Burns 1980). See also, CALIF. CIVIL CODE §§ 4800, 4800.3, and 4801 (1985).

9. The Nat'l L. J., Nov. 28, 1983, at 1, col. 2 (until 1978, the question of dividing the value of a professional degree was usually settled privately).

10. See, e.g., *In re Graham*, 194 Colo. 429, 574 P.2d 75 (1978) (master's degree in business administration is not marital property subject to division); *In re Marriage of Goldstein*, 97 Ill. App. 3d 1023, 423 N.E.2d 1201 (1983) (increased potential derived from husband's medical degree was not marital asset which court could divide in dissolving marriage).

that even if the advanced degree is property within the meaning of their equitable distribution statute, the valuation problems are too difficult and speculative to divide the degree.<sup>11</sup>

Third, some states do not value the degree as property, but nevertheless recognize the non-degree-earning spouse's substantial loss and award that spouse reimbursement for financial contributions.<sup>12</sup> Lastly, other states value the degree as property which is subject to division under their statute.<sup>13</sup> Although this fourth group stands together in their view that the advanced degree is divisible property, disagreement presently exists amongst these states regarding the best method of valuing the degree.<sup>14</sup> In order to decide which of these four approaches is the most equitable, it is first necessary to more closely examine each of these positions and evaluate the arguments offered in support of the various courts' decisions.

#### I. STATES WHICH HOLD THAT ADVANCED DEGREES ARE NOT PROPERTY WITHIN THEIR EQUITABLE DISTRIBUTION STATUTES AND, THEREFORE, NOT SUBJECT TO DIVISION UPON DIVORCE

The leading case supporting the view that the advanced degree is not property under the equitable distribution statute and, therefore, not subject to division upon divorce is *In re Marriage of Graham*.<sup>15</sup> In this landmark decision, the Colorado Supreme Court, in refusing to divide the advanced degree, stated:

an educational degree . . . is simply not encompassed even by the broad view of the concept of "property." It does not have an exchange value or any objective transferable value on the open market. It is personal to the holder. It terminates on death of the holder and is not inheritable. It cannot be assigned, sold, transferred, conveyed, or pledged. An advanced degree is a cumulative product of many years of previous education, combined with diligence and hard work. It may not be acquired by the mere expenditure of money. It is simply an intellectual achievement that may potentially assist in the future acquisition of property. In our view, it has none of the attributes of property in the usual sense of the term.<sup>16</sup>

The result of the court's strict interpretation as to what constitutes property is that the wife, who supported her husband while he was

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11. See, e.g., *Hughes v. Hughes*, 438 So. 2d 146 (Fla. App. 1983) (educational expenses not "property" subject to distribution in divorce because future earnings capacity too speculative to calculate).

12. See, e.g., *In re Marriage of Horstman*, 263 N.W.2d 885 (Iowa 1978); *Mahoney v. Mahoney*, 91 N.J. 488, 453 A.2d 527 (1982).

13. *Woodworth v. Woodworth*, 126 Mich. App. 258, 337 N.W.2d 332 (1983) (husband's law degree is marital property subject to distribution upon divorce).

14. Compare *id.* with *O'Brien v. O'Brien*, 114 Misc. 2d 233, 452 N.Y.S.2d 801 (1982), modified, 106 A.D.2d 223, 485 N.Y.S.2d 548 (1985).

15. 194 Colo. 429, 574 P.2d 75 (1978).

16. *Id.* at 432, 574 P.2d at 77.

in school acquiring this separate property, is left with no part of the degree. Consequently, she must rely on other traditional remedies such as alimony and an equitable division of the marital property.<sup>17</sup> The problem with these remedies is that, as in the case of the *Grahams* and many other marriages, there is no other divisible marital property.<sup>18</sup>

A number of states have followed the rationale in *Graham* and held that the advanced degree is not property and, therefore, not subject to division under the equitable distribution law.<sup>19</sup> In addition, most community property states generally agree with *Graham*. In *Wisner v. Wisner*,<sup>20</sup> the court defined an education as an intangible property right, the value of which can not be properly characterized as property subject to division.<sup>21</sup> California, an influential community property state, also follows the view that an advanced degree is not property subject to division. In *Todd v. Todd*,<sup>22</sup> the court held that a professional degree was “[a]t best . . . an intangible property right, the value of which, because of its character, cannot have monetary value placed upon it for division between spouses.”<sup>23</sup> While such reasoning may be technically correct, it does substantial injustice to the non-degree-earning spouse.

