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# DILEMMA v. PARADOX: VALUATION OF AN ADVANCED DEGREE UPON DISSOLUTION OF A MARRIAGE

LEONARD L. LOEB\*  
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## I. THE DILEMMA

As a result of the reform of the divorce laws across the nation, the element of no fault is available in all but two jurisdictions.<sup>1</sup> Consequently, courts now focus their attention on the economic aspects of divorce and have broadened the definition of marital property to include such things as pension plans,<sup>2</sup> stock options,<sup>3</sup> annuities<sup>4</sup> and other intangibles.<sup>5</sup> A recent economic controversy over which courts have split, even within the same state,<sup>6</sup> is whether a professional degree or license is property and thus subject to division upon dissolution of a marriage. This legal problem has

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1. ILL. ANN. STAT. ch. 40, § 401 (Smith-Hurd Supp. 1982); S.D. CODIFIED LAWS ANN. § 25-4-2 (1982).

2. *See, e.g.*, Leighton v. Leighton, 81 Wis. 2d 620, 634-35, 261 N.W.2d 457, 463-64 (1978).

3. *See, e.g.*, Ettinger v. Ettinger, 637 P.2d 63 (Okla. 1981) (stock options not property to be divided).

4. *See, e.g.*, Daniels v. Retirement Bd. of the Policeman's Annuity & Benefit Fund, 106 Ill. App. 3d 412, 435 N.E.2d 1276 (1982).

5. *See* Arnett v. Kennedy, 416 U.S. 134 (1974). Dissenting in this case, Justice Marshall observed that: "The decisions of this Court have given constitutional recognition to the fact that in our complex modern society, wealth and property take many forms. We have said that property interests requiring constitutional protection 'extend well beyond actual ownership of real estate, chattels, or money.'" *Id.* at 207-08 (Marshall, J., dissenting) (footnote and citations omitted). In the same case he noted that "today more and more of our wealth takes the form of rights or status rather than of tangible goods. . . . A profession or job is frequently far more valuable than a house or bank account . . ." *Id.* at 207 n.2 (quoting Reich, *The New Property*, 73 YALE L.J. 733, 738 (1964)).

6. *See, e.g.*, *infra* text accompanying notes 49-61.

arisen in both community property<sup>7</sup> and equitable distribution<sup>8</sup> states, where courts have been confronted with the problem of how to fairly compensate a spouse who has supported the other while he or she obtains a postgraduate degree.

The typical fact pattern involves a wife who was the principal breadwinner during the time of the husband's professional education or training.<sup>9</sup> All of the couple's efforts were devoted to the education of the husband. After he obtains his advanced degree but before the family can benefit from

7. Four community property states, California, Idaho, Louisiana and New Mexico, provide for an equal division of property. CAL. CIV. CODE § 5104 (West 1970); IDAHO CODE § 32-906 (Supp. 1982); LA. CIV. CODE ANN. art. 2335 (West Supp. 1983); N.M. STAT. ANN. § 40-3-8B (1978).

The remaining community property states, Arizona, Nevada, Texas and Washington, provide for an "equitable" but not necessarily equal division. ARIZ. REV. STAT. ANN. § 25-211 (1976); NEV. REV. STAT. § 123.220 (1979); TEX. FAM. CODE ANN. § 5.01(b) (Vernon 1975); WASH. REV. CODE ANN. § 26.16.030 (Supp. 1982).

8. Thirty-nine states can be termed "equitable distribution" states: ALA. CODE § 30-4-19 (Supp. 1982); ALASKA STAT. § 09.55.210(6) (1975 & Supp. 1982); ARK. STAT. ANN. § 34-1214 (Supp. 1981); COLO. REV. STAT. § 14-10-113(1) (1973 & Supp. 1982); CONN. GEN. STAT. § 46b-81(a) (Supp. 1982); DEL. CODE ANN. tit. 13, § 1513(a) (1974); FLA. STAT. § 61.14 (1975 & Supp. 1983); GA. CODE § 30-105 (1967 & Supp. 1982); HAWAII REV. STAT. § 580-47(a) (Supp. 1981); ILL. ANN. STAT. ch. 40, § 503(c) (Smith-Hurd Supp. 1982); IND. CODE § 31-1-11.5-11(b) (West 1982); IOWA CODE ANN. § 598.21 (West 1981); KAN. STAT. ANN. § 60-1610(d) (Supp. 1981); KY. REV. STAT. ANN. § 403.190(1) (Baldwin Supp. 1981); ME. REV. STAT. ANN. tit. 19, § 7221-1A(1) (1981); MD. FAM. LAW CODE ANN. § 1 (1981); MASS. GEN. LAWS ANN. ch. 208, § 34 (West Supp. 1982-1983); MICH. COMP. LAWS ANN. § 552.23(1) (Supp. 1982-1983); MINN. STAT. § 518.58 (Supp. 1982); MO. ANN. STAT. § 452-330.1 (Vernon Supp. 1982); MONT. CODE ANN. § 48-321(1) (Supp. 1977); NEB. REV. STAT. § 42-365 (1978); N.H. REV. STAT. ANN. § 458.19 (1968); N.J. STAT. ANN. § 2A-34-23 (West Supp. 1982-1983); N.Y. DOM. REL. LAW § 236 (McKinney Supp. 1982-1983); N.C. GEN. STAT. § 50.20 (1981); N.D. CENT. CODE § 14-05-24 (1981); OHIO REV. CODE ANN. § 3105.18 (Page 1980); OKLA. STAT. tit. 12, § 1278 (Supp. 1982-1983); OR. REV. STAT. § 107.105(1)(c) (1981-1982); 21-23 PA. CONS. STAT. ANN. § 23-401(d) (Purdon Supp. 1982-1983); R.I. GEN. LAWS § 15-5-16 (Supp. 1982); S.D. COMP. LAWS ANN. § 25-4-44 (1976); TENN. CODE ANN. § 36-825 (1977); UTAH CODE ANN. § 30-3-5(1) (Supp. 1981); VT. STAT. ANN. tit. 15, § 751 (Supp. 1982); VA. CODE § 20-107.3 (Supp. 1982); WIS. STAT. § 767.255 (1981-1982); WYO. STAT. § 20-2-114 (1977).

The remaining three states are strict title states where property is awarded on the basis of the name or names on the title. MISS. CODE ANN. § 93-5-23 (Supp. 1982); S.C. CODE ANN. § 20-3-130 (Law Co-op 1976); W. VA. CODE § 48-2-16 (1980).

9. No reported cases could be found in which a husband claimed an interest in a wife's advanced degree or license. *But see* Scislowicz v. Scislowicz, No. 80-1744 (Wis. Ct App Sept. 15, 1981) (available Feb. 16, 1983, on LEXIS, Wis library, Ct. App. file) (unpublished decision) (where the court refused to grant the husband an interest in the increased earning ability of the wife he had helped put through law school).

the fruits of its endeavors, the marriage breaks up. Frequently there are no children, so child support is not involved. Even if child support is involved, a substantial portion of the wife's economic resources will be used for child care costs. Moreover, no tangible assets of any substantial value have been accumulated, since all of the couple's financial resources have gone into the husband's education. Consequently, there is little or no property subject to distribution upon dissolution. Meanwhile, the wife has foregone her own career goals and education in expectation of a higher standard of living in the future based upon her husband's training.

Thus, the timing of the divorce triggers a compensation problem regarding the supporting spouse in this situation. The traditional awards of a divorce court consist of property division and maintenance. When the divorce occurs many years after the husband has obtained his professional degree, these traditional means may be adequate to compensate the wife. Then the marital estate will usually consist of a substantial accumulation of assets. The husband will have an established practice or profession with an ascertainable income. The wife will realize a return on her investment by an appropriate award of the couple's accumulated assets in the property division and a maintenance award based on her husband's increased earning capacity.

When a marriage breaks up soon after the supported spouse obtains his degree or license, a different problem arises: how is the supporting spouse to be compensated for her foregone opportunities and loss of investment? In recent years supporting spouses have asserted claims on their partners' degrees on the theory that the degree is an asset of the marriage and thus subject to division or that she is entitled to reimbursement for her financial contributions towards its attainment. As the following discussion will show, the answer as to how successful such claims will be is still unsettled.

## II. IS THE SPOUSE'S PROFESSIONAL DEGREE OR LICENSE MARITAL PROPERTY SUBJECT TO DISTRIBUTION?

Generally, community property and equitable distribution statutes provide that property legally and beneficially

acquired during the marriage is subject to distribution upon dissolution of the marriage.<sup>10</sup> How a jurisdiction defines property determines whether a professional degree or license is an asset includable in or excludable from the marital estate. Appellate courts in at least nineteen states<sup>11</sup> have now confronted the issue of whether to divide the fruits of the professional degree with differing results.

