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IN RE MARRIAGE OF GRAHAM
EDUCATION ACQUIRED DURING MARRIAGE—FOR RICHER OR POORER?

Upon dissolution of marriage, couples often call upon the courts to clearly define their rights and equitably divide their interests in property acquired through collaborative efforts. Property division is impeded by the clash between classifying the result of the couple's effort as "marital property"[1] and perceiving their relationship as a "partnership" or "shared enterprise."[2] Additionally, courts have failed to develop specific guidelines for dividing the property acquired during marriage. Rather they have resorted to a case-by-case approach.[3] As such, partners to a dissolving marriage may find little certainty in pursuing a just division of their acquisitions.

The "partnership-enterprise" approach to marriage is a response to rapidly changing social attitudes toward women's roles. Because the traditional common law failed to recognize their separate property interests, increasing numbers of working women demanded independent legal recognition of their personal gains.[4] Married Women's Property Acts were devel-

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1. Marital property is to be distinguished from property concepts in general. *See generally* H. CLARK, LAW OF DOMESTIC RELATIONS § 14.8, at 450 (1968) [hereinafter cited as CLARK]. Although different systems are statutorily employed to divide property acquired during marriage upon divorce, "the bare legal title to property acquired or accumulated by the spouses during marriage often does not correspond to their real rights in such property." *See* text accompanying notes 60-66 *infra* (describing traditional concepts of property and statutory guidelines enacted to enable narrow categorization of various properties as "marital property").

2. *E.g.*, Krauskopf, *A Theory for "Just" Division of Marital Property in Missouri*, 41 MO. L. REV. 165, 166 n.14 (1976) [hereinafter cited as Krauskopf]. "Marriage is a partnership to which each spouse makes [an] equally important contribution." The term "partnership" is here restricted in reference to economic aspects of marriage and not the legal entity of partnership.

3. Statutes modeled upon the UNIFORM MARRIAGE AND DIVORCE ACT, UNIFORM LAWS ANNOTATED 459 (Supp. 1977) supply only general guidelines for determining whether an item constitutes marital property. *See* note 66 *infra*. Property division is typically dependent upon factual circumstances of each case. Granato v. Granato, 130 Colo. 283, 497 P.2d 1006 (1954).

4. For a detailed discussion of this historical development, see Foster, Freed, *Marital Property Reform in New York: Partnership of Co-Equals?*, 8 FAM. L.Q. 169, 171-78 (1974). *See also* Hill, Stogel, *Family Law*, 1976 ANN. SURV. OF AM. LAW 359:

> Under . . . traditional rules, courts relied on assumptions about marriage and property which are no longer valid today: . . . alimony was considered a discharge of the husband's duty to support his wife indefi-

oped to assure protection of these interests,[5] but fell short of fulfilling the homemaker-housewife's position. The nature of her role made enhancement of her property interests socially unlikely. Recently, courts have sought to rectify this situation by recognizing the marital relationship as comprised of two contributing members, thus giving each an interest in marital acquisitions.[6] Judicial use of this construct has since expanded considerably and is now widely applied to contributions by homemakers or wage-earners.[7] Benefit to the "partnership" has become a keynote in protecting each spouse's "investment."

Although the partnership-enterprise theory ideally seeks a fair adjudication of partners' fractional shares at dissolution, its application is not without obstacles. A primary impediment is that property acquired during the marriage must additionally, by statute, be capable of division.[8] The presence of intangible qualities inherent in some properties[9] further complicates this

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nitely, and jointly owned marital property was presumed to be held by the husband. With the increasing importance of equal rights concepts, especially in the context of women's rights, reform of this antiquated system was inevitable. . . . ;

Note, *The Economics of Divorce: Alimony and Property Awards*, 43 U. CIN. L. REV. 133, 146 (1974).

5. *See generally* Rheinstein, *Division of Marital Property*, 12 WILLAMETTE L.J. 413 (1976) [hereinafter cited as Rheinstein]: "The Married Women's Property Acts . . . gave married women unrestricted disposition and title to their own earnings and whatever property they might own through inheritance or other events." *Id.* at 414; CLARK, *supra* note 1, § 7.2, at 222-29.

6. Rothman v. Rothman, 65 N.J. 219, 229, 320 A.2d 496, 501 (1974) *quoted in* Krauskopf, *supra* note 2, at 172-73:

> [T]he division of property upon divorce is responsive to the concept that marriage is a shared enterprise, a joint undertaking, that in many ways it is akin to a partnership. Only if it is clearly understood that far more than economic factors are involved, will the resulting distribution be equitable . . . .

See, e.g., Inman v. Inman, 578 S.W.2d 266 (Ky. App. 1979) wherein the court indicated its concern for protection of the "investment" nature of a spouse's contributions; Vier v. Vier, 62 Wis. 2d 378, 382, 173 N.W.2d 432, 434 (1974); Lacey v. Lacey, 45 Wis. 2d 378, 382, 173 N.W.2d 142, 144 (1970). *See also* Foster, Freed, *Divorce Reform: Brakes on Breakdown?*, 13 J. FAM. L. 443, 476 (1974): "[M]odern marriage should be viewed as a partnership . . . and that upon breakdown of the partnership, alimony and division of property should be utilized to effect economic justice between them." *See* note 52 *infra*.

7. Foster, *Preface* to I. BAXTER, MARITAL PROPERTY xiii (1973): "[A]t least when the family is a functioning unit the wife's contributions should be regarded as equal to those of the husband, whether they consist exclusively of services in the home or also involve supplementing the family income."

8. *E.g.*, COLO. REV. STAT. § 14-10-113(1) (1973): "[T]he court shall . . . divide the marital property . . . in such proportions as [it] deems just . . . ."

9. *See* text accompanying notes 93-119 *infra* (discussing the intangible elements of personal skill and ability).

division. Where the property, or benefit derived therefrom, inures to one spouse though acquired by the collective efforts of both,[10] courts are strained to satisfy "partnership" interests.

The need for greater clarification of the processes invoked to resolve property division conflicts has recently arisen in several jurisdictions.[11] *In re Marriage of Graham*[12] brought the scrutiny of the Colorado Supreme Court to bear upon a most novel question: Is an educational degree obtained by one spouse during the marriage subject to division as marital property, where the other spouse has borne the burden of supporting the couple during that time?[13] If answered affirmatively, problems of prospective valuation ensue due to peculiar characteristics of the education itself.[14] In formulating a property division which is responsive to the exigencies of each spouse's situation, the court will face the dilemma of resolving the conflict between the rights of the contributing partner's interests on the one hand, and the "personal" nature of the singularly-possessed degree on the other.

FACTS AND PROCEDURAL HISTORY

In 1974, the petitioner, Anne Graham, and the co-petitioner, Dennis Graham, filed jointly for dissolution of their irretrievably broken marriage.[15] They had been married for approximately five years. Both were young, in good health, and without children. The Grahams jointly managed the apartment house where they lived, the wife performing a majority of the household tasks. She was also employed as a full-time airline stewardess throughout the marriage, and contributed her earnings to her husband's education as well as to their primary means of

10. *See* note 52 *infra*.