The California Court of Appeals in *In re Marriage of Aufmuth*,<sup>24</sup> advanced another rationale for refusing to hold the advanced degree as divisible property. The court observed that valuing a professional degree as an asset in the marital estate would necessarily require a division of the post-divorce earnings and efforts of the degree holder in that the degree could not be sold to pay the appropriate share to the non-degree-holding spouse. Such a division of the spouse's post-divorce earnings, however, would be inconsistent with the philosophy that only assets acquired during the marriage are

17. *Id.* at 433, 574 P.2d at 78.

18. *Id.* But see *Washburn v. Washburn*, 101 Wash. 2d 168, 172-73, 677 P.2d 152, 154-55 (1984) (one couple divided \$13,600 in community property and another couple divided over \$20,000 in community property).

19. See *In re Marriage of Goldstein*, 97 Ill. App. 3d 1023, 423 N.E.2d 120 (1981); *In re Marriage of McManama*, 272 Ind. 483, 399 N.E.2d 371 (1980); *Wilcox v. Wilcox*, 173 Ind. App. 661, 365 N.E.2d 792 (1977); *Ruben v. Ruben*, 123 N.H. 358, 461 A.2d 733 (1983); *Eisenstadt v. Eisenstadt*, 10 Fam. L. Rptr. (BNA) 1004 (N.Y. Sup. Ct. 1983); *Lesman v. Lesman*, 110 Misc. 2d 815, 442 N.Y.S.2d 955 (1981), *modified*, 88 App. Div. 2d 153, 452 N.Y.S.2d 935 (1982).

20. 129 Ariz. 333, 631 P.2d 115 (1981).

21. *Id.* See also, *Muckleroy v. Muckleroy*, 84 N.M. 14, 498 P.2d 1357 (1972) (medical license cannot be “community property” because it cannot be subject to joint ownership).

22. 272 Cal. App. 2d 786, 78 Cal. Rptr. 131 (1969). Cf. CALIF. CIVIL CODE §§ 4800, 4801 and 4800.3 (1985).

23. *Todd*, 272 Cal. App. 2d at 792, 78 Cal. Rptr. at 135. See also, *In re Marriage of Sullivan*, 134 Cal. App. 3d 634, 184 Cal. Rptr. 796 (1982).

24. 89 Cal. App. 3d 446, 152 Cal. Rptr. 668 (1979).

subject to division. While dividing post divorce property should be a concern of the court, it should not totally preclude any share for the non-degree-earning spouse.

The New Jersey Supreme Court, in *Mahoney v. Mahoney*,<sup>25</sup> stated that even providing the term "property" with an "expansive interpretation" would not allow the court to characterize an advanced degree as property.<sup>26</sup> The court reasoned that to subject the degree to distribution would require, in effect, the distribution of future earnings. Again, this violates the principle of the equitable distribution law that only property acquired during the marriage is subject to distribution. Additionally, the court was concerned about the speculative nature of any such award.<sup>27</sup>

The combined result of these rationales is to deny property status to the degree earned during the marriage, leaving the non-degree-earning spouse, in many instances, with nothing to show for years of effort.

## II. STATES WHICH DO NOT ALLOW DISTRIBUTION OF ADVANCED DEGREES PRIMARILY BECAUSE IT IS TOO DIFFICULT AND TOO SPECULATIVE TO VALUE THE DEGREE

As was noted in the previous section, many courts which have confronted the problems of divisibility of advanced degrees have been deeply concerned with valuation problems.<sup>28</sup> These courts have reasoned that the crux of the problem is not whether the degree is or is not property, but rather, whether it is feasible to accurately value the degree without dividing future earnings.

The first problem then is to determine a value for the degree. Obviously, such a determination will involve a number of factors, many of which would require the court to engage in speculation. For instance, in the case of the newly acquired law degree, how successful will the new lawyer be? What type of practice will he or she engage in? What type of practice should be standard if the new lawyer doesn't have a job? What if the new lawyer decides after a few years of practice that he or she wants to pursue a new, less lucrative career? In *Hughes v. Hughes*,<sup>29</sup> the court stated that the proper measure of an educational degree can only be determined by the future earnings it will generate, and not by its cost. The court fur-

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25. 91 N.J. 488, 453 A.2d 527 (1982).

26. *Id.* at 495-96, 453 A.2d at 531.