### A. Community Property States

#### 1. California

The community property state of California appears to be holding fast to the position that a professional degree is not property. In 1969 in *Todd v. Todd*<sup>12</sup> a wife had worked to supplement her husband's veterans' benefits to put him through college and law school during their twenty-year marriage. The California Court of Appeal decided that a legal education was not community property and affirmed the trial court holding that there was no value to a legal education as a claimed marital asset.<sup>13</sup> The *Todd* court's chief concern seemed to be that it would be too difficult to value such a degree: "At best, education is an intangible property right, the value of which, because of its character, cannot

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10. See *supra* notes 7 & 8.

11. See, e.g., *Wisner v. Wisner*, 129 Ariz. 333, 631 P.2d 115 (Ct. App. 1981); *Todd v. Todd*, 272 Cal. App. 2d 786, 78 Cal. Rptr. 131 (1969); *In re Marriage of Graham*, 194 Colo. 429, 574 P.2d 75 (1978); *In re Marriage of Goldstein*, 97 Ill. App. 3d 1023, 423 N.E.2d 1201 (1981); *In re Marriage of McManama*, 399 N.E.2d 371 (Ind. 1980); *In re Marriage of Horstmann*, 263 N.W.2d 885 (Iowa 1978); *Leveck v. Leveck*, 614 S.W.2d 710 (Ky. Ct. App. 1981); *Moss v. Moss*, 80 Mich. App. 693, 264 N.W.2d 97 (1978); *DeLa Rosa v. DeLa Rosa*, 309 N.W.2d 755 (Minn. 1981); *In re Marriage of Vanet*, 544 S.W.2d 236 (Mo. Ct. App. 1976); *Wheeler v. Wheeler*, 193 Neb. 615, 228 N.W.2d 594 (1975); *Stern v. Stern*, 66 N.J. 340, 331 A.2d 257 (1975); *Muckleroy v. Muckleroy*, 84 N.M. 14, 498 P.2d 1357 (1972); *Lesman v. Lesman*, 88 A.D.2d 153, 452 N.Y.S.2d 935 (1982); *Hegge v. Hegge*, 236 N.W.2d 910 (N.D. 1975); *Lira v. Lira*, 88 Ohio App. 2d 164, 428 N.E.2d 445 (1980); *Diment v. Diment*, 531 P.2d 1071 (Okla. Ct. App. 1974); *Frausto v. Frausto*, 611 S.W.2d 656 (Tex. Civ. App. 1980); *Lundberg v. Lundberg*, 107 Wis. 2d 1, 318 N.W.2d 918 (1982).

See also, e.g., lower court opinions in *Zahler v. Zahler*, 8 FAM. L. REP. (BNA) 2694 (Conn. Super. Ct. Aug. 5, 1982); *Reen v. Reen*, 8 FAM. L. REP. (BNA) 2193 (Mass. Prob. & Fam. Ct. 1981).

12. 272 Cal. App. 2d 786, 78 Cal. Rptr. 131 (1969).

13. *Id.* at \_\_\_, 78 Cal. Rptr. at 135.

have a monetary value placed upon it for division between spouses."<sup>14</sup>

Ten years later in *In re Marriage of Aufmuth*,<sup>15</sup> the California Court of Appeal again refused to denominate the degree community property, this time on the theory that to do so would be to divide postdivorce earnings:

The value of a legal education lies in the potential for increase in the future earning capacity of the acquiring spouse made possible by the law degree and innumerable other factors and conditions which contribute to the development of a successful law practice. A determination that such an "asset" is community property would require a division of post-dissolution earnings to the extent that they are attributable to the law degree, even though such earnings are by definition the separate property of the acquiring spouse. . . . "Since the philosophy of the community property system is that a community interest can be acquired only during the time of the marriage, it would then be inconsistent with that philosophy to assign to any community interest the value of the post-marital efforts to either spouse."<sup>16</sup>

A recent California case, *Sullivan v. Sullivan*,<sup>17</sup> which is still being litigated,<sup>18</sup> has had a tortuous journey through the California court system. On the first appeal<sup>19</sup> the court held that the degree could be considered property since there was no valid distinction between a degree and a closely held corporation.<sup>20</sup> On a second appeal<sup>21</sup> the court rejected this holding, explaining that for something to be defined as property, it must have certain attributes such as the potential for being transferred, shared with others or passed on after death. No professional education has any of these attributes.<sup>22</sup> Thus, California has not yet found reason to reject its initial holding in *Todd*.

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14. *Id.*

15. 89 Cal. App. 3d 446, 152 Cal. Rptr. 668 (1979).

16. *Id.* at —, 152 Cal. Rptr. at 678 (quoting *Fortier v. Fortier*, 34 Cal. App. 3d 384, 388, 109 Cal. Rptr. 915, 918 (1973)).

17. 27 Cal. App. 3d 656, (unpublished) *vacated*, 134 Cal. App. 3d 634, 184 Cal. Rptr. 796 (1982).

18. No. LA-31-653 (Cal. Sup. Ct. argued Feb. 8, 1983).

19. *Sullivan*, 27 Cal. App. 3d 656.

20. *Id.*

21. *Sullivan*, 134 Cal. App. 3d 634, 184 Cal. Rptr. 796.

22. *Id.* at —, 184 Cal. Rptr. at 800.

## 2. Texas

A wife's attempt to have the court divide the medical education of her husband fared no better in the Court of Civil Appeals of Texas. In *Frausto v. Frausto*<sup>23</sup> the trial court ordered a \$20,000 payment as reimbursement for "Petitioner's share of the community expense for Respondent's education."<sup>24</sup> In 1981 the higher court reversed and stated: "We hold that a professional education acquired during marriage is not a property right and is not divisible upon divorce."<sup>25</sup> While recognizing that a trial court has equitable powers to consider many factors, the opinion conceded that "the trial court is limited by our basic community property laws."<sup>26</sup>

The court would not countenance a restitutionary award either, reasoning that the education had been financed with community funds and that restitution is appropriate only when separate property has been contributed or when community funds have been used to enhance separate property. Here, the degree or education was not considered to be property. Moreover, Mrs. Frausto had filed no pleadings seeking reimbursement, so the award of \$20,000 was denied.<sup>27</sup>

## 3. New Mexico and Arizona

A third community property state, New Mexico, arrived at a similar result in *Muckleroy v. Muckleroy*,<sup>28</sup> where the debts of a physician and his wife exceeded their assets. That court said that while "the right to engage in a licensed profession is a protected property right . . . not all property rights are property within the meaning of the community property statutes."<sup>29</sup> Thus, the court stated:

We believe that in order for a medical license to become community property, it must possess the attribute of joint ownership. A medical license is only a permit issued by the controlling authority of the State, authorizing the individual licensee to engage in the practice of medicine. The

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23. 611 S.W.2d 656 (Tex. Civ. App. 1980).

24. *Id.* at 657 n.1.

25. *Id.* at 659.

26. *Id.*

27. *Id.* at 660.

28. 84 N.M. 14, 498 P.2d 1357 (1972).

29. *Id.* at \_\_\_, 498 P.2d at 1358.

medical license may be used and enjoyed by the licensee as a means of earning a livelihood, but it is not community property because it cannot be the subject of joint ownership. We hold, therefore, that for purposes of the community property laws of the State of New Mexico, a medical license is not community property.<sup>30</sup>

The wife was also denied the fifteen percent of Dr. Muckleroy's future earnings which she was seeking.<sup>31</sup>

Almost ten years later the Arizona Court of Appeals relied on *Muckleroy* to reject the property concept in regard to a medical degree in *Wisner v. Wisner*.<sup>32</sup> Unlike the New Mexico court, however, the Arizona court added that "while an *education* is not property subject to division, it is still a factor to be considered, in addition to others, in arriving at an equitable property division and in determining matters of spousal maintenance and child support."<sup>33</sup> Noting that the Wisners had been married for fifteen years, the court said that "an important factor to consider in the overall picture is the extent to which the non-license or degree holder has already or otherwise benefited financially during coverture from his or her spouse's earning capacity."<sup>34</sup> In this case the wife benefited from the fruits of her husband's education by way of the property settlement and maintenance award in addition to the higher standard of living enjoyed during the latter years of the marriage. The court also rejected the wife's unjust enrichment theory, deeming it inappropriate as applied to a marriage unless such an agreement had been memorialized in a formal contract.<sup>35</sup>

### B. *Equitable Distribution States*

Equitable distribution states appear to have a more flexible approach to the issue of whether the value of an education is distributable. Yet, the vast majority of these jurisdictions refuse to call the license or degree "marital property." Most will, however, take it into consideration if

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30. *Id.*

31. *Id.*

32. 129 Ariz. 333, 631 P.2d 115 (Ct. App. 1981).

33. *Id.* at \_\_\_, 631 P.2d at 122.