11. *E.g.*, Inman v. Inman, 578 S.W.2d 266 (Ky. App. 1979) (license to practice dentistry as marital property); *In re* Marriage of Graham, 574 P.2d 75 (Colo. 1978) (education as marital property subject to division); *In re* Marriage of Horstmann, 263 N.W.2d 885 (Iowa 1978) (potential future earning capacity as a distributable asset); Moss v. Moss, 80 Mich. App. 693, 264 N.W.2d 97 (1978) (compensatory relief for contributions to spouse's education).

12. 574 P.2d 75 (Colo. 1978).

13. *Id.*

14. For extensive analyses of such difficulties in valuing an educational achievement, see Castleberry, *Constitutional Limitations on the Division of Property Upon Divorce*, 10 ST. MARY'S L.J. 37 (1978); Comment, *The Interest of the Community in a Professional Education*, 10 CALIF. W.L. REV. 590 (1974).

15. "Irretrievably broken" is legislative terminology given to dissolution of marriage without regard to fault of either party. COLO. REV. STAT. § 14-10-110 (1973); *see also* IOWA CODE § 598.17 (1970); MO. REV. STAT. § 452.320 (1973 Supp.).

support. While employed on a part-time basis, Mr. Graham devoted considerable time to acquiring a master's degree in business administration. At the time of the divorce, he had become employed as an executive assistant with a starting salary of $14,000.00 per year. No assets had been accumulated during their marriage.[16]

At trial, the parties stipulated that the issues were the value of the education, whether such an education was a marital asset, and whether such an asset was subject to division by the court.[17] The trial court found the education to be property to which the wife acquired a right through her contributions. The trial judge relied on the earlier case of *Greer v. Greer*.[18] There, the Colorado Court of Appeals held that, upon dissolution, the wife was entitled to alimony for the like period of years that she had contributed to the family upkeep.[19] The court interpreted the term "alimony" in light of the then-existing statute[20] which supplied no definition. Although referred to as such, the award was

> not intended for the support of the wife. . . . [I]t resulted from a consideration of the wife's contribution to the parties' assets and constitutes an adjustment of property rights. . . . It must be considered as a substitute for, or in lieu of, the wife's rights in the husband's property as distinguished from her rights of future support envisioned by the ordinary award of alimony.[21]

The underlying factual circumstances in *Greer* hinted at some need for alimony *per se*, and the "adjusted property right" may have compensated for weight given to those unmentioned nuances.[22] Though the opinion impliedly pointed to the influence

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16. 574 P.2d at 76.

17. Brief for Petitioner-Appellee at 2, Brief for Co-Petitioner-Appellant at (iii), *In re* Marriage of Graham, 555 P.2d 527 (Colo. App. 1976).

18. 32 Colo. App. 196, 510 P.2d 905 (1973).

19. 32 Colo. App. 196, 510 P.2d 905 (1973); *accord*, Diment v. Diment, 531 P.2d 1071 (Okla. 1974) (alimony awarded *in lieu of* property).

20. COLO. REV. STAT. § 14-1-5 (1963).

21. 32 Colo. App. at 199, 510 P.2d at 907.

22. *Id.* Although the *Greer* trial court awarded alimony, division of property and child support, the appellate court focused upon the lower court's adhesion to facts similar to *Graham*. Of weighty concern was the wife's expenditure of time and labor enabling her husband to attend medical school. This warranted compensation which the appellate court supported through a reading of the applicable statute allowing for alimony "and other such orders as the circumstances of the case may warrant relative to the division of property, in such proportions as may be fair and equitable." Citing Colorado precedent establishing the definition of alimony as "payments necessary for food, clothing, habitation, and other necessaries for the [wife's] support," the appellate court distinguished Mrs. Greer's lump sum "alimony" award as a property award adjustment. This was apparently done to prevent the statutorily mandated termination of alimony payments upon her remarriage, perhaps due to consideration given to the award's remunerative purpose in reimbursing her for contributions made towards her husband's scholastic endeavors. Though not discussed in the court's find-

of "partnership" theory by its intermingling of alimony and property division concepts,[23] the amount of the award was at best remuneration for the wife's contributions.[24]

In *Graham*, the wife had not sought alimony.[25] The *Graham* trial court, apparently aware of possible deprivation to the wife's interests, concluded that she was entitled to a share of her husband's future earning capacity[26] equal to the estimated percentage of her contributions.[27]

The appellate court reversed,[28] finding no authority in support of the holding that education constitutes marital property.[29] On the contrary, it decided that education is only one factor to be weighed in determining property division, alimony and child support awards.[30] Focusing essentially upon problems of valuing education in terms of increased earning capacity,[31] the ap-

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ing, certain underlying circumstances may have been influential. Present in the instant case was a minor son, custody of whom was awarded the wife, with the potentially resulting threat to the wife's continued capacity to be self-supporting. Such factors are familiar to typical determinations of alimony *per se*.

23. *See* note 102 *infra* (discussing the need to clearly differentiate between alimony and property division).

24. 32 Colo. App. at 199, 510 P.2d at 907. The total award came to $7,200.00.

25. 574 P.2d at 78. It appears unlikely that the wife could have demonstrated the requisite need for alimony where she was able to maintain employment and be self-supporting, despite a lack of accumulated funds. *Contra*, Magruder v. Magruder, 190 Neb. 573, 209 N.W.2d 585 (1973). There the wife was awarded over $100,000.00 in the form of alimony, although highly educated, childless, young and in good health. The term "alimony" appears to have been misused, the award being based upon her substantial contributions to her husband's attainment of a medical degree. The court found that the parties were on the verge of economic growth when the husband sought divorce. Even though the case arose in a "no-fault" jurisdiction, the majority opinion may have based its decision, as pointed out by the strong dissent, upon fault, noting the wife's desire for reconciliation.

26. 574 P.2d at 76.

27. Brief for Petitioner-Appellee at 5, *In re* Marriage of Graham, 555 P.2d 527 (Colo. App. 1976). At trial, the wife called an expert who testified that on the basis of probability of economic worth, the value of the advanced degree over the undergraduate degree, in terms of lifetime expectancy, was $178,000.00. This was discounted to present value of $82,800.00. He further testified that a comparison of financial contributions by the spouses showed that the wife and husband had contributed 70% and 30% respectively, credit having been given to the husband's study time. These percentages were decreased to 60% and 40% so as to present a more conservative figure. The court awarded the wife a share of the "property" in the sum of $34,134.00. *See* note 135 *infra* (comparison of valuation methods used).

28. 555 P.2d 527 (Colo. App. 1976).

29. *Id.* at 528.

30. *Id.* at 529.

31. *Id.* at 528 (citing Carlson v. Carlson, 178 Colo. 283, 286, 497 P.2d 1006, 1009-10 (1973) which stated: "No one questions that it is difficult to estimate the prospects that the parties have to generate future earnings, but factors such as occupational experience, coupled with education, training, and

pellate court relied upon cases from other jurisdictions. *Todd v. Todd*,[32] which had arisen under California's community property law, found that while education was an intangible property right, it was unsuitable for monetary valuation.[33] The *Graham* appellate court, however, neither elaborated upon the factual circumstances of, nor sought to distinguish *Todd*.[34] Also offered in support of the reversal was the New Jersey case of *Stern v. Stern*.[35] *Stern* similarly held that potential earning capacity was only one factor for trial court consideration in making an appropriate division of property.[36] Again, any disparity in the facts influential to that outcome were not discussed in *Graham*.[37] With her "partnership investment" unrecognized, Anne Graham filed a Petition for Writ of Certiorari to the Colorado Supreme Court.