27. *Id.* at 497, 453 A.2d at 532. *Accord* *Hughes v. Hughes*, 438 So. 2d 146 (Fla. App. 1983); *In re Marriage of Goldstein*, 97 Ill. App. 2d 1023, 423 N.E.2d 1201 (1981); *In re Marriage of McManama*, 272 Ind. 483, 399 N.E.2d 371 (1980), *DeWitt v. DeWitt*, 98 Wis. 2d 44, 296 N.W.2d 761 (1980).

28. *See supra* note 27.

29. 438 So. 2d 146 (Fla. App. 1983).

ther indicated that such a measure of value was just too imprecise, uncertain, and speculative to allow for an accurate award.<sup>30</sup>

It is difficult to value any asset correctly, but using future earnings to value an advanced degree is almost pure speculation.<sup>31</sup> As the court pointed out in the case of *DeWitt v. DeWitt*,<sup>32</sup>

[w]hether a professional education is and will be of future value to its recipient is a matter resting on factors which are at best difficult to anticipate or measure. A person qualified by education for a given profession may choose not to practice it, may fail at it, or may practice in a speciality, location or manner which generates less than average income enjoyed by fellow professionals. The potential worth of the education may never be realized for these or many other reasons. An award based on the prediction of the degree holder's success at the chosen field may bear no relationship to the reality he or she faces after divorce.<sup>33</sup>

These courts have not been impressed with the argument that valuation of the advanced degree is no less speculative than an award of goodwill or a tort award in a wrongful death action.<sup>34</sup> In both of those examples, factors are present which do not exist in the case of an advanced degree. A goodwill valuation at least concerns an "on-going business." The examiner thus has some concrete factors on which to base an award. As a matter of fact, some courts which have refused to make an award based on future earnings, have valued goodwill and distributed its value upon divorce.<sup>35</sup> Addi-

30. *Id.* See also *Wehrkamp v. Wehrkamp*, 10 Fam. L. Rep. (BNA) 1697 (1984).

31. *Mahoney*, 91 N.J. at 496-97, 453 A.2d at 532. Nevertheless, several commentators have suggested ways to value a degree or to provide compensation for the working spouse. Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property Alimony and Child Support Awards*, 28 U.C.L.A. L. REV. 1181, 1281-21 (1981). See also Fitzpatrick & Ducette, *Can the Economic Value of an Education Really be Measured? A Guide for Marital Property Dissolution*, 21 J. FAM. LAW 511, 514-24 (1983) (value of degree based on incremental change in earning capacity); Mullenix, *The Valuation of an Educational Degree at Divorce*, 16 LOY. L.A. L. REV. 227, 268-83 (1983) (value of degree based on labor theory of value).

32. 98 Wis.2d 44, 296 N.W.2d 761 (1980).

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

34. *Id. Contra Woodworth*, 126 Mich. App. at 264, 337 N.W.2d at 336 (measuring future earnings from advanced degrees not anymore speculative than calculating future earnings in cases of personal injury, wrongful death, or workers' compensation). The dissenting opinion to a California case argued that the majority, in refusing to view a medical degree as property, too narrowly defined property. In *re Marriage of Sullivan*, 134 Cal. App. 3d 634, 645-57, 184 Cal. Rptr. 796, 804-12 (1982), partially reversed and remanded 37 Cal.3d 762, 209 Cal. Rptr. 354 (1984). The dissenting opinion pointed out that other decisions had recognized various intangible assets as property, including term life insurance benefits, non-vested pension rights, and contingent retirement rights. 134 Cal. App. 3d at 645-57, 184 Cal. Rptr. at 804-12.

35. *In re Marriage of Nichols*, 43 Colo. App. 383, 606 P.2d 1314 (1979); *Heller v. Heller*, 672 S.W.2d 945 (Ky. App. 1984). In *Poore v. Poore*, the North Carolina Court of Appeals in dealing with the problem of valuing goodwill said:

There is no set rule for determining the value of goodwill of a professional practice; rather, each case must be determined in light of its own particular facts. . . . Courts are cautioned to value goodwill with great care, for the indi-



tionally, in a goodwill valuation, assets may be sold to pay the judgment, which is not the case with a degree. Similarly, in making a tort award, an insurance policy usually exists to pay the judgment. Thus, the individual is not condemned to a lifetime of servitude to fulfill the court's judgment.