34. *Id.* at \_\_\_, 631 P.2d at 123.

35. *Id.*



there are other assets to divide and in a low asset or no asset case will use it as a factor in setting a level of maintenance.

### 1. Iowa

The highest court in only one state — Iowa — has held that an education is an asset capable of being distributed in a property settlement. In *In re Marriage of Horstmann*<sup>36</sup> the wife dropped out of college and both she and her parents financed the husband's legal education.<sup>37</sup> At the time of trial the couple had one child and virtually no assets. The husband was ordered to pay \$18,000 in installments as a property settlement along with child support and token alimony.<sup>38</sup> The supreme court upheld this award, explaining that:

[T]he law degree from Drake University and the certificate of admission to practice law in the courts of this state do not themselves constitute an asset of the parties for court consideration in making distribution upon dissolution of the marriage. However, it is the potential for increase in future earning capacity made possible by the law degree and certificate of admission conferred upon the husband with the aid of his wife's efforts which constitutes the asset for distribution by the court.<sup>39</sup>

### 2. Ohio

The *Horstmann* opinion relied heavily on *Daniels v. Daniels*,<sup>40</sup> where the Ohio Court of Appeals took the position that a professional degree is marital property.<sup>41</sup> The Daniels were married while both were students in college. The wife completed her undergraduate education and had a child during the seven-year marriage while the husband went on

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36. 263 N.W.2d 885 (Iowa 1978). See also Comment, *Horstmann v. Horstmann: Present Right to Practice a Profession as Marital Property*, 56 DEN. L.J. 677 (1979); Comment, *Professional Education as a Divisible Asset in Marriage Dissolutions*, 64 IOWA L. REV. 705 (1979); Note, *Divorce After Professional School: Education and Future Earning Capacity May Be Marital Property*, 44 MO. L. REV. 329 (1979) (analyses of *Horstmann*).

37. 263 N.W.2d at 889.

38. *Id.* at 886.

39. *Id.* at 891.

40. 20 Ohio App. 2d 458, 185 N.E.2d 773 (1961).

41. *Id.* at \_\_\_, 185 N.E.2d at 775.

to obtain a medical degree. Both contributed approximately equal amounts of their earnings to the support of the family. The wife's father also gave sizeable sums to the household. The marriage broke up as the husband was beginning his residency in obstetrics and gynecology.<sup>42</sup> The *Daniels* court upheld an award to the wife of \$24,000 in "property settlement alimony," which under Ohio law is actually a distribution of marital assets and liabilities.<sup>43</sup> The court concluded that the degree was the principal asset of the parties and went on to state that "the right to practice medicine being in the nature of a franchise constitutes property."<sup>44</sup>

Almost two decades later in *Lira v. Lira*,<sup>45</sup> the same Ohio court agreed with the *Daniels* holding that a medical degree is an asset of the marriage. However, the court went on to state that although the degree is an asset, the license itself is not subject to division, but rather is but one factor to consider in arriving at an equitable division of the marital estate.<sup>46</sup>

### 3. Kentucky

The Kentucky Court of Appeals has also differentiated between the divisibility of a degree and a license. In *Moss v. Moss*,<sup>47</sup> where a pharmacist's license was at stake, the court said:

A degree may be a marital investment, one which is subject to cost basis analysis. A license, however, is an illusory asset, one which represents merely a potential for increased earnings. The license is no more and no less than the authorized right to engage in the profession selected. To say the license has no value obviously would be wrong, but it is just as obvious that such value is only *intrinsic* and *intangi-*

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42. *Id.* at \_\_\_, 185 N.E.2d at 774. The court also noted that at the time of trial the parties' daughter had a heart condition and that they had accumulated no assets. *Id.*

43. *Id.* at \_\_\_, 185 N.E.2d at 776. Ohio's statute provides for two types of alimony: alimony constituting a division of marital assets and liabilities, and alimony consisting of periodic payments for sustenance and support. OHIO REV. CODE ANN. § 3105.18 (Page 1980). See also *Cherry v. Cherry*, 66 Ohio St. 2d 348, 421 N.E.2d 1293 (1981) (discussing the Ohio alimony statute).

44. *Daniels*, 20 Ohio App. 2d at \_\_\_, 185 N.E.2d at 775.

45. 68 Ohio App. 2d 164, 428 N.E.2d 445 (1980).

46. *Id.* at \_\_\_, 428 N.E.2d at 448.

47. 639 S.W.2d 370 (Ky. Ct. App. 1982).

ble and not equatable with dollar amounts as are things of *extrinsic* and *tangible* value.<sup>48</sup>

Confusion in the Kentucky courts over the issue of whether a license is divisible is evident throughout the course of *Inman v. Inman*.<sup>49</sup> The Inmans were married for seventeen years, but as a result of an affluent lifestyle with correspondingly large debts, the net worth of their marital estate was reduced to practically nothing.<sup>50</sup> The wife had been teaching school during most of the marriage while the husband went to dental school and established his practice.

In 1979 the Kentucky Court of Appeals ruled that the husband's license to practice dentistry was divisible marital property and that the wife should be compensated for the husband's increased earning capacity.<sup>51</sup> On a second appeal the court reversed its decision.<sup>52</sup> It rejected the increased earning capacity concept and ruled that the wife should only be reimbursed for the amounts she spent to put her husband through school plus interest.<sup>53</sup>

Finally, the Supreme Court of Kentucky, relying on the law of the case doctrine,<sup>54</sup> precluded the Kentucky appellate court from reversing itself on the issue of whether a professional license obtained during the marriage is a divisible marital asset.<sup>55</sup> However, the supreme court stated that if the issue were before its forum, it could not accept the proposition that an educational degree obtained by one spouse is

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48. *Id.* at 374.

49. 578 S.W.2d 266 (Ky. Ct. App. 1979); 8 FAM. L. REP. (BNA) 2329 (Ky. Ct. App. Mar. 12, 1982) (second appeal); 9 FAM. L. REP. (BNA) 2131 (Ky. Sup. Ct. Nov. 11, 1982). See also Comment, *Property Division — License to Practice Dentistry is Marital Property Subject to Division*, 17 J. FAM. L. 826 (1979); Note, 7 N. KY. L. REV. 143 (1980).

50. 578 S.W.2d at 267.

51. *Id.* at 268.

52. 8 FAM. L. REP. (BNA) 2329 (Ky. Ct. App. Mar. 12, 1982).

53. *Id.*

54. BLACK'S LAW DICTIONARY 798 (5th ed. 1979), defines "law of the case" as: the principle that if an appellate court has passed on a legal question and remanded the cause to the court below for further proceedings, the legal question thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain the same.

55. 9 FAM. L. REP. (BNA) 2131, 2131 (Ky. Sup. Ct. Nov. 11, 1982).

marital property even though the other spouse contributed financially to its cost.<sup>56</sup>

Before the final resolution in *Inman*, the Kentucky Court of Appeals had indicated in *Leveck v. Leveck*<sup>57</sup> that when there are sufficient other assets to distribute or when maintenance is warranted, it is preferable to use these means to compensate the spouse. In *Leveck*, where the wife worked as a nurse to put the husband through medical school, the court was able to award her \$10,000 in a lump sum in partial repayment for her contributions.<sup>58</sup> In contrast to *Inman*, where there were no assets, the court explained that: "In this case, an equitable result was able to be reached without treatment of the license as marital property, because Judith was entitled to maintenance. The trial court was not clearly erroneous in failing to find the medical license as marital property."<sup>59</sup>

#### 4. Colorado and Illinois

*Horstmann, Daniels* and the first *Inman* appeal held that an education is distributable either as property or as future earning power. In *In re Marriage of Graham*<sup>60</sup> the Colorado Supreme Court rejected these theories in concluding that a degree is not property.<sup>61</sup> Many subsequent decisions in other jurisdictions<sup>62</sup> have relied on the *Graham* court's rationale which stated:

An educational degree . . . is simply not encompassed even by the broad views of the concept of "property." It does not have an exchange value or any objective transferable value on an 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 pledg-

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56. *Id.* at 2133.

57. 614 S.W.2d 710 (Ky. Ct. App. 1981).

58. *Id.* at 712.

59. *Id.*

60. 194 Colo. 429, 574 P.2d 75 (1978). See also Note, *Graduate Degree Rejected as Marital Property Subject to Division upon Divorce*, 11 CONN. L. REV. 62 (1978); Note, *Education Acquired During Marriage — For Richer or Poorer*, 12 J. MAR. J. PRAC. & PROC. 709 (1979); Recent Development, *Domestic Relations — Educational Degree Does Not Constitute Marital Property Subject to Division Between Spouses upon Divorce*, 13 TULSA L.J. 646 (1978).

61. *Graham*, 194 Colo. at —, 574 P.2d at 77.