THE SUPREME COURT HOLDING

The Supreme Court of Colorado affirmed the appellate court's reversal,[38] agreeing that an educational degree is not itself marital property subject to division.[39] In recognizing it as a product of the husband's personal effort,[40] the court minimized

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business background should be considered in determining what division should be made of property"). The appellate court did not discuss the impact of this finding upon a division of property wherein no assets were accumulated. It flatly stated that no authority existed to support a finding of education as property itself.

32. 272 Cal. App. 2d 786, 78 Cal. Rptr. 131 (1969). *See* text accompanying notes 108-15 *infra*.

33. 272 Cal. App. 2d at 791, 78 Cal. Rptr. at 134. "If a spouse's education . . . can be said to be 'community property' . . . it is manifestly of such a character that a monetary value for division cannot be placed upon it."

34. *See* text accompanying notes 108-20 *infra* (comparison of factual circumstances in *Graham*).

35. 66 N.J. 340, 331 A.2d 257 (1975).

36. *Id.* at 345, 331 A.2d at 260. The court quoted the trial court's opinion, 123 N.J. Super. 566, 568, 304 A.2d 202, 204 (1973), stating that a husband's ability, or earning capacity, was an *amorphous* asset of the marriage where no others had been accumulated in that it consisted of his natural ability and education.

37. The *Stern* divorce was based on fault, the wife being awarded custody of a minor child. Also, seemingly denying the presence of an interest in her husband's earning capacity, the court awarded her a share in his established law practice. Also awarded were alimony and child support. These facts appear radically different from those presented in *In re* Marriage of Graham, 574 P.2d 75 (Colo. 1978). *See* text accompanying notes 115-20 *infra*.

38. 574 P.2d 75 (Colo. 1978).

39. *Id.* at 77.

40. *Id.* The supreme court found an advanced degree to be a "product of . . . years of previous education, diligence and hard work," in other words, those contributions made by the husband alone.

the wife's monetary contributions,[41] and thereby her "investment." The supreme court held that a degree is "personal to the holder . . . and is simply an intellectual achievement that may potentially assist in the future acquisition of property. In our view it has none of the attributes of property in the usual sense of that term."[42]

ANALYSIS

Division of Property: A Concept in Flux

The National Conference of Commissioners, in developing a uniform approach to the dissolution of marriage,[43] formulated their original recommendation for division of property[44] as, in essence, "a community property rule."[45] Sought to be incorporated in their Uniform Act was an effective alternative to the acknowledged deficiencies in the common law which gave little or no consideration to property rights arising in the wife during, and by virtue of, the marriage.[46] Under the common law, the husband was deemed to hold the property interests, leaving the wife in a disadvantaged position.[47] Where the marriage was dissolved through no fault of the wife, she was awarded alimony in lieu of a proprietary interest in marital assets.[48] However, as

41. *Id.* An education "may not be acquired by the mere expenditure of money."

42. *Id.*

43. UNIFORM MARRIAGE AND DIVORCE ACT, UNIFORM LAWS ANNOTATED 459 (Supp. 1977).

44. *Id.* at 490. § 307 defines "marital property" as:

> [A]ll property acquired by either spouse subsequent to the marriage except:
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> (1) Property acquired by gift, bequest, devise or descent;
> (2) Property acquired in exchange for property acquired by gift, bequest, devise or descent;
> (3) Property acquired by a spouse after a decree of legal separation;
> (4) Property excluded by valid agreement of the parties; and
> (5) The increase or value of the property acquired prior to the marriage.

45. FAMILY LAW REPORTER, DESK GUIDE TO THE UNIFORM MARRIAGE AND DIVORCE ACT 57 (1974). Generally, community property jurisdictions regard property accumulated jointly during the marriage as that which is divisible between its joint holders upon divorce. *See* text accompanying notes 52-56 *infra*.

46. *E.g.*, Krauskopf, *supra* note 2, at 167-71.

47. *See, e.g.*, Hill, Stogel, *Family Law*, 1976 ANN. SURV. OF AM. LAW 359.

48. *See* CLARK, *supra* note 1, § 14.5, at 442, who argues that:

> The husband, having entered one of the strongest, most permanent relationships known to the law, must continue to bear its financial burden where he can reasonably do so and where it is necessary to prevent a relatively greater hardship to the wife. Divorce inevitably produces painful alterations in the lives of the parties. A major function of alimony is to minimize its financial impact.

more women joined their husbands in wage-earner roles, they sought recognition of an equal right to title and disposition of marital assets. Married Women's Property Acts formally equalized each spouse's ownership and management of respective properties.[49] But this ability to leave the marriage possessed of individually earned property brought disadvantages as well. The homemaker-housewife who owned little if any property would be left empty-handed. Although this misfortune was sought to be remedied by grants of alimony,[50] such remedy was of dubious quality. The possible disproportion between an award of alimony and the value of the property interests retained by the husband could render such a disposition less effective.[51] The common law was thus ripe for an alternative.

Community property laws provided for the wife's share in marital assets.[52] Property acquired by either spouse during the marriage became property of the marital community,[53] a development which fostered the view that marital property consists of "products" of the marriage.[54] Weighing the economic status of the divorcing spouses and the aforementioned shortcomings undermining separate property concepts,[55] lawmakers perceived the marriage as a "shared undertaking, based on division of labor, which should entitle each spouse to a share of the family assets."[56] Further, community property jurisdictions provided for such sharing of acquisitions without regard to fault.[57] This approach recognized economic realities regarding property

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49. *E.g.*, Thompson v. Thompson, 30 Colo. App. 57, 489 P.2d 1062 (1971) (modern legal theory has equalized men's and women's rights to title and disposition of property). *See also* Rheinstein, *supra* note 5, at 414.

50. *E.g.*, Magarell v. Magarell, 144 Colo. 228, 355 P.2d 946 (1960) (alimony generally defined as that which is necessary for the wife's support). *See generally* Inkler, Walsh, Perocchi, *Alimony and Assignment of Property: The New Statutory Scheme in Massachusetts*, 11 FAM. L.Q. 59, 61 (1977) [hereinafter referred to as Inkler] (alimony awards limited to amounts necessary for support; the separate property concept in combination with this limitation restricted courts in rendering justice).

51. *See generally* Krauskopf, *supra* note 2, at 168.

52. *Id.* at 167 n.19 (citing W. DE FUNIAK & M. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY 128 (1971) [hereinafter cited as DE FUNIAK & VAUGHN]):

> Property acquired during the marriage is community property because: "[I]t is acquired by the labor and industry of members of a form of partnership, that is, a marital partnership . . . and whatever is earned or gained by one marital partner during the existence of [the marriage] must accrue to the benefit of both marital partners."

53. *E.g.*, DE FUNIAK & VAUGHN, *supra* note 52, at 128.

54. Staff, *Property, Maintenance and Child Support: Decrees Under the Uniform Marriage and Divorce Act*, 18 S.D. L. REV. 559, 566-67 (1973).