In addition to the speculative nature of a future earnings valuation, two other problems connected with valuation have troubled the courts. First, is the fact that any award based on future earnings will necessarily divide assets which were acquired after the marriage had terminated.<sup>36</sup> As previously noted, equitable distribution statutes only provide for division of property acquired during the marriage.<sup>37</sup> Thus, an award based on future earnings would constitute an award of property not subject to distribution under the equitable distribution statute.<sup>38</sup> The second problem is the fact that a property division, unlike an alimony award, is not modifiable.<sup>39</sup> If the degree-holder fails to achieve the court's expectations, the finality of the property distribution precludes a remedy.<sup>40</sup> Consequently, it is more likely that a particular equitable distribution will prove unfair if the court miscalculates the value of the degree. As the *DeWitt* court noted, "the potential for inequity to the failed professional or one who changes careers is at once apparent; his or her spouse will have been awarded a share of something which never existed in any real sense."<sup>41</sup>

This problem is not present in the normal equitable distribution award. In most cases the court is dividing property which pos-

vidual practitioner will be forced to pay the ex-spouse tangible dollars for an intangible asset at a value concededly arrived at on the basis of some uncertain elements.

331 S.E.2d 266, 271 (N.C. Ct. App. 1985). The court went on to set forth the following factors which it said were relevant in valuing goodwill: (1) age; (2) health; (3) professional reputation; (4) nature of practice; (5) length of time the practice has been in existence; (6) past profits; (7) comparative professional success and the value of its other assets. 331 S.E.2d at 271. See also *In re Marriage of King*, 150 Cal. App. 3d 304, 197 Cal. Rptr. 716 (1984).

36. *Mahoney*, 91 N.J. at 497, 453 A.2d at 532; *DeWitt*, 98 Wis. 2d at 58-59 n.17, 296 N.W.2d at 768 n.17. The *Dewitt* court characterized the result of such an award as a "lien' on future earnings." 98 Wis. 20 at 59, 296 N.W.2d at 768. See also *In re Marriage of Aufwuth*, 89 Cal. App.3d 446, 152 Cal. Rptr. 915 (1973); *In re Marriage of McNanama*, 399 N.E.2d 371 (Ind. 1980).

37. For example see N.C. GEN. STAT. § 50-20(c) (1984).

38. *Hughes*, 438 So. 2d at 150. See Comment, *The Professional Education Earned During Marriage: The Case for Spousal Support*, 16 PAC. L.J. 981, 994 (1985).

39. *DeWitt*, 98 Wis. 2d at 58, 296 N.W.2d at 768.

40. *Hughes*, 438 So. 2d at 148. See also *In re Marriage of Nichols*, 43 Colo. App. 383, 606 P.2d 1314 (1979).

41. 98 Wis. 2d at 58, 296 N.W.2d at 768. For a discussion of judicial hesitation to encumber the future earnings of the degree-holding spouse, see *Recent Developments, Professional Degrees as Marital Property*, 6 HARV. WOMEN'S L.J. 208, 215-16 (1983).

sesses some tangible form. Once the court decides how the division shall take place, the property is transferred. Even in the case of a distributive award, there is usually other property awarded to the spouse which then may be sold to comply with the award. To the contrary, if future earnings are divided, they still must be earned.

Due to these problems, a number of states have refused to make any award to the non-degree-earning spouse. This result, though reached for different reasons, is the same as if the court had held that the degree was not property. Whether you refuse to award the non-degree-earning spouse compensation because the degree is not property subject to division or because such a division is too speculative, becomes irrelevant to that spouse. In either situation, the spouse is left holding an empty bag. Many states believe that such a result is highly inequitable, and, therefore, have taken decisive action to avoid this injustice.

### III. STATES WHICH DO NOT TREAT THE ADVANCED DEGREE AS MARITAL PROPERTY, BUT DO ALLOW THE NON-DEGREE-EARNING SPOUSE COMPENSATION BASED ON EQUITABLE PRINCIPLES

While a number of courts have denied recovery to a non-degree-earning spouse based on the arguments set forth in the preceding sections, a few courts have followed equitable principles rather than the strict common law. These jurisdictions have permitted an award to the spouse who has contributed to the degree through the support of the family unit, while the other spouse attended school. These courts have not been as concerned with the legal status of the degree or the various valuation problems as they have been with preventing injustices. Such awards are usually based on some theory of restitution or unjust enrichment. The measure of the award is often different from one state to another, but in each case, the courts' aim is to achieve justice between the parties.