62. See, e.g., *Wisner v. Wisner*, 129 Ariz. 333, —, 631 P.2d 115, 121-22 (Ct. App. 1981).

ed. 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 that term.<sup>63</sup>

In *Graham* the wife, an airline stewardess, had provided over seventy percent of the couple's financial support during the six-year marriage. Meanwhile, her husband earned his bachelor of science and master of business administration degrees, but the couple acquired no tangible assets of any value.<sup>64</sup> In denying a property award based on the value of the degree, the court pointed out that some spouses who support their mates in obtaining an education are not without remedies. If there is property, the degree of one party can be a consideration for a larger award to the other party or it can be used as a factor in setting maintenance.<sup>65</sup> Unfortunately, Mrs. Graham had not sought maintenance, and because she had proved herself to be capable of self support, she probably would not have been awarded any. Also, because she had spent her money on her husband's education instead of on tangible assets, no property could be awarded to her.<sup>66</sup>

Illinois followed the lead of Colorado in *In re Marriage of Goldstein*,<sup>67</sup> where the court of appeals decided that earning potential was too speculative to be the basis for a property award.<sup>68</sup> In this case the parties had only been married for fifteen months and the schoolteacher wife had only supported the husband through his last year of osteopathy school.<sup>69</sup>

## 5. New York and Indiana

The highest New York court to consider the issue of the divisibility of a degree also concluded that an advanced edu-

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63. *Graham*, 194 Colo. at \_\_\_, 574 P.2d at 77.

64. *Id.* at \_\_\_, 574 P.2d at 76.

65. *Id.* at \_\_\_, 574 P.2d at 78.

66. *Id.* at \_\_\_, 574 P.2d at 77.

67. 97 Ill. App. 3d 1023, 423 N.E.2d 1201 (1981).

68. *Id.* at \_\_\_, 423 N.E.2d at 1204.

69. *Id.* at \_\_\_, 423 N.E.2d at 1202.

cation, professional license or enhanced earning power is not subject to equitable distribution.<sup>70</sup> In *Lesman v. Lesman*<sup>71</sup> the wife worked for only one year while her husband received his medical training. She was awarded "substantial" support for herself and their two children, but no interest in the degree.<sup>72</sup>

Criticizing the Kentucky courts for classifying the degree as property in the case of the needy wife and not in the case of the self supporting wife, the New York court pointed out that every marriage which ends in divorce ends in disappointment of expectations — financial as well as nonfinancial.<sup>73</sup> Thus, when the parties formulate a joint plan to sacrifice for the education of one of them for the sake of future benefits, the court need not grant the supporting party restitution based on future earnings unless the legislature so decrees.<sup>74</sup>

New York's equitable distribution statute explicitly states that "any equitable claim to, interest in, or direct or indirect contribution made . . . to the career or career potential of the other spouse," shall be included in equitable distribution.<sup>75</sup> But where there is no marital estate, there is little to consider. Indiana has gone one step further to provide for the situation in which maintenance is not warranted and there are no assets. Indiana's law provides that courts may reimburse the spouse who contributed to the other's education.<sup>76</sup> This statute was passed after decisions in *In re Marriage of McManama*<sup>77</sup> and *Wilcox v. Wilcox*<sup>78</sup> in which

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70. It should be noted that lower courts in New York are split on the issue of whether the degree is divisible property. See *Kutanovski v. Kutanovski*, 8 FAM. L. REP. (BNA) 2692 (N.Y. Sup. Ct. Aug. 25, 1982); *O'Brien v. O'Brien*, 114 Misc. 2d 233, 452 N.Y.S.2d 801 (1982); *Barton v. Barton*, 8 FAM. L. REP. (BNA) 2453 (N.Y. Sup. Ct. May 20, 1982) (all holding that a degree or license is property or that the fruits of the license are distributable assets). *Contra Conner v. Conner*, 8 FAM. L. REP. (BNA) 2682 (N.Y. Sup. Ct. Aug. 31, 1982); *Litman v. Litman*, 115 Misc. 2d 230, 453 N.Y.S.2d 1003 (1982) (both holding that a degree or license or future earning power is not subject to equitable distribution).

71. 114 Misc. 2d 864, 452 N.Y.S.2d 935 (1982).

72. *Id.* at —, 452 N.Y.S.2d at 939.

73. *Id.*

74. *Id.* at —, 452 N.Y.S.2d at 940.

75. N.Y. DOM. REL. LAW § 236(B)(5)(d)(6) (McKinney Supp. 1982-1983).

76. IND. CODE § 31-1-11.5-11(b) (1981).

77. 399 N.E.2d 371 (Ind. 1980).

husbands had obtained advanced degrees while their wives supported them. At the end of the marriages neither couple had any assets and under Indiana law only a party who is physically or mentally incapacitated could receive maintenance.<sup>79</sup> The new statute provides a remedy in such a situation.

#### 6. Remedies in New Jersey and Other States

The remaining equitable distribution states in which a degree has been at issue in a divorce have pursued a middle course under which they do not identify a degree or increased earning power as "property," but do fashion a remedy for the supporting spouse. However, these courts differ as to whether to repay the supporting spouse for monies expended or to attempt to allow the economically and educationally disadvantaged spouse to share in the fruits of the other's degree.

In *DeLa Rosa v. DeLa Rosa*<sup>80</sup> the Minnesota Supreme Court allowed restitution to the extent of actual expenses for a spouse who had supported her husband's medical education. By contrast, in *In re Marriage of Vanet*<sup>81</sup> the Missouri appellate court did not discuss the cost or worth of the husband's law degree but upheld an award to the wife of seventy-four percent of the property as well as alimony and child support. The court explained that this judgment was not predicated on future earnings so much as on contributions by the wife and the needs of the children.<sup>82</sup> Decisions in Michigan<sup>83</sup> and Nebraska<sup>84</sup> have awarded alimony in

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78. 173 Ind. App. 661, 365 N.E.2d 792 (1977).

79. IND. CODE §§ 31-1-11.5-9(c), 31-1-11.5-11 (1976); 33-1-11.5-11 (Supp. 1979).

80. 309 N.W.2d 755 (Minn. 1981). See also Note, *Disposition of Professional Degree upon Marriage Dissolution: DeLa Rosa v. DeLa Rosa*, 66 MINN. L. REV. 1205 (1982).

81. 544 S.W.2d 236 (Mo. Ct. App. 1976).

82. *Id.* at 241. Cf. *Hegge v. Hegge*, 236 N.W.2d 910 (N.D. 1975). In this case the court did not reach the question of whether an alimony award was warranted because the wife had allegedly contributed to the attainment of the husband's master's degree. The facts showed that her contribution consisted of a sales clerk job during one Christmas season and that this was more than offset by her misconduct in other spheres. *Id.* at 917.

83. *Moss v. Moss*, 80 Mich. App. 693, 264 N.W.2d 97 (1978). See also Lombard, *Family Law*, 25 WAYNE L. REV. 519, 523-24 (1979); Schwartz, *Divorce and Earning Ability*, 1982 DET. C.L. REV. 69, 78.

gross<sup>85</sup> to women who supported their husbands through professional school. Oklahoma allows a similar award of alimony in lieu of property.<sup>86</sup> In *Hubbard v. Hubbard*<sup>87</sup> the supreme court of that state also premised the payment of \$100,000 to the wife on theories of unjust enrichment and reimbursement.<sup>88</sup>

In a trilogy of cases decided in 1982, the New Jersey Supreme Court attempted to bring order out of the doctrinal chaos in other states and in lower courts in its own state<sup>89</sup> and to set forth guidelines for how a degree is to be treated upon the dissolution of a marriage. In *Mahoney v. Mahoney*<sup>90</sup> the court approved reimbursement for a wife who supported her husband while he earned an M.B.A. degree at the Wharton School of Business Administration.<sup>91</sup> The court was careful to state that a degree or enhanced earning capacity is not property and is not subject to equitable distribution and that to base an award on future earnings would be too

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84. *Wheeler v. Wheeler*, 193 Neb. 615, 228 N.W.2d 594 (1975); *Magruder v. Magruder*, 190 Neb. 573, 209 N.W.2d 585 (1973); *Loukota v. Loukota*, 177 Neb. 355, 128 N.W.2d 809 (1964); *Prosser v. Prosser*, 156 Neb. 629, 57 N.W.2d 173 (1953). See also *Van Pelt, No Fault Divorce: A Re-examination of Nebraska Law*, 54 NEB. L. REV. 27, 34-36 (1975); Note, 7 CREIGHTON L. REV. 369 (1974); Note, *Alimony Awards Under No Fault Statutes*, 53 NEB. L. REV. 126 (1974).