55. *See* text accompanying notes 47-51 *supra*.

56. Inkler, *supra* note 50, at 61.

57. *E.g.*, Rheinstein, *supra* note 5, at 416.

division upon divorce. Hence, it tended to conceptualize dissolution as analogous to dissolving a partnership.[58] Relief from the harsh common law was therefore available, and the Commissioners agreed with suggestions that their uniform proposal be aligned with these current social demands.[59]

Marital Property: Narrowing the Expanse

"Property" necessarily encompasses a multitude of characteristics.[60] Traditionally, it has generally been defined as a manifestation of human expectations arising from the relationship of the possessor to the thing possessed.[61] This relation has been subject to both legislative and judicial interpretation in varying contexts.[62] Indeed it has been said that the context controls the definition.[63]

The Colorado property division statute is clearly limited to "marital property."[64] The limitations imposed do not expressly erode the statute's applicability to property in general. As recognized by the supreme court in *Graham*, the legislature's intent was to give broad meaning to the term[65] while excluding

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58. *E.g.*, DE FUNIAK & VAUGHN, *supra* note 52, at 128. *See* Freed, Foster, *Economic Effects of Divorce*, 7 FAM. L.Q. 275, 277 (1973).

59. *See* Krauskopf, *supra* note 2, at 167 n.14 (citing R. LEVY, UNIFORM MARRIAGE AND DIVORCE LEGISLATION: A PRELIMINARY ANALYSIS 165 (1968)).

60. *E.g.*, BALLANTINE'S LAW DICTIONARY 1009-10 (3rd ed. 1969) defines "property" as:

> Inclusive of both tangibles and intangibles; that which is corporeal and that which is incorporeal; . . . Strictly, that dominion or indefinite right of use, control and disposition which may be lawfully exercised over particular things or objects. . . . The right of a person to possess, use, enjoy and dispose of a thing. . . . Not the material object itself, but the right and interest or disposition rightfully obtained over such object.
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> . . . [A]ll valuable interests which a man may possess outside of himself . . . being more than which a person owns.

61. BENTHAM, THEORY OF LEGISLATION, PRINCIPLES OF THE CIVIL CODE 111-13, Part 1 (Dumont ed. 1864):

> Property is nothing but a basis of expectation; the expectation of deriving certain advantages from a thing which we are said to possess, in consequence of the relation in which we stand towards it. . . . There is no . . . visible trait which can express the relation that constitutes a property. It is not material, it is metaphysical; it is a mere conception of the mind.

62. *See generally* 63 AM. JUR. 2d *Property* §§ 5-6 (1972).

63. *See* Comment, *The Interest of the Community in a Professional Education*, 10 CALIF. W.L. REV. 590, 598 (1974).

64. COLO. REV. STAT. § 14-10-113(1) (1973): "[T]he court shall set apart to each spouse his property and shall divide the marital property . . . ."

65. 574 P.2d at 76. The supreme court cited Las Animas County High School District v. Raye, 144 Colo. 367, 356 P.2d 237 (1960) (the term property encompasses that which belongs to a person and the right to which is *legally* protected).

property acquired during certain times and through particular modes.[66] That marital property be "subject to division,"[67] however, invoked the court's power to "at all times interpret Colorado statutes."[68]

Notwithstanding these legislative guidelines, the supreme court restrictively defined the term "marital property."[69] Lacking, it said, was any indication of legislative intent to include facets of the term "other than those usually understood to be [so] embodied . . . ."[70] Varied attributes gleaned from prior decisions,[71] and partial definitions[72] were used to support this categorization. These signpost characteristics further delimited the legislature's broad conception of property appropriate to division of marital acquisitions.[73] Such supplementary limits foreclosed reinstatement of the trial court's finding.[74]

Colorado trial judges have long been vested with vast discretion in effectuating just divisions of marital property.[75] The facts and circumstances of each case, upon which this discretion is exercised, have proven determinative.[76] Other indicia, how-

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66. COLO. REV. STAT. § 14-10-113(2) (1973) defines "marital property" as:
[A]ll property acquired by either spouse subsequent to the marriage except:
a) Property acquired by gift, bequest, devise, or descent;
b) Property acquired in exchange for property acquired prior to the marriage or in exchange for property acquired by gift, bequest, devise, or descent;
c) Property acquired by a spouse after a decree of legal separation; and
d) Property excluded by valid agreement of the parties.

67. *E.g.*, COLO. REV. STAT. § 14-10-113(1) (1973).

68. 574 P.2d at 76.

69. *See* note 65 *supra* and notes 71-72 *infra*.

70. 574 P.2d at 77.

71. *E.g.*, Ellis v. Ellis, 552 P.2d 506 (Colo. 1976) (elements characterizing marital property include cash surrender value, loan value, redemption value, lump-sum value and value realizable after death).

72. BLACK'S LAW DICTIONARY 1382 (rev. 4th ed. 1968) was cited for its mention that "property" encompasses "everything that has an exchangeable value or which goes to make up wealth or estate."

73. *See* note 71 *supra*.

74. Although the appellate court did not expressly so find, it has been consistently held that a trial court's determination should not be disturbed on review unless abuse of discretion is shown. *E.g.*, Carlson v. Carlson, 178 Colo. 283, 497 P.2d 1006 (1972); Bell v. Bell, 156 Colo. 513, 400 P.2d 440 (1965); Granato v. Granato, 130 Colo. 439, 277 P.2d 236 (1954).

75. Imel v. United States, 375 F. Supp. 1102, 1113-15 & n.11 (D. Colo. 1974). *See also* COLO. REV. STAT. § 46-1-5 (1963).

76. *E.g.*, Carlson v. Carlson, 178 Colo. 283, 497 P.2d 1006 (1972) (no rigid mathematical formula for establishing an equitable division of property); Kraus v. Kraus, 159 Colo. 331, 411 P.2d 240 (1966); Reap v. Reap, 142 Colo. 354, 350 P.2d 1063 (1960). *See* Rheinstein, *supra* note 5, at 432:
Judicial discretion . . . may appear . . . indispensable. No hard . . .

ever, have also been established in aid of such discretion, such as, the efforts and attitudes of the spouses toward the particular acquisitions, earning ability, necessity, and financial condition.[77] Additionally, the "partnership-shared enterprise" approach was originally intended to further a just division.[78]

Despite this support of broad trial court discretion, the supreme court failed to incorporate any acknowledgement of separate "partnership" interests. Thus, the wife's interest in "investment" returns as a result of her contributions[79] was left unrecognized even though such security was generally intended where jointly accrued property would otherwise inure to the benefit of only one marital partner.[80] While the court may have been aware of such underpinnings, its reasoning reflects no influence by them. The court expressed the conception that an education must first be determined as *property* before any value can be assigned.[81] The broader question of whether prospective benefits attained through utilization of the degree after dissolution was not discussed.[82] Anticipated obstacles to valuation apparently stirred the court to seek shelter in judge-made limitations,[83] but to the contravention of "shared-enterprise" principles. With this consequence in the offing, to what rationale could this apprehension be attributed?

Education: A Cooperative vs. A Personal "Harvest"

The supreme court in *Graham*, relying upon cases cited in the appellate opinion,[84] neglected to discuss or distinguish pos-

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rule seems to do justice to infinitely varying circumstances of individual cases . . . .