In *Mahoney*, the court expressly stated that it did not view the husband's advanced degree as marital property subject to division under New Jersey law.<sup>42</sup> The court determined, however, that it would be unfair not to "do something" to aid the wife who had supported the family while the husband was in graduate school.<sup>43</sup> The

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42. 91 N.J. at 492, 453 A.2d at 533-34.

43. *Id.* at 491, 453 A.2d at 532. The court reasoned that: . . . the supporting spouse made financial contributions towards her husband's professional education with the expectation that both parties would enjoy material benefits flowing from the professional license or degree. . . . The supporting spouse's sacrifices would have been rewarded had the marriage endured and the mutual expectations of both of them been fulfilled. The unredressed sacrifices—loss of support and reduction of the standard of living—coupled with the unfairness attendant upon the defeat of the supporting

court suggested numerous methods for valuing this "remedial reward"<sup>44</sup> and introduced the concept of reimbursement alimony.<sup>45</sup> Reimbursement alimony is the court's attempt to return to the supporting spouse that money which he or she has invested in the education of the degree-earning spouse. The court supported this form of award because it

[p]roperly accords with the Court's belief that regardless of the appropriateness of permanent alimony or the presence or absence of marital property to be equitably distributed, 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. Such reimbursement alimony should cover *all* financial contributions toward the former spouse's education, including household expenses, education costs, school travel expenses and any other contributions used by the supported spouse in obtaining his or her degree or license.<sup>46</sup>

The court clearly indicated that reimbursement alimony was an equitable remedy and should not be applied in all cases.<sup>47</sup> It is especially designed for situations where a "young professional who after being supported through graduate school leaves his mate for greener pastures. One spouse ought not to receive a divorce complaint when the other receives a diploma."<sup>48</sup> In other cases, however, different remedies may be more appropriate.<sup>49</sup>

Other courts have not found it necessary to resort to the creation of a new class of remedy to make an award. In *Hubbard v. Hubbard*,<sup>50</sup> the court faced a situation similar to the one discussed in *Mahoney*. A doctor filed for divorce from his wife of twelve years when he was "on the threshold of a successful professional life."<sup>51</sup> The court stated that although Dr. Hubbard's license to practice was not marital property, this fact did not preclude Mrs. Hubbard from receiving some type of award in lieu of property division.<sup>52</sup>

Because all the resources of the *Hubbard* marriage had been de-

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spouse's shared expectation of future advantages, further justify a remedial reward.

*Id.* at 491, 453 A.2d at 533-34.

44. *Id.* at 491, 453 A.2d at 533. See also *In re Washburn*, 101 Wash. 2d 176, 677 P.2d 152 (Wash. 1984).

45. *Mahoney*, 91 N.J. at 492, 453 A.2d at 534. See also *Olah v. Olah*, 10 Fam. L. Rep. (BNA) 1665 (1984). But see Comment, *The Professional Education Earned During Marriage: The Case for Spousal Support*, 16 PAC. L.J. 981, 984-85 (1985) (mere reimbursement for education costs incurred before divorce without reimbursement for the expectation of sharing in a higher standard of living is inequitable).

46. *Mahoney*, 91 N.J. at 492, 453 A.2d at 534.

47. *Id.* at 492, 453 A.2d at 535.

48. *Id.*

49. *Saint-Pierre v. Saint-Pierre*, 10 Fam. L. Rep. (BNA) 1689 (1984).

50. 603 P.2d 747 (Okla. 1979).

51. *Id.* at 750.

52. *Id.*

voted to his education, the couple was left with few conventional assets to divide at the time of the divorce. The court determined that there was no legitimate reason to allow Dr. Hubbard to retain the only valuable asset of the marriage.<sup>53</sup> The court further stressed that it should not be "rendered impotent" in such a situation because of a narrow definition of the term "property."<sup>54</sup> It also rejected the idea that Mrs. Hubbard should be limited to alimony for support and maintenance, reasoning that such an award "would force her to forego remarriage and perhaps even be celibate for many years to realize a return on her investment and sacrifices of the past twelve years."<sup>55</sup>