85. BLACK'S LAW DICTIONARY 67 (5th ed. 1979), defines "alimony in gross" as: [I]n the nature of a final property settlement, and hence in some jurisdictions is not included in the term "alimony," which in its strict or technical sense contemplates money payments at regular intervals. Refers to those alimony arrangements where entire award is a vested and determined amount and not subject to change.

86. See *Diment v. Diment*, 531 P.2d 1071, 1074 (Okla. Ct. App. 1974).

87. 603 P.2d 747 (Okla. 1979). See also *Kenderdine, Contributions to Spouse's Education: The Search for Compensation When the Marriage Ends*, 5 OKLA. L. REV. 409 (1980); Note, *Domestic Relations: Recognition of Wife's Interest in Professional Degree Earned by Husband During Marriage* — *Hubbard v. Hubbard*, 603 P.2d 747 (Okla. 1979), 7 U. DAYTON L. REV. 183 (1981).

88. *Hubbard*, 603 P.2d at 752.

89. *Lynn v. Lynn*, 91 N.J. 510, 453 A.2d 539 (1982); *Hill v. Hill*, 91 N.J. 506, 453 A.2d 537 (1982); *Mahoney v. Mahoney*, 91 N.J. 488, 453 A.2d 527 (1982). See DiLeo & Model, *A Survey of the Law of Property Disposition upon Divorce in the Tristate Area*, 56 ST. JOHN'S L. REV. 219, 242-45 (1982); Model & DiLeo, *The New Jersey Influence on New York's Equitable Distribution Law*, 12 SETON HALL L. REV. 37, 51-53 (1981); Survey, *Domestic Relations*, 13 SETON HALL L. REV. 207 (1982). These articles describe the differing dispositions of these three cases in the lower courts of New Jersey.

90. 91 N.J. 488, 453 A.2d 527 (1982).

91. *Id.* at \_\_\_, 453 A.2d at 529-30.



speculative. It said that "[o]nce a degree candidate has earned his or her degree, the amount that a spouse — or anyone else — paid towards its attainment has no bearing whatever on its value. The cost of a spouse's financial contributions has no logical connection to the value of that degree."<sup>92</sup> Thus, the court concluded that the basis for the award was not equitable distribution but reimbursement.<sup>93</sup>

The court warned that it would not support reimbursement between former spouses in alimony proceedings as a general principle.<sup>94</sup> But in the case where one spouse has supported the other and foregone a higher standard of living it would be "patently unfair that the supporting spouse be denied the mutually anticipated benefit while the supported spouse keeps not only the degree, but also all of the financial and material rewards flowing from it."<sup>95</sup> The court suggested that remedies could include reimbursement, rehabilitative maintenance, permanent alimony or an adjusted property division if there were sufficient assets.<sup>96</sup> The justices recognized that no one formula will cover every situation and that each case should be considered on its own facts. Thus, in the companion case of *Hill v. Hill*,<sup>97</sup> where the wife had interrupted her own education to put her husband through dental school, the court applied the *Mahoney* criteria to suggest that either rehabilitative or reimbursement alimony might be in order.<sup>98</sup>

In the third case, *Lynn v. Lynn*,<sup>99</sup> the need for relief was more urgent. The court stated:

This court can hardly envision a marriage leaving the two parties in more divergent financial situations. At the time of their marriage, Robert and Bonnie Lynn were young college graduates who looked forward to advanced degrees and promising careers. By the time of trial nine years later, however, the plaintiff was a physician in private

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92. *Id.* at \_\_\_, 453 A.2d at 533.

93. *Id.*

94. *Id.* at \_\_\_, 453 A.2d at 533.

95. *Id.* at \_\_\_, 453 A.2d at 533-34.

96. *Id.* at \_\_\_, 453 A.2d at 535.

97. 91 N.J. 506, 453 A.2d 537 (1982).

98. *Id.* at \_\_\_, 453 A.2d at 538.

99. 91 N.J. 510, 453 A.2d 539 (1982).

practice while his former wife had no graduate degree and was living on social security disability pay.<sup>100</sup>

The year the husband graduated from medical school the wife who had been supporting him developed an incurable inner ear disease which resulted in permanent hearing loss, nausea and vertigo.<sup>101</sup> After the trial court entered a judgment granting the wife \$61,377 in distribution on the theory that the degree was property, the husband attempted to institute bankruptcy proceedings and to discharge the equitable distribution award and the \$28,525 he was ordered to pay for the wife's attorney fees.<sup>102</sup> Based on *Mahoney*, the supreme court said that the degree was not property, but remanded the case to the trial court to set a lump sum award of reimbursement alimony and a separate continuing support alimony. The court directed that expert testimony concerning the value of the degree would not be necessary, but that the wife should produce testimony regarding the ability of the husband to pay.<sup>103</sup>

### C. Wisconsin

#### 1. *DeWitt v. DeWitt*

Wisconsin is an equitable distribution state<sup>104</sup> which has three reported cases dealing with the issue of how to compensate the supporting spouse pursuant to a divorce.<sup>105</sup> In *DeWitt v. DeWitt*<sup>106</sup> the court of appeals held that neither the legal education of the husband nor his increased earning capacity could be considered an asset of the marital estate subject to division. In *DeWitt* the wife had discontinued her college education so that her husband could finish his undergraduate and legal education. She held numerous full and part time jobs to finance his education and to support them and their only child. After the husband obtained his law degree, she resumed her education on a part-time basis and

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100. *Id.* at \_\_\_, 453 A.2d at 542.

101. *Id.* at \_\_\_, 453 A.2d at 540.

102. *Id.* at \_\_\_, 453 A.2d at 541.

103. *Id.* at \_\_\_, 453 A.2d at 543.

104. See *supra* note 8. See also WIS. STAT. § 767.255 (1981-1982).

105. *Roberto v. Brown*, 107 Wis. 2d 17, 318 N.W.2d 358 (1982); *Lundberg v. Lundberg*, 107 Wis. 2d 1, 318 N.W.2d 918 (1982); *DeWitt v. DeWitt*, 98 Wis. 2d 44, 296 N.W.2d 761 (Ct. App. 1980).

106. 98 Wis. 2d 44, 296 N.W.2d 761 (Ct. App. 1980).

completed an associate degree in accounting.<sup>107</sup> The *DeWitt* court stated that although "equity compels some sort of remuneration for a spouse whose contribution to the marriage have significantly exceeded those of the mate . . . equity is [not] served by attempting to place a dollar value on something so intangible as a professional education, degree, or license."<sup>108</sup> The court of appeals rejected the trial court's valuation based on the "cost approach," which presumes that the value of the degree is the amount of money spent obtaining it.<sup>109</sup> According to the court,

[Such a method] fails to consider the scholastic efforts and acumen of the degree holder, which may well have a bearing on the income-yielding potential of the education. It treats the parties as though they were strictly business partners, one of whom has made a calculated investment in the commodity of the other's professional training, expecting a dollar for dollar return.<sup>110</sup>

The court went on to characterize methods used in other jurisdictions to value a professional education as being "wholly speculative."<sup>111</sup> The court reasoned that the holder of the degree "may choose not to practice it, may fail at it, or may practice in a specialty, location or manner which generates less than the average income enjoyed by fellow professionals."<sup>112</sup> The court also pointed out that a division based on valuation involves a division of postdivorce earnings which is precluded by Wisconsin law.<sup>113</sup> Although the court concluded that the trial court erred in valuing Mr. DeWitt's law degree as an asset of the marital estate,<sup>114</sup> it did say that on remand the wife's contributions should serve as a consideration in determining the property division and whether alimony would be appropriate.<sup>115</sup>

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107. *Id.* at 46-47, 296 N.W.2d at 763.

108. *Id.* at 56-57, 296 N.W.2d at 767.

109. *Id.* at 57, 296 N.W.2d at 767.

110. *Id.*

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

112. *Id.*

113. *Id.* at 59, 296 N.W.2d at 768.

114. *Id.* at 60, 296 N.W.2d at 769.

115. *Id.* See *Lacey v. Lacey*, 45 Wis. 2d 378, 173 N.W.2d 142 (1970) (listing the criteria suggested by the *DeWitt* court).

## 2. *Lundberg v. Lundberg*

Three years later the Wisconsin Supreme Court addressed the valuation of a degree issue in two cases<sup>116</sup> which arose under the 1977 Divorce Reform Act.<sup>117</sup> In *Lundberg v. Lundberg*<sup>118</sup> the court reversed the court of appeals and upheld a trial court award of \$25,000 to the wife as compensation for the contribution she had made to her ex-husband's medical education.