. . . .

But, as in all problems of public policy, one has to consider the price, and the price of individual justice can be high. *One can never entirely foresee how judicial discretion will be exercised, and foreseeability may be vital to a married person who must decide whether or not to take the grave step of divorce.* (emphasis added).

77. Other indicia to aid discretion in division of property include: How the property was acquired; the parties' financial situation; their contributions to preserving its value; the value of their respective properties; the duration of the marriage; earning capacity; age; and health. *E.g.*, Kraus v. Kraus, 159 Colo. 31, 411 P.2d 240 (1966); Liggett v. Liggett, 152 Colo. 110, 380 P.2d 673 (1963); Nunemacher v. Nunemacher, 132 Colo. 300, 287 P.2d 662 (1955); Larrabee v. Larrabee, 31 Colo. App. 493, 504 P.2d 358 (1972).

78. *See* Krauskopf, *supra* note 2, at 166.

79. *See* text accompanying notes 56-59 *supra*.

80. *E.g.*, DE FUNIAK & VAUGHN, *supra* note 52, at 128.

81. 574 P.2d at 77.

82. *Cf. In re* Marriage of Horstmann, 263 N.W.2d 885 (Iowa 1978) (potential increased earning capacity is a marital asset subject to division).

83. *See* note 71 *supra* & note 131 *infra*.

84. Todd v. Todd, 272 Cal. App. 2d 786, 78 Cal. Rptr. 131 (1969); Stern v.

sible factual dissimilarities.[85] The court also failed to explain any differences in cases cited as dealing "only with related issues."[86] Closer scrutiny of these decisions reveals distinctions which may have had a greater impact upon the supreme court's reasoning than that indicated.

In *Daniels v. Daniels*,[87] the wife's lump-sum alimony award was "based almost entirely upon the [husband's] future earning capacity in the medical profession."[88] This professional opportunity constituted the marriage's principal asset. It arose through the use of the husband's medical education, acquired through the couple's collective efforts. While the wife contributed a tangible asset in the form of money, the husband's contributions were intangible in the form of intellect and ambition.[89] The medical practice, according to the appellate court, was in the nature of a franchise and therefore subject to a trial court's consideration in determining alimony. The problem of valuing such an asset for property division was thereby obviated by the readily used factor of increased earning capacity in the computation of financial support.[90] Whether the potential for increased earning capacity could stand as property itself[91] or as a method of valuing an education[92] was not at issue.

In cases dealing with certain intangibles,[93] the inherently personal nature of the possession impedes judicial division.[94] Freedom of choice in utilizing a particular achievement, ability

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Stern, 66 N.J. 340, 331 A.2d 257 (1975). *But see* CLARK, *supra* note 1, § 14.5, at 443: "[P]recedents are of relatively little value in determining alimony." This statement is based on discussion of numerous factors influential to trial court discretion in making such an award. *See generally* Rheinstein, *supra* note 5, at 432. It might be contended that precedent is similarly weak in the area of property division.

85. *See* note 37 *supra* and text accompanying notes 108-20 *infra*.

86. 574 P.2d at 77.

87. 20 Ohio Op. 2d 458, 185 N.E.2d 773 (1961).

88. *Id.* at 459, 185 N.E.2d at 774.

89. *Id.*

90. *E.g.*, Carlson v. Carlson, 178 Colo. 283, 497 P.2d 1006 (1972); CLARK, *supra* note 1, § 14.5, at 443 (alimony award takes into account the husband's ability to pay which necessarily entails inquiry into earning capacity).

91. *Cf.* text accompanying notes 128-36 *infra* (potential for increased earnings deemed a marital asset to be valued and divided).

92. 574 P.2d 75.

93. *E.g.*, Ellis v. Ellis, 552 P.2d 506 (Colo. 1976) (wife's interest in husband's military retirement pay); Menor v. Menor, 154 Colo. 475, 391 P.2d 473 (1964) (insurance policy not marital property subject to division where it had no cash surrender value); Kalcevic v. Kalcevic, 156 Colo. 151, 397 P.2d 483 (1964) (value of stock). *See, e.g.*, Shaw, *Domestic Relations—Husband's "Vested" Interest in Retirement Plan is Divisible as Marital Property*, 42 MO. L. REV. 143 (1977) [hereinafter cited as Shaw]; Annot., 22 A.L.R.2d 1421 (1952) (pension of husband as resource).

94. *See* Shaw, *supra* note 93, at 149.

or skill[95] is a primary obstacle to this end. Where, however, a dependent or incapacitated spouse proves the need for continued support upon divorce, such personal freedom must give way. Such a showing of dependence lessens the court's apprehension of impinging upon freedom of choice, *putting to work* the supporting spouse's skill or recognized ability.[96] Future earning capacity often enables an appropriate calculation of alimony,[97] hence, the supporting spouse's duty of support is met.[98] The clearly debilitated position of the recipient warrants such financial assistance. As a safeguard, modification of the award is available should extenuating circumstances arise,[99] a feature unavailable to the division of property.[100]

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95. *E.g.*, Nastrom v. Nastrom, 262 N.W.2d 487, 493 (N.D. 1978):

> [T]he potential future earnings, be they the result of a skill *developed during marriage* or otherwise, *are much too tenuous to be a property right.* It would be unjust to order the distribution of *what is, at best, an expectancy, where* . . . [it may] *fail to materialize. When the nature of the interest is such that the court must maintain its jurisdiction, distribution must take the form of alimony* . . . . (emphasis added).

96. *See* CLARK, *supra* note 1, § 14.5, at 443:

> Alimony need not be limited by the husband's income as of the time of trial. *If he is not earning as much as he might*, either deliberately or through poor management, alimony may be calculated *on the basis of what the court thinks he could and should earn.* Likewise, his *future prospects for increased earnings may be considered.* . . . Caution should be exercised in estimating his future earnings, however, since hardship to the husband may result from an over-estimate. (emphasis added).

97. *Id.*

98. *Id.* at 442. *But see* Project, *Rehabilitative Spousal Support: In Need of a More Comprehensive Approach to Mitigating Dissolution Trauma*, 12 U. OF S.F. L. REV. 493 (1978). A developing trend is to determine the amount and object of financial support. An award of "rehabilitative" alimony, for example, might be appropriate where one spouse had foregone further education in enabling the other's academic pursuit. Financial assistance, provided for a limited time, could thereby combine with efforts of the once-supporting spouse towards similar educational ends, yielding an opportunity similar to that afforded the other. Apparently, no direct compensation for time lost could be awarded. Such a time factor would be given considerably greater weight, however, where the marriage was of such a lengthy duration that the "deprived" spouse would more appropriately be awarded alimony in its more traditional application.

99. *E.g.*, Zlaten v. Zlaten, 117 Colo. 296, 186 P.2d 583 (1947). *See generally* 24 AM. JUR. 2d *Permanent Alimony* § 665 (1966). *See also* CLARK, *supra* note 1, § 14.8, at 452-65 (modification of alimony).