The court opted instead to follow the *Graham* dissent, turning to the traditional doctrine of quasi contract to compensate Mrs. Hubbard for the amount of her investment in Dr. Hubbard's education and training.<sup>56</sup> The measure of compensation was based on her contribution to his "direct support and school and professional training expenses, plus reasonable interests and adjustments for inflation."<sup>57</sup> The *Hubbard* court also limited its decision to the facts at bar noting that because this was an equitable remedy, different facts might warrant a different remedy.<sup>58</sup>

Several other jurisdictions have also allowed recovery for the non-degree-earning spouse even though they were unwilling to characterize the degree as property.<sup>59</sup> In these cases, equitable considerations motivated the courts' decisions. For example, in *DeLa Rosa v. DeLa Rosa*,<sup>60</sup> the Minnesota Supreme Court stated that, "[one] spouse has foregone the immediate enjoyment of earned income to enable the other to pursue an advanced education on a full-time basis. Typically, this sacrifice is made with expectation that the parties will enjoy a higher standard of living in the future."<sup>61</sup> The court concluded that to allow the degree-earning spouse to then abandon the marriage, with all the benefits of the degree which resulted from the joint effort, was highly unconscionable.

In *Inman v. Inman*,<sup>62</sup> the Kentucky Supreme Court, in dicta,

53. *Id.* at 750-51. *But see Washburn*, 101 Wash. 2d at 170-71, 677 P.2d at 156-57 (court refused to compensate supporting spouse under the theory of unjust enrichment).

54. *Hubbard*, 603 P.2d at 751.

55. *Id.*

56. *Id.* at 752. *See also* OKLA. STAT. tit. 12, § 1289 (Supp. 1978) (voluntary cohabitation with member of the opposite sex is grounds for modification of final order for alimony support).

57. *Hubbard*, 603 P.2d at 751.

58. *Id.*

59. *See, e.g., DeLa Rosa v. DeLa Rosa*, 309 N.W.2d 755 (Minn. 1981).

60. 309 N.W.2d 755 (Minn. 1981).

61. *Id.* at 758.

62. 648 S.W.2d 847 (Ky. 1982).

indicated that it could not accept the position of the court of appeals that an advanced degree was marital property. It did, however, recognize that the non-degree spouse was entitled to compensation for his or her contribution, finding the proper measure of award to be the non-degree-earning spouse's contribution to the degree plus the future earning capacity of the degree-holding spouse. Although the law-of-the-case doctrine prohibited the *Inman* court from reversing the lower court's decision,<sup>63</sup> the supreme court's statements concerning advanced degrees indicate a possible change in Kentucky's treatment of advanced degrees. Most likely, the degree will not be treated as marital property, but nonetheless, some sort of equitable award will be provided for the non-degree spouse.

While it is true that these decisions achieve a more equitable result than those reached in the previous sections, there is a problem with relying on equity to handle the valuation of advanced degrees. The main setback with using equitable principles is that the desired solution is often limited to the facts, and thus it becomes very difficult for an attorney to advise his client. It also vests enormous power in the trial judge; and, the legal status of these remedies may be unknown. For example, in *Mahoney*, the court admitted that it did not know the status of a reimbursement alimony award as far as modification or adjustment was concerned.<sup>64</sup>

Other jurisdictions, however, take the view that it should not be necessary to deal with the uncertainties inherent in an equitable award to achieve some degree of fairness between the parties.<sup>65</sup> For instance, a few courts have determined that the advanced degree is property, and thus divisible under an equitable distribution statute.<sup>66</sup> Turning our attention to these solutions, it is necessary to determine if they are truly "equitable" and, at the same time, whether they manage to remove the uncertainty of the purely equitable remedy.

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63. *Inman v. Inman*, 578 S.W.2d 266 (Ky. Ct. App. 1979), *reversed*, 648 S.W.2d 847 (Ky. 1982).

64. *Mahoney*, 91 N.J. at 491, 453 A.2d at 533. *See supra* note 51.

65. *See, e.g., In re Marriage of Horstmann*, 263 N.W.2d 885 (Iowa 1978); *Woodworth v. Woodworth*, 126 Mich. App. 258, 337 N.W.2d 332 (1982); *O'Brien v. O'Brien*, 114 Misc. 2d 233, 452 N.Y.S.2d 801 (1982), *modified*, 106 A.D.2d 223, 485 N.Y.S.2d 548 (1985).