At the outset in *Lundberg* the supreme court noted that no clear trend was evident from similar cases in other jurisdictions.<sup>119</sup> The court then engaged in an in depth analysis of the 1977 Wisconsin Divorce Reform Act, which was not in effect at the inception of the *DeWitt* case.<sup>120</sup> The court determined that in amending these statutes, the legislature made clear its intent that "a spouse who has been handicapped socially and economically by his or her contributions to a marriage shall be compensated for such contributions at the termination of the marriage."<sup>121</sup>

The parties, David and Judy Lundberg, were married in 1970. In the fall of 1972 David began his medical education at the Mayo Medical School in Rochester, Minnesota. Judy provided for the couple's financial support by teaching in a high school, gardening, canning and keeping chickens. After his graduation, David began a three-year residency which he had almost completed at the time the divorce action was commenced.<sup>122</sup>

At trial, Judy requested compensation for supporting her husband while he attended medical school. She used an economist to establish the value of her investment in David's medical degree. The expert's first method calculated the present value of her husband's future earnings. He deter-

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116. *Roberto v. Brown*, 107 Wis. 2d 17, 318 N.W.2d 358 (1982); *Lundberg v. Lundberg*, 107 Wis. 2d 1, 318 N.W.2d 918 (1982).

117. Divorce Reform Act, ch. 105, 1977 Wis. Laws 560.

118. 107 Wis. 2d 1, 14-15, 318 N.W.2d 918, 924 (1982).

119. *Id.* at 8, 318 N.W.2d at 921.

120. *Id.* at 9-14, 318 N.W.2d at 922-24. *DeWitt* was decided under Wis. STAT. ch. 247 (1975); *Lundberg* was decided under Wis. STAT. ch. 247 (1977).

121. *Lundberg*, 107 Wis. 2d at 10, 318 N.W.2d at 924 (quoting Divorce Reform Act, ch. 105, § 1, 1977 Wis. Laws 560, 560-61).

122. *Lundberg*, 107 Wis. 2d at 3-5, 318 N.W.2d at 919.

mined this amount to be between \$110,800 and \$132,000.<sup>123</sup> The second method measured Judy's actual expenditures. Using a cost-plus-interest analysis, the economist figured the amount to be \$33,077.<sup>124</sup> At trial Judy testified that she estimated the cost of her support to be \$25,000 and requested that amount.<sup>125</sup> The trial court found that Judy had supported both of them during David's years in medical school and had also provided substantial emotional support and performed virtually all of the household tasks.<sup>126</sup> It therefore awarded Judy the \$25,000 without denominating the compensation as either property division or maintenance.<sup>127</sup>

The court of appeals reversed, finding no legal basis for the award.<sup>128</sup> Relying on *DeWitt*, it said that the \$25,000 could not be classified as a property division.<sup>129</sup> It also concluded that it was not proper to award Judy a return on her investment in David's medical degree, inasmuch as *DeWitt* had disapproved of the approach taken by some jurisdictions which allowed the supporting spouse to recover the monies expended on the student spouse.<sup>130</sup> Moreover, the \$25,000 exceeded the total value of the parties' assets and could only be satisfied out of postdivorce earnings — a result also not approved in *DeWitt*.<sup>131</sup>

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123. *Id.* at 5, 318 N.W.2d at 920. This method took into account the difference between the average earnings of family practitioners and the average earnings of white males with five or more years of college education. Calculating this amount over a 25-year working period, the sum was then reduced to present value using both a 10% and 12% discount rate.

124. *Id.*

125. *Id.* at 6, 318 N.W.2d at 920. David estimated that her contributions had been worth \$20,207.39, and was willing to pay her that amount. *Id.*

126. *Id.* at 4-5, 318 N.W.2d at 920.

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

128. *Lundberg v. Lundberg*, 103 Wis. 2d 689, 309 N.W.2d 889 (1981) (the memorandum decision of the Wisconsin Court of Appeals is unpublished).

129. *Lundberg*, 107 Wis. 2d at 6, 318 N.W.2d at 920.

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

131. *Id.* See *Balaam v. Balaam*, 52 Wis. 2d 20, 28, 187 N.W.2d 867, 872 (1971) (quoting with approval *Conrad v. Conrad*, 252 N.C. 412, —, 113 S.E.2d 912, 916 (1960)) ("The award should be based on the amount which defendant is earning when alimony is sought and the award made . . ."). See also *Whitwam v. Whitwam*, 87 Wis. 2d 22, 35, 273 N.W.2d 366, 372 (1978) ("A family trial court has authority to divide and distribute the real estate owned by the parties on the date of the divorce. This authority does not extend to disposing of or limiting the parties from disposing of real property acquired after the divorce judgment."); *Bussewitz v. Bussewitz*, 75 Wis. 2d 78, 82-83, 248 N.W.2d 417, 420 (1977) ("A property division is the fair, equi-

The supreme court reversed and upheld the \$25,000 award although, like the trial court, it did not label the award as being either maintenance or a property division.<sup>132</sup> Unable to rely on the conflicting results in other jurisdictions, the *Lundberg* court invoked the equity powers of the family court and found legislative authority "to compensate a spouse in cases of this kind."<sup>133</sup>

In 1977 the legislature made numerous changes to the Wisconsin divorce statutes. In amending these statutes the legislature set forth a presumption that the marital estate should be divided equally, but that the spouse who has made social and economic sacrifices for the benefit of the other should be compensated.<sup>134</sup> This compensation can be achieved through both property division and maintenance payments.<sup>135</sup> The 1977 amendment to section 247.255<sup>136</sup> allows a court to award more than one-half of the marital property to one of the parties after considering a number of factors. In *Lundberg* the court focused on subsection (5) of this property division statute which allows a court to con-

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table and just division of the marital estate, or assets of the parties as they exist at the time of the divorce. That is, the assets which the parties brought into the marriage and or acquired during the marriage.").

132. *Lundberg*, 107 Wis. 2d at 14, 318 N.W.2d at 924.

133. *Id.* at 9, 318 N.W.2d at 922.

134. *Id.* at 10, 318 N.W.2d at 922.

135. *Id.*

136. Divorce Reform Act, ch. 105, § 41, 1977 Wis. Laws 560, 571-72 (current version at WIS. STAT. § 767.255 (1981-1982)). The current statute provides:

*Property division.* Upon every judgment of annulment, divorce or legal separation, or in rendering a judgment in an action under s. 767.02 (1) (h), the court shall divide the property of the parties and divest and transfer the title of any such property accordingly. A certified copy of the portion of the judgment which affects title to real estate shall be recorded in the office of the register of deeds of the county in which the lands so affected are situated. The court may protect and promote the best interests of the children by setting aside a portion of the property of the parties in a separate fund or trust for the support, maintenance, education and general welfare of any minor children of the parties. Any property shown to have been acquired by either party prior to or during the course of the marriage as a gift, bequest, devise or inheritance or to have been paid for by either party with funds so acquired shall remain the property of such party and may not be subjected to a property division under this section except upon a finding that refusal to divide such property will create a hardship on the other party or on the children of the marriage, and in that event the court may divest the party of such property in a fair and equitable manner. The court shall presume that all other property is to be divided

sider "the contribution by one party to the education, training or increased earning power of the other."<sup>137</sup>

The *Lundberg* court also analyzed the change in the Wisconsin maintenance statute<sup>138</sup> which sets forth factors for the trial court to consider in making such an award. The nature of these factors persuaded the court that maintenance was no

equally between the parties, but may alter this distribution without regard to marital misconduct after considering:

- (1) The length of the marriage.
- (2) The property brought to the marriage by each party.
- (2r) Whether one of the parties has substantial assets not subject to division by the court.
- (3) The contribution of each party to the marriage, giving appropriate economic value to each party's contribution in homemaking and child care services.
- (4) The age and physical and emotional health of the parties.
- (5) The contribution by one party to the education, training or increased earning power of the other.
- (6) The earning capacity of each party, including educational background, training, employment skills, work experience, length of absence from the job market, custodial responsibilities for children and the time and expense necessary to acquire sufficient education or training to enable the party to become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage.
- (7) The desirability of awarding the family home or the right to live therein for a reasonable period to the party having custody of any children.
- (8) The amount and duration of an order under s. 767.26 granting maintenance payments to either party, any order for periodic family support payments under s. 767.261 and whether the property division is in lieu of such payments.
- (9) Other economic circumstances of each party, including pension benefits, vested or unvested, and future interests.
- (10) The tax consequences to each party.
- (11) Any written agreement made by the parties before or during the marriage concerning any arrangement for property distribution; such agreements shall be binding upon the court except that no such agreement shall be binding where the terms of the agreement are inequitable as to either party. The court shall presume any such agreement to be equitable as to both parties.
- (12) Such other factors as the court may in each individual case determine to be relevant.