100. *E.g.*, Triebelhorn v. Turzanski, 149 Colo. 558, 370 P.2d 757 (1962) (court lost jurisdiction to divide property where it had not divided property at the time of the decree); Shapiro v. Shapiro, 115 Colo. 505, 176 P.2d 363 (1946) (division of property based on circumstances existing at time of divorce). *See* 24 AM. JUR. 2d *Modification of Decree* § 941, at 1075 (1966):

> If . . . a decree provides for a lump sum or payments in installments . . . it is generally held that the award is final and is *not subject to modification as the circumstances of the parties change*, and this is true even though a decree in favor of the wife erroneously calls the award "ali-

In contrast, where the need for alimony is less than "substantial," the factor of freedom of choice whether to use a skill or degree will attract greater consideration.[101] In such cases, there is firmer adherence to the traditional rationale supporting the appropriateness of alimony and/or division of property awards.[102] The case of *Nail v. Nail*,[103] cited by the *Graham* majority,[104] is indicative of this point. There, the accrued good will of an established medical practice was held not "an earned or vested right or one which fixes any benefit or sum. . . . [T]hat it would have value in the future *is no more than an expectancy wholly dependent upon continuation of existing circumstances*."[105] Based upon this contingency of continued practice, dependent as it is upon personal skill, experience and reputation, the Texas Supreme Court held improper any characterization of good will as community property subject to division.[106] Noteworthy, however, was the wife's community interest in a

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mony" . . . . However, the court may construe and clarify in case of uncertainty . . . . (emphasis added).

See also CLARK, *supra* note 1, § 14.8, at 452 (modification of both alimony and property division awards would be preferable).

101. *E.g.*, 262 N.W.2d 487 (N.D. 1978).

102. *E.g.*, *In re* Questions Submitted by United States District Court, 517 P.2d 1331, 1335 (Colo. 1974). "A court may conclude that a wife has sufficient property and income not to be entitled to alimony. That does not mean that division of property is a part of alimony . . . ." *See generally* CLARK, *supra* note 1, § 14.8, at 450-52, stating:

> [T]he fundamental difference between the two . . . is in the purpose for which they are given and the function which they serve. The [function] of alimony [relates] primarily to support of the wife. . . . Many courts . . . assimilate the property division to the alimony decree, taking into account the same sort of factors which are relevant in settling alimony. . . . The authority to make the division is . . . granted in general terms, limited only [in that] . . . the result be "equitable" . . . . It is easy to see how . . . the courts have come to blur the distinction. . . . The ensuing confusion would not matter if it were not for the legal consequences regarding the inability to modify property divisions.;

Rheinstein, *supra* note 5, at 418: "The frequent insufficiency of the right to alimony, together with the postulated equality of husband and wife, is resulting in an increased demand for property sharing upon divorce . . . . These ideals . . . contradict each other and the problem of how to reconcile them is troublesome." *See* notes 99-100 *supra*.

103. 486 S.W.2d 761 (Tex. 1972).

104. 574 P.2d at 77.

105. Nail v. Nail, 486 S.W.2d 761, 764 (Tex. 1972) (emphasis added). *Accord*, *In re* Marriage of Lopez, 38 Cal. App. 3d 93, 113 Cal. Rptr. 58 (1974) (future earnings not synonymous with value of good will). *Contra*, Brawman v. Brawman, 199 Cal. App. 2d 876, 19 Cal. Rptr. 106 (1962) (established law practice evaluated to determine wife's interest therein).

106. The general rule is that good will is not subject to forced sale or fictional division where affixed to principal property. *See* 38 C.J.S. *Good Will* §§ 3-4 (1943). *See also* Lurvey, *Professional Goodwill on Marital Dissolution: Is It Property or Another Name for Alimony?*, 52 CAL. S. B.J. 27 (1977).

large accumulation of assets which would apparently soothe shattered hopes of marital security.[107]

Todd v. Todd,[108] also relied upon by the supreme court in *Graham*,[109] presented distinguishable facts as well. There, the mother of minor children had shown her incapacity to seek independent employment after divorce.[110] The California Court of Appeals found that "while the [husband's] right to practice law is a property right which cannot be classed as community property, the *value of the practice at the time of dissolution* . . . is community property."[111] While a monetary value could not be placed upon the degree,[112] *existing* resultant gains from the established practice provided a basis for the wife's property interests.[113] In this manner, though the wife's "investment" returns were not satisfied, she was given a share in the degree's benefits as though she were, as said in another California case,[114] a silent partner forced into retirement.[115]

The facts in *Graham* stymied application of the "shared enterprise" approach. No pre-exisitng practice was available upon which to build a case for valuation.[116] The education, although a culmination of combined efforts, was found to have no readily ascertainable value, and no benefits had been produced through its use.[117] There was little likelihood that the wife could prove a need for support sufficient to even hint at an alimony award.[118]

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107. 486 S.W.2d at 762. Among the accumulated assets were a house, real property, household fixtures, two automobiles and a boat.

108. 272 Cal. App. 2d 786, 78 Cal. Rptr. 131 (1969).

109. 574 P.2d at 77.

110. 272 Cal. App. 2d at 795, 78 Cal. Rptr. at 137.

111. 272 Cal. App. 2d at 791, 78 Cal. Rptr. at 135 (emphasis added).

112. *Id.*

113. 272 Cal. App. 2d at 792, 78 Cal. Rptr. at 136. The appellate court reasoned that the trial court must take these existing benefits into consideration and therefore remanded the case.

114. Brawman v. Brawman, 199 Cal. App. 2d 876, 19 Cal. Rptr. 106 (1962).

115. *Id.* The husband's established practice was proven in terms of past success. The court felt that this valuable practice would depart with the husband upon divorce. It equated the wife's position with that of a silent partner with a share due her upon divorce. *Accord*, Fritsche v. Teed, 213 Cal. App. 2d 718, 726, 29 Cal. Rptr. 114, 119 (1963). The husband had an established professional practice. The court found that, upon divorce, "the . . . professional practice . . . remains in the hands of the spouse licensed to practice it. Nevertheless, in terms of its existing economic potential, it may have a substantial worth which must be taken into account . . . ."

116. *Contra*, Wheeler v. Wheeler, 193 Neb. 615, 228 N.W.2d 594 (1975) (veterinarian husband, who acquired his degree with the wife's aid through financial contributions, had established practice). *See generally* cases cited in notes 114-15 *supra*.

117. 574 P.2d 75.

118. *Id.* The wife had been and was currently employed; no children were present; she was young and in good health. *Contra*, Colvert v. Colvert, 568 P.3d 623 (Okla. 1977), where the Oklahoma Supreme Court found statu-

The lack of such a showing may have tipped the balance against what otherwise appeared as a strong argument favoring an interest in the degree.[119] She sought fulfillment of her investment expectations, a lonely request in the light of considerations favoring her husband's choice regarding any prospective use of his degree.

Apprehensive of potential injustice, the supreme court briefly reflected that a spouse who contributes support while the other acquires an education is not without a remedy.[120] In a comprehensive comment submitted for the supreme court's consideration and addressing the problem of valuing a professional degree for division of property purposes,[121] one writer elaborately set forth theories of recovery both in equity and at law.[122] Offering generally compensatory relief, however, these alternatives do not equitably redress the sacrifices made by the "investing" partner. Thus, the *Graham* supreme court did not acknowledge that, without an enforceable interest in the value of the education, the non-student spouse is deprived of the benefits for which "only the law of community property offers protection."[123] Without discussion of these inadequacies, the court

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tory support for a property settlement award characterized as "alimony" despite its non-supportive function. The court thus compensated the wife's investment in her husband's professional career, although avoiding the perceived mire of questions surrounding property rights in education and resultant increased earning capacity.