66. *See, e.g., Inman v. Inman*, 578 S.W.2d 266 (Ky. Ct. App. 1979), *reversed*, 648 S.W.2d 847 (Ky. 1982); *Woodworth v. Woodworth*, 126 Mich. App. 258, 337 N.W.2d 332 (1983); *O'Brien v. O'Brien*, 114 Misc. 2d 233, 452 N.Y.S.2d 801 (1982), *modified*, 106 A.D.2d 223, 485 N.Y.S.2d 548 (1985).

#### IV. STATES WHICH HOLD THAT THE ADVANCED DEGREE OR THE FUTURE EARNINGS IT WILL GENERATE IS MARITAL PROPERTY SUBJECT TO DIVISION

The first case to recognize that the non-degree-earning spouse had a legal, not equitable, claim to the earned degree, or to the future earnings it might generate, was *In re Marriage of Horstmann*.<sup>67</sup> In this case, the Iowa Supreme Court held that, while it agreed with the *Graham* holding that the advanced degree was not itself property, the degree's potential for increased future earning capacity was an asset for judicial distribution.<sup>68</sup> The court then affirmed the lower court's award of an \$18,000 property division to Mrs. Horstmann. Interestingly, though the court stated that the advanced degree was not property and that only future earnings were subject to division, the basis of the award was the cost of obtaining the degree.<sup>69</sup> Making no effort to determine the value of future earnings, it appears that the court divided the degree and used its cost to obtain the desired spousal award.

The first court to actually hold that an advanced degree was property subject to division under an equitable distribution statute was the Kentucky Court of Appeals in *Inman v. Inman*.<sup>70</sup> While the court admitted that it had strong reservations in marking a professional degree as marital property, such a label was necessary to achieve a just result.<sup>71</sup> The court explained "that the best measure of a spouse's interest in such a degree should be measured by his or her monetary investment in the degree."<sup>72</sup> According to *Inman*, therefore, the amount each spouse spends in obtaining the degree should be the proper measure of his or her investment.<sup>73</sup>

Two recent cases have also declared that the advanced degree is property subject to division, holding that the amount of future earnings a degree will generate should measure its true value.<sup>74</sup> In *Woodworth v. Woodworth*,<sup>75</sup> the court remarked that traditional definitions of property would not bind the court because it was more "concerned with how best to distribute between the parties what they have once the marriage has for all intents and purposes dis-

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67. 263 N.W.2d 885 (Iowa 1978).

68. *Id.*

69. *Id.*

70. 578 S.W.2d 266 (Ky. Ct. App. 1979), *reversed*, 648 S.W.2d 847 (Ky. 1982).

71. *Id.* at 268.

72. *Id.* at 269.

73. *Id.*

74. *Woodworth v. Woodworth*, 126 Mich. App. 258, 337 N.W.2d 332 (1983); *O'Brien v. O'Brien*, 114 Misc. 2d 233, 452 N.Y.S.2d 801 (1982), *modified*, 106 A.D.2d 223, 485 N.Y.S.2d 548 (1985).

75. 126 Mich. App. 258, 337 N.W.2d 332 (1983).

solved."<sup>76</sup> Because both parties contributed to the earning of the degree, the court treated it as marital property. The court further rejected the argument that the valuation problems were so numerous so as to preclude consideration of the advanced degree as marital property.<sup>77</sup> The court reasoned that

[f]uture earnings due to an advanced degree are not "too speculative." While a degree-holder spouse might change professions, earn less than projected at trial, or even die, courts have proved adept at measuring future earnings in such contexts as personal injury, wrongful death, and worker's compensation actions. In fact, pain and suffering, professional goodwill and mental distress, within legal issues, have similar valuation "problems."<sup>78</sup>

The court subsequently renounced the method of valuation adopted in *Inman* and *Horstmann* and instead, used the future earnings the degree would generate to calculate the proper measure of its value.<sup>79</sup> The court stated that the cost approach utilized in *Inman* and *Horstmann* "would provide [the non-degree-holding spouse] no realization of [his or] her expectation of economic benefit from the career for which the education laid the foundation."<sup>80</sup> Rejecting the idea of compensation through the use of alimony, the court found that the considerations for alimony are different from those of property division in that remarriage may terminate alimony. Thus, the court held that the correct measure of the value of the degree for equitable distribution purposes was "to estimate what the person holding the degree is likely to make in the particular job market and subtract from that what he or she would probably have earned without the degree."<sup>81</sup>

While the *Woodworth* approach is very favorable to the non-degree-earning spouse, it may prove unfair to the other spouse in that the degree-earning spouse is tied to a highly speculative award and is almost forced to practice a profession which he or she may not enjoy. Because this remedy is as inequitable as the decision reached in *Graham*, it is not surprising that *Woodworth* has failed to receive a wide following.<sup>82</sup>

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76. *Id.* at 265, 337 N.W.2d at 336.