137. WIS. STAT. § 247.255(5) (1977).

138. Divorce Reform Act, ch. 105 § 42, 1977 Wis. Laws 560, 572 (codified at WIS. STAT. § 247.26) (current version at WIS. STAT. § 767.26 (1981-1982)). The current statute provides:

*Maintenance payments.* Upon every judgment of annulment, divorce or legal separation, or in rendering a judgment in an action under s. 767.02(1)(g) or (j),

longer to be based solely on need.<sup>139</sup> The possibility that the party seeking maintenance can become self-supporting is only one factor to consider in making a maintenance award. Judy's contribution to David's education was considered under the catch-all subsection 247.26(1)(i)<sup>140</sup> which allows the court to consider "such other factors as the court may determine in each individual case to be relevant."<sup>141</sup> Likewise, it indicated that maintenance can be employed for compensation purposes even in situations where a spouse is capable of self-support.<sup>142</sup> The court stated that: "When maintenance is employed for compensation purposes, as opposed to purposes of support, it seems preferable to arrange a series of payments over a fixed period."<sup>143</sup> In essence the

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the court may grant an order requiring maintenance payments to either party for a limited or indefinite length of time after considering:

- (1) The length of the marriage.
- (2) The age and physical and emotional health of the parties.
- (3) The division of property made under s. 767.255.
- (4) The educational level of each party at the time of marriage and at the time the action is commenced.
- (5) The earning capacity of the party seeking maintenance, including educational background, training, employment skills, work experience, length of absence from the job market, custodial responsibilities for children and the time and expense necessary to acquire sufficient education or training to enable the party to find appropriate employment.
- (6) The feasibility that the party seeking maintenance can become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage, and, if so, the length of time necessary to achieve this goal.
- (7) The tax consequences to each party.
- (8) Any mutual agreement made by the parties before or during the marriage, according to the terms of which one party has made financial or service contributions to the other with the expectation of reciprocation or other compensation in the future, where such repayment has not been made, or any mutual agreement made by the parties before or during the marriage concerning any arrangement for the financial support of the parties.
- (9) The contribution by one party to the education, training or increased earning power of the other.
- (10) Such other factors as the court may in each individual case determine to be relevant.

139. *Lundberg*, 107 Wis. 2d at 12-13, 318 N.W.2d at 424. Cf. COLO. REV. STAT. § 14-10-114 (1973 & Supp. 1982); MINN. STAT. ANN. § 518.552 (West 1980) (both statutes require that a maintenance award be based on need).

140. WIS. STAT. § 247.26(1)(i) (1977) (current version at WIS. STAT. § 767.26(10) (1981-1982)).

141. *Id.*

142. *Lundberg*, 107 Wis. 2d at 12, 318 N.W.2d at 923-24.

143. *Id.* at 14, 318 N.W.2d at 924.



court appears to be saying that a lump sum award payable in the form of maintenance or property division is appropriate in circumstances such as these. The court reasoned that "[t]his allows both parties to plan their financial matters and allows a spouse to be reimbursed for his or her contributions within a reasonable period of time."<sup>144</sup>

Although the property division statute<sup>145</sup> also allows the court to consider the contributions by one party to the support of the other, the court did not treat David's medical degree or enhanced earning potential as a divisible marital asset. Instead, it framed the issue as whether to compensate Judy for her contributions to David's degree.<sup>146</sup> In this case reimbursement from the couple's property was not possible, so it was done with future cash payments. Hence, the supreme court is indicating that a trial court should look to the circumstances of the parties and use both maintenance and property division as flexible tools to compensate the working spouse.

### 3. *Roberto v. Brown*

In the companion case of *Roberto v. Brown*<sup>147</sup> the husband and wife had made roughly equal financial contributions to the marriage while the husband attended medical school. But the wife had deferred her own career goals working at a job that was personally distasteful to her and moving about the country to further her husband's career goals.<sup>148</sup>

At the time of the divorce the couple's only divisible asset was a house. A seventy percent share of the proceeds from its sale was to go to the wife. This award was valued at \$10,000, which the court deemed to be inadequate compensation in view of the fact that she would theoretically have been entitled to half the proceeds even if she had not supported her husband's education.<sup>149</sup> Again, equity came into play with the court stating that "it seems only fair" that a

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144. *Id.*

145. *See supra* note 136.

146. *Lundberg*, 107 Wis. 2d at 3, 318 N.W.2d at 919.

147. 107 Wis. 2d 17, 318 N.W.2d 358 (1982).

148. *Id.* at 18-21, 318 N.W.2d at 359.

149. *Id.* at 23, 318 N.W.2d at 360.

wife who deferred her own career goals to aid her husband substantially in the attainment of his goal should be helped by him in return.<sup>150</sup> The case was then remanded to the trial court with the direction to consider an award of maintenance in addition to the property settlement.<sup>151</sup>

### III. METHODS OF VALUATION

#### A. *As Property*

In Wisconsin assets are valued as of the date the divorce is granted.<sup>152</sup> If the degree is to be taken into consideration as the asset of one spouse, some method of setting its present value must be used.<sup>153</sup> A similar situation arises when a couple's efforts and resources are directed toward building a business that has a potential for future remuneration. A spouse's interest in a closely held corporation is classified as marital property which is distributable upon divorce.<sup>154</sup> Courts have relied upon Revenue Ruling 59-60<sup>155</sup> for purposes of valuation. Section 5(A) of that ruling states that in

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150. *Id.* at 22, 318 N.W.2d at 360.

151. *Id.* at 23, 318 N.W.2d at 360.

152. *See* Dean v. Dean, 87 Wis. 2d 854, 871, 275 N.W.2d 902, 909 (1979); Sholund v. Sholund, 34 Wis. 2d 122, 132, 148 N.W.2d 726, 731 (1967); Holbrook v. Holbrook, 103 Wis. 2d 327, 335, 309 N.W.2d 343, 346-49 (Ct. App. 1981). *See also supra* note 125.

153. *See generally* Erickson, *Spousal Support Toward the Realization of Educational Goals: How the Law Can Ensure Reciprocity*, 1978 WIS. L. REV. 947; Krauskoph, *Recompense for Financing Spouse's Education: Legal Protection for the Marital Investor in Human Capital*, 28 KAN. L. REV. 379 (1980); Moore, *Should a Professional Degree Be Considered a Marital Asset upon Divorce?* 15 AKRON L. REV. 543 (1982); Raggio, *Professional Goodwill and Professional Licenses as Property Subject to Distribution upon Dissolution of Marriage*, 16 FAM. L.Q. 147 (1982); Schwartz, *supra* note 83; Comment, *Family Law: Ought a Professional Degree Be Divisible as Property upon Divorce?* 22 WM. & MARY L. REV. 517 (1981) (all setting forth comparisons of various methods for valuing a professional degree).

154. *See* King, *Divorce Settlements: The Value of Human Capital*, TRIAL, Aug. 1982, at 48-51 (analogy between a degree and an interest in a closely held corporation).

155. Rev. Rul. 59-60, 1959-1 C.B. 237, as amended by Rev. Rul. 65-193, 1965-2 C.B. 370. The eight factors set forth in this ruling are: the nature of the business and the history of the enterprise from its inception; the economic outlook in general and the condition and outlook of the specific industry in particular; the book value of the stock and the financial condition of the business; the earning capacity of the company; the dividend-paying capacity; whether or not the enterprise has goodwill or other intangible value; sales of the stock and the size of the block to be valued; and the market price of stocks of corporations engaged in the same or similar line of business

trying to determine the market value of the assets owned by the corporation "earnings may be the most important criterion of value."<sup>156</sup> Accordingly, the accountant or expert evaluating the business will examine the tax returns of the business for the past five years to determine the company's past earnings. A capitalization factor is then used as a multiplier of past earnings to determine the present value. Basically, the capitalization process is a means of converting the future income into present value. This method is similar to using an increased earnings approach in the valuation of a degree.<sup>157</sup>

An economist can value a professional degree by comparing the stream of income that a professional could expect to earn over the remainder of his work life as compared to the stream of income generated by a college graduate with an undergraduate bachelor's degree who is in a related occupation (for example, a doctor's income as compared to that of a nurse).<sup>158</sup> After the appropriate income projections are made and the work life is determined from expectancy tables, the value can be determined.<sup>159</sup> This amount equals the difference between the present value of the professional income and the present value of the income of the four-year college graduate.<sup>160</sup>

The disadvantage of classifying the professional degree as a marital asset distributable in a property settlement is that a property settlement is dischargeable in bankruptcy.<sup>161</sup>

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having their stocks actively traded in a free and open market, either on exchange or over-the-counter.

Courts have accorded various weights to the factors depending upon the property valued and circumstances involved. Treas. Reg. § 20.2031-2(f) (1981).

156. Rev. Rul. 59-60, 1959-1 C.B. 237.

157. See *Todd v. Todd*, 272 Cal. App. 2d 786, 791, 78 Cal. Rptr. 131, 134 (1969); Comment, *The Interest of the Community in a Professional Education*, 10 CAL. W.L. REV. 590, 604-12 (1974) (formulas for determining increased earning capacity).