119. *Cf. In re* Marriage of Horstmann, 263 N.W.2d 885 (Iowa 1978) (the income of the wife in custody of the child, combined with the child support award, reached only a modest level of subsistence).

120. 574 P.2d at 78. The court indicated that consideration of the education would be appropriate for division of *accumulated* assets or in calculating alimony.

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

122. *Id.* at 592-97. In equity, quantum meruit is generally available to a putative spouse, but no reason supports the idea that services rendered in a valid marriage are less deserving of recovery. Such relief would not, however, reflect the benefits derived from the education, therefore unjustly enriching the "student" spouse. Second, implied loan theory would provide only for recapture of expenditures made by the "non-student" spouse, thereby leaving the student enriched once again. Thirdly, community property jurisdictions could apply an unjust enrichment concept to the managing spouse's fiduciary duty to care for the marital assets in his charge. This concept would seem inapplicable in other jurisdictions. At law, support (alimony/maintenance) is available though dependent upon the recipient's demonstrated needs. Secondly, reimbursement, similar to the use of community property funds to improve one spouse's separate property, is obstructed by consent to use the funds towards an education.

This delineation of alternatives was appended to the wife's petition. Petitioner's Brief for Certiorari, Appendix C, *In re* Marriage of Graham, 574 P.2d 75 (Colo. 1978).

123. Comment, *The Interest of the Community in a Professional Education*, 10 CALIF. W.L. REV. 590, 591 (1974). It is conceivable that the supreme

instead reasoned that education could be given weight as a factor, but not as property itself, in the division of accrued marital property.[124] However, as in *Graham*, if the education and its resultant potential for increased earnings are excluded, no accumulated marital assets remain.

THE KINDRED CASES: SEEDS OF DISCONTENT?

Recent cases have considered the argument set forth by the *Graham* dissent: That increased potential earning capacity constitutes the asset to be divided between the marital partners.[125] Once again, factual circumstances intertwined with trial court discretion appear to have controlled these judicial attempts to achieve a delicate balance of equitable concerns.[126] In response to an initial inquiry into the factual setting of each case, these courts have curiously given problems of valuation only secondary consideration.[127]

In re Marriage of Horstmann[128] agreed with *Todd v. Todd*[129] that a degree is not, of itself, a "marital" asset.[130] Also cognizant of the cases cited and the limited interpretation given to the term "marital property" in *Graham*,[131] the Iowa Supreme Court approached the problem more expansively. The *Horstmann* trial court expressly adopted a "partnership" theory, finding that, had the marriage held together, the wife would have real-

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court in *Graham* consciously chose not to follow community property precepts. *See In re* Marriage of Ellis, 36 Colo. App. 234, 237, 538 P.2d 1347, 1349 (1975). The appellate court declared that Colorado is not a community property state and such laws do not control. From the context in which this statement was made, however, it may have referred to the oftentimes equal division required of marital property in those jurisdictions, and hence not literally preclusive of the considerations *underlying* the Uniform Dissolution of Marriage Act.

124. 574 P.2d at 77-78.

125. *In re* Marriage of Graham, 574 P.2d 75, 78 (Colo. 1978) (Carrigan, J., dissenting).

126. *See* text accompanying notes 96-100 *supra*.

127. *See* note 95 *supra*.

128. 263 N.W.2d 885 (Iowa 1978). *See, e.g.*, Nastrom v. Nastrom, 262 N.W.2d 487, 493-94 (N.D. 1978) (Vogel, J., dissenting). "[T]he earning ability . . . is an asset of the marriage and should be considered in making [a] property division."

129. 272 Cal. App. 2d 786, 78 Cal. Rptr. 131 (1969).

130. 263 N.W.2d at 891. *Accord*, *In re* Marriage of Graham, 574 P.2d 75 (Colo. 1978). The supreme court in *Horstmann* stated: "[W]e have no quarrel with the pronouncement of the majority in *Graham* which would mean that the law degree [does not of itself] constitute an asset of the parties . . . ."

131. 263 N.W.2d at 887. The court recognized the limitations to the characterization of a degree as marital property, in that it has no exchange value nor transferable value; further, it terminates on death and cannot be assigned, sold, conveyed or pledged.

ized the benefits of her sacrifices in terms of increased family income and improved life style. The potential for increased earnings was determined as the only distributable marital asset.[132] The trial judge took this insightful step based upon the common use of future earning capacity, affected by personal skills and education, in computing alimony awards.[133]

The supreme court, in a *de novo* review, affirmed.[134] Absent from the opinion, however, was an explanation of the method used in valuing the potential earning capacity.[135] Nonetheless, the curious award of one dollar per year alimony affords an inference that a larger support award may have been inappropriate in view of those facts bespeaking the wife's minimal need for assistance.[136] Upon a less-than-substantial showing of need, division of property could supplant alimony, while the nominal alimony award could hold the door open for modification should a *greater* need for support arise.

In *Moss v. Moss*,[137] the Michigan Court of Appeals affirmed the lower court's "alimony" award granted to a self-supporting wife.[138] The husband argued against the award's seeming incompatibility with the traditional rationale for financial support.[139] The appellate court was aware, however, of the unavailability of assets for division, at least partially due to the

132. *Id.* "[T]he obtaining [of a degree] through efforts of both parties is similar to the building of a business through joint efforts. . . ." *But see* Wilcox v. Wilcox, 365 N.W.2d 792 (Ind. App. 1977); Nastrom v. Nastrom, 262 N.W.2d 487, 493 (N.D. 1978).

133. 263 N.W.2d at 888. As noted by the supreme court, the trial judge found little difficulty in dealing with the problem of future expectancy regarding success in future endeavors. "[T]here is no guarantee that [the husband would gain] a good paying job . . . or that his practice . . . will be a financial success."

134. 263 N.W.2d 885 (Iowa 1978).

135. *Id.* at 886. The trial court had used the wife's testimony regarding finances contributed. The supreme court, however, did not elaborate upon its own suggestions that various methods are available for valuing such an asset. The wife in *Graham* presented a much more elaborate case for valuation though the amount calculated there was much greater than in *Horstmann*. This may have been influential to these disparate findings. *See* note 27 *supra*.

136. 263 N.W.2d at 890. The supreme court viewed the wife's position as tenuous, given her custody of the couple's minor child, a lack of accumulated assets, and her limited earning capacity. It attributed her modest subsistence to her having foregone education to support her husband and care for the child.

137. 80 Mich. App. 693, 264 N.W.2d 97 (1978).

138. *Id.* at 694-95, 264 N.W.2d at 98. Although the wife's income would exceed the husband's for the first few years following divorce, alimony in gross was awarded as an equitable adjustment of property interests. *Accord*, Magruder v. Magruder, 190 Neb. 573, 209 N.W.2d 585 (1973) (young, employed and educated wife awarded "alimony").