77. *Id.*

78. *Id.*

79. *Id.* at 268, 337 N.W.2d at 337. The court did not deal with the argument that it was, in effect, dividing non-marital property when it divided future earnings. It also did not seem to realize that in the case of workman's compensation awards and wrongful death awards, there is usually a fund available to pay any award even if it is speculative. However, there is no fund available in these advanced degree cases until the earnings are paid.

80. *Id.* (citing Comment, *Divorce After Professional School: Education and Future Earning Capacity May Be Marital Property*, 44 Mo. L. REV. 329 (1979)).

81. *Woodworth*, 126 Mich. App. at 268, 337 N.W.2d at 337.

82. *Id.*

## CONCLUSION AND RECOMMENDATION

Resolution of the courts' dilemma in marriage dissolution proceedings where the advanced degree is the only major asset has not been simple or uniform. The solutions have tended to favor one party or the other, or have been uncertain in application. Unfortunately, most states' statutes do not aid in the resolution. Most states simply provide that a factor to consider in an equitable distribution of marital property is one spouse's contribution to help educate or develop the career potential of the other spouse.<sup>83</sup> Yet, such a provision is only beneficial when there is marital property to divide. Alimony, or other similar remedies, provide only a make-shift solution. Additionally, in many instances, the non-degree-earning spouse will not even qualify for such an award.

Because a majority of the states' equitable distribution statutes do not deal specifically with the status of an advanced degree, courts must formulate equitable solutions to the dilemma or adjudicate such cases on antiquated property law concepts. The majority of states hold that the degrees themselves are not marital property and, therefore, not subject to the provisions of the equitable distribution statute. This solution, though consistent with traditional property law concepts, is highly inequitable vis-a-vis the non-degree-earning spouse. The minority position, which regards the degree as marital property and values it according to the future earnings it will generate, is equally inequitable vis-a-vis the degree-earning spouse.

Because of the inherent inequities of these two positions, other states have adopted more equitable solutions. For example, in *Mahoney*, the New Jersey court did not compensate the non-degree-earning spouse for all of her expectation,<sup>84</sup> but it at least gave that spouse some compensation for the investment of time and money. Additionally, *Mahoney* did not saddle the degree-earning spouse with a judgment which obligated that party to practice a potentially unsuccessful profession, one which he may not even enjoy. The primary flaw with the *Mahoney* remedy, however, is that it is an equitable one, limited to its facts and uncertain in its application.

A few states have enacted statutes in an attempt to eliminate the uncertainty of *Mahoney* and, at the same time, achieve its desirable result.<sup>85</sup> Indiana was the first state to address the problem in a statute. Its code provides that:

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83. See *supra* note 9.

84. 91 N.J. 488, 453 A.2d 527 (1982).

85. See, e.g., CALIF. CIV. CODE §§ 4800, 4800.3, and 4801 (West 1985); IND. CODE ANN. § 31-1-11.5-11(b)(1) (Burns 1980).



when the court finds there is little or no marital property, it may award either spouse a money judgment not limited to existing property. This award is based on the financial contribution of one [1] spouse toward tuition, books, and laboratory fees for the higher education of the other spouse.<sup>86</sup>

This legislation is desirable because it promotes the spirit of the equitable distribution law. There is no question as to the legal status of a money judgment. Moreover, the statute clearly identifies the applicable factors that a court should consider in declaring an award for the non-degree-earning spouse. Lastly, even though sufficient marital property may not exist to reimburse the non-degree-earning spouse for his or her contributions, a judgment is still awarded which creates a continuing obligation to pay a debt.

Indiana's statute is fairly narrow concerning the expenses it will consider in setting the judgment. Other states considering a similar provision may want to assess additional cost factors such as reasonable living expenses, travel costs, and other related educational fees to determine the appropriate statutory award. Nonetheless, an enactment similar to the Indiana statute is essential for other jurisdictions because it accurately defines the status of an advanced degree, thus providing certainty in a confusing area of the law. Most importantly, such legislation demands fairness between the spouses in the event of a marriage dissolution.

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86. IND. CODE ANN. § 31-1-11.5-11(b)(1) (Burns 1980).