139. *See* Inkler, *supra* note 50, at 69. *See* note 48 *supra*.

wife's contributions toward her husband's attainment of a medical degree. The court realized that granting the wife a share in the degree itself was impossible,[140] and that she would be "left by the roadside before the fruits of that education could be harvested."[141]

There also, the wife had virtually no need for alimony *per se*.[142] Although she similarly contended that she was entitled to a sum proportionate to investment expectations, as in *Graham*, the court's award was only remunerative of her expenditures.[143] Nevertheless, the compensatory grant of "alimony," in lieu of a property settlement, avoided the gross inequity resulting from no award whatsoever.[144] Further, it is interesting to note that, on appeal, the manner of payment was modified in response to the husband's complaint that a lump-sum grant was burdensome to him while still pursuing his medical training![145] In so doing, the *Moss* court minimized intrusion into his personal endeavor, a compromise not ordinarily available to the division of property, though enabled through the use of "alimony" in other than its traditional context.[146]

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140. 80 Mich. App. at 695, 264 N.W.2d at 98. *Accord*, *In re* Marriage of Graham, 574 P.2d 75 (Colo. 1978); Todd v. Todd, 272 Cal. App. 2d 786, 78 Cal. Rptr. 131 (1969).

141. 80 Mich. App. at 694, 264 N.W.2d at 98.

142. *Id.* The couple had been married for seven years and were without children; the wife remained employed and there was no indication that she suffered from ill health or incapacity.

143. *Id.* The court awarded $15,000.00 which it felt was sufficient to compensate her for her contributions to the "asset."

144. The *Moss* court thereby achieved resolution in *one proceeding*, an economical result for the court and the parties. This result was propounded by the *Graham* dissent, 574 P.2d 75, 79 (Carrigan, J., dissenting). Further, the *Graham* majority did not consider the potential for applying concepts of "rehabilitative" alimony. In Morgan v. Morgan, 81 Misc. 2d 616, 366 N.Y.S.2d 977 (1975), the appellate court awarded a wife financial support that would enable her pursuit of a medical degree, previously foregone in financing her husband's education. The court, despite her actual employment, felt that she should not be relegated to work as a "technician" where she might otherwise have attained a professional career. Such an award, though far from recompensing an "investment" interest, would closely approximate the opportunities afforded the husband. Following reasoning apparently akin to *Morgan*, the court in Marvin v. Marvin, No. C-23303 (Sup. Ct. L.A. April 18, 1979), granted an unmarried woman over $100,000.00 for "rehabilitative" purposes where her expectations of security in a non-marital relationship were disappointed. *See* note 98 *supra*.

145. *See* note 100 *supra*.

146. *See, e.g.*, Diment v. Diment, 531 P.2d 1071 (Okla. 1974). There, the wife of a long-standing marriage, who had once contributed to her husband's medical education, was awarded alimony in lieu of property interests. The court realized that the award was a misnomer, though it affirmed the trial court's findings. The husband's contention that the award was based upon a share in his medical practice was rejected. The court considered the husband's increased earning capacity in view of the wife's having nothing to show for the marriage if the award was denied; Magruder v. Ma-

Most recently, the Kentucky Court of Appeals was confronted with *Inman v. Inman*,[147] a case virtually identical to *Graham*. The court was realistically apprehensive of opening a Pandora's box of obstacles to equitable resolution of property division by categorizing a professional license to practice dentistry as "marital property."[148] It did, however, acknowledge that the circumstances of the parties, considering such factors as duration of the marriage, accumulation of marital assets, and sacrifices made by an "investing" spouse to her detriment, could guide the court in flexibly defining whether such an achievement could be, for that particular case, "marital property."[149] Despite such an admirable perspective, the court declined to define her interest with the same breadth. Expenses paid for schooling and familial support, with allowances for interest and inflation would generally comprise the award befitting the supporting spouse.[150] Yet such an award is merely remunerative, once again indicating the courts' refusals to expand "partnership" theory.

CONCLUSION

Satisfying a contributing spouse's investment expectations while appeasing the court's equitable conscience is a delicate balance. Division of the intangible right embodied in an educational degree is hampered by its uniquely personal elements. The court is faced with weighing conflicting social interests: On the one hand, failure to acknowledge the "investor's" interests in increased marital security intrudes upon "partnership" principles which evolved in response to changing social attitudes toward spousal roles; on the other, impingement upon personal

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gruder, 190 Neb. 573, 209 N.W.2d 585 (1973); Greer v. Greer, 32 Colo. App. 196, 510 P.2d 905 (1973). *See also* note 102 *supra*.

147. 578 S.W.2d 266 (Ky. App. 1979).

148. *Id.* at 268.

> This court has strong reservations about placing a professional license in the category of marital property. Doing so can only create another field for battle in the already complex and delicate area of division of marital property. *In spite of these reservations, however, we feel that there are certain instances in which* [doing so] . . . *is the only way a court can achieve an equitable result.* (emphasis added).

149. *Id.* The court meant these guidelines to serve only as examples of avenues open to a trial court's reasoning. The court felt compelled to offer these due to recognition that to "refuse to find any sort of protected property interest would work the grossest inequity. . . . *In those instances* [where] . . . *little or no marital property has been accumulated*, . . . there is generally no entitlement to maintenance as each spouse is self-supporting." (emphasis added). Thus, the court found justification for the "investment" argument without the presence of influential factors typical to an alimony award.

150. *Id.*

freedom to utilize such a skill or professional ability speaks strongly to the exclusion of such an intangible property from division upon divorce. Courts must nevertheless attempt to resolve this dilemma. Current decisions regretfully lack the explicitness necessary to clearly guide the divorcing partners and their attorneys through their disentanglement.

A separate scrutiny of individual cases reflects the presence of factual circumstances which have influenced courts to cross the borders of property division to draw from elements traditionally related to awards of alimony. Typically in this area, a spouse proving a substantial need for support is generally granted both alimony and property division. But when that requisite need is marginal, alimony is not usually justified. However, when *potential* incapacitation is combined with an absence of accumulated assets and disparity in the partners' future financial security, the threat of gross inequity becomes apparent. With alimony unavailable and no property to divide, the potentially needy spouse is left unprotected. Where such threatened deprivation is evidenced, the only accessible item from which to seek relief may be the collectively-attained, though singularly-possessed, education. That it was acquired through collaborative effort yields a "partnership interest." The contributing spouse's dependence places the problem of valuation in a position of secondary importance, if that.

Conversely, where not even a threatened need for financial support is shown amongst the myriad facts within the court's purview, the inherent problems of valuing an education take precedence. Courts are unwilling to burden the personal, intangible right to use and reap the benefits from an educational degree, where no justification for imposing a continuing *duty* exists. This is so despite the "partnership" entity, lending the inference that judicial utilization of this "shared enterprise" concept may be treading close to its periphery. In such a case, remedies yielding remuneration for amounts contributed appear appropriate, though leaving expended time and the hope of marital security uncompensated.

The trend to perceive marriage as a joint endeavor is clear though the scope of this concept is obscured by the clash between certainty in division of property and the expectations of the marital partners. Both certainty and expectancy are sought in human endeavor and are especially magnified within the marital relationship. If this is true, exacting legal propositions developed in attempts to meet reality's demands will inevitably

fall short of predictability, thus leaving inequities to be borne not by the courts, but by the partners themselves.

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