158. See, e.g., *Lundberg v. Lundberg*, 107 Wis. 2d 1, 5, 318 N.W.2d 918, 920 (1982).

159. Expectancy tables are published by the U.S. Department of Labor, Bureau of Labor Statistics.

160. See *Burke & Rosen, Economic Value of a Professional License*, FAIRSHARE, June 1982 at 9-12 (detailed explanation of this method of determining enhanced earning power).

161. 11 U.S.C. § 523(a)(5)(B) (Supp. V 1981). See also *Usher v. Usher*, 442 F. Supp. 866 (N.D. Ga. 1977) (discussing the argument that because "lump sum ali-

Also, a property division is final and is not subject to revision or modification based upon a change of circumstances.<sup>162</sup> Finally, it may be argued that the valuation method just suggested is too speculative and involves merely a possibility of increased earning capacity and thus involves postdivorce earnings.<sup>163</sup>

### B. *As Maintenance*

In Wisconsin the present maintenance statute<sup>164</sup> does not distinguish among different types of alimony. *Lundberg*<sup>165</sup> seems to indicate that a lump sum maintenance award with payments spread over a fixed period of time is acceptable when maintenance is employed for compensation purposes.<sup>166</sup> This language also indicates that the type of periodic payment specified in sections 71 and 215 of the Internal Revenue Code<sup>167</sup> could be made. Section 71 refers to "periodic payments" and is only applicable to payments intended as support, not to installment payments for property division.<sup>168</sup> This term does not have an equivalent in state law and is a device used to reduce the tax impact of a divorce settlement. The payments can be made for a property settlement, in which case they are nondeductible by the payor, or they can be made for spousal support, in which case they are includable as income to the payee and deductible by the payor under section 215 of the Internal Revenue Code.<sup>169</sup> The language in section 71 referring to "periodic payments" is similar to the language in *Lundberg* which states that in order to fairly compensate the supporting spouse the court

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mony" may not be treated as alimony for federal income tax purposes, such an obligation may not be alimony and thus is dischargeable in bankruptcy).

162. WIS. STAT. § 767.32 (1981-1982).

163. *DeWitt v. DeWitt*, 98 Wis. 2d 44, 53-63, 296 N.W.2d 761, 765-70 (Ct. App. 1980) (where the court agreed with these arguments).

164. WIS. STAT. § 767.26 (1981-1982). See *supra* note 138.

165. *Lundberg v. Lundberg*, 107 Wis. 2d 1, 318 S.W.2d 918 (1982).

166. *Id.* at 14-15, 318 N.W.2d at 924.

167. I.R.C. §§ 71, 215 (1976).

168. I.R.C. § 71(c)(1) (1976). "For purposes of subsection (a), installment payments discharging a part of an obligation the principal sum of which is, either in terms of money or property, specified in the decree, instrument, or agreement shall not be treated as periodic payments.")

169. I.R.C. § 215(a) (1976).

may employ maintenance, property division or a combination of the two.<sup>170</sup>

The advantage of a maintenance award is that it is non-dischargeable in bankruptcy.<sup>171</sup> However, a maintenance award is subject to revision and modification upon a change of circumstances.<sup>172</sup> Another problem with maintenance is that it is not an entitlement but an award within the court's discretion which can terminate upon a spouse's remarriage.<sup>173</sup> In addition, Wisconsin, in effect, no longer has limited term maintenance. *Dixon v. Dixon*<sup>174</sup> states that the trial court has the power to revise or alter the judgment respecting the amount of limited maintenance or its duration provided that the petition to revise the payments is filed prior to the termination date of the limited maintenance as set forth in the judgment.<sup>175</sup> Again, if a periodic payment is used pursuant to section 71, it is to be of a calculable amount which means a fixed term payment.<sup>176</sup> Thus, the court would have to award a lump sum to the supporting spouse over a fixed period of time in installments.

Another disadvantage of a maintenance award made pursuant to Wisconsin Statute section 767.26<sup>177</sup> is that it is a device to be used to allow the party seeking relief to enjoy a standard of living comparable to that enjoyed during the marriage. Yet in the typical fact pattern under discussion, the parties have forfeited a higher standard of living during the marriage in order to devote their resources to the attainment of a professional degree. Hence, this award cannot be made in reference to the standard of living the party with the advanced degree is able to maintain in the future.

### C. *As a Specific Type of Alimony*

As noted previously, Wisconsin's maintenance statute

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170. Compare I.R.C. § 71 (1976) with *Lundberg v. Lundberg*, 107 Wis. 2d 1, 15, 318 N.W.2d 918, 924 (1982).

171. See *supra* note 161.

172. WIS. STAT. § 767.32 (1981-1982).

173. *Id.* § 767.32(3). See also *Van Gorder v. Van Gorder*, 110 Wis. 2d 188, 327 N.W.2d 674 (1983) (cohabitation of the maintenance receiving spouse with another person can be a factor in revising or terminating maintenance payments).

174. 107 Wis. 2d 492, 319 N.W.2d 846 (1982).

175. *Id.* at 506-08, 319 N.W.2d at 853-54.

176. I.R.C. § 71(c)(1) (1976).

177. WIS. STAT. § 767.26 (1981-1982).

does not differentiate among different types of alimony.<sup>178</sup> Some jurisdictions, however, have carved out and labeled specific awards to be made.<sup>179</sup> This is done so that an award denominated as "reimbursement alimony" or "rehabilitative alimony" cannot be terminated by contingencies, such as remarriage, which are set forth under a state's statutory scheme.<sup>180</sup> This is the stance the New Jersey Supreme Court took in *Mahoney v. Mahoney*,<sup>181</sup> where the court stated:

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 towards the former spouse's education, including household expenses, educational costs, school travel expenses and any other contributions used by the supported spouse in obtaining his or her degree or license.<sup>182</sup>

The court then went on to set forth a caveat for using reimbursement alimony:

[O]nly monetary contributions made with the mutual and shared expectation that both parties to the marriage will derive increased income and material benefits should be a basis for such an award. For example, it is unlikely that a financially successful executive's spouse, who, after many years of homemaking, returns to school would upon divorce be required to reimburse her husband for his contributions toward her degree.<sup>183</sup>

The *Mahoney* court also stated that an award of reimbursement alimony does not involve any consideration of the economic value of the professional degree.<sup>184</sup>

At the time of the divorce in *Hill v. Hill*<sup>185</sup> the wife was enrolled in dental school and required the financial assist-

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178. See *supra* note 164 and accompanying text.

179. See *supra* notes 89-103.

180. See, e.g., WIS. STAT. § 767.32 (1981-1982). See also Kenderdine, *supra* note 87, at 426-27 n.101; Moore, *supra* note 153, at 550-52; Comment, *supra* note 153, at 603-04 (discussion of both reimbursement alimony and restitution).

181. 91 N.J. 488, 453 A.2d 527 (1982).

182. *Id.* at \_\_\_, 453 A.2d at 534.

183. *Id.* at \_\_\_, 453 A.2d at 535.

184. *Id.* at \_\_\_, 453 A.2d at 533.

185. 91 N.J. 506, 453 A.2d 537 (1982).

ance which the husband was now able to provide.<sup>186</sup> The New Jersey Supreme Court approved an award of rehabilitative alimony stating that "the concept of rehabilitative alimony where a short-term or lump-sum award from one party in a divorce will enable his former spouse to complete the preparation necessary for economic self-sufficiency" was supported by precedent.<sup>187</sup> Presumably, the amount of this type of award would be based more on the cost to educate the former supporting spouse than on the monies spent on the former supported spouse.

In the third companion case, *Lynn v. Lynn*,<sup>188</sup> where the wife's illness rendered rehabilitative alimony useless, the court suggested awarding two other types of relief:

[W]here the circumstances of the parties diverge greatly at the end of a relatively short marriage, the more fortunate spouse may fairly be called upon to accept responsibility for the other's misfortune — the fate of their shared enterprise. Under the facts of this case, both an initial lump-sum award of reimbursement alimony as described in *Mahoney*, . . . and a separate continuing alimony obligation would be appropriate.<sup>189</sup>

#### D. *As Restitution*

In other jurisdictions maintenance statutes preclude an award for support when a spouse is capable of self-support.<sup>190</sup> In these states courts have allowed the equitable remedy of restitution to compensate the supporting spouse.

In *DeLa Rosa v. DeLa Rosa*<sup>191</sup> the Minnesota Supreme Court used the approach of granting restitution to the working spouse in the amount contributed by that spouse to the education and training of the student spouse.<sup>192</sup> In that case, where the working spouse had "foregone the immediate enjoyment of earned income to enable the other to pursue an

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186. *Id.* at \_\_\_, 453 A.2d at 538-39.

187. *Id.* at \_\_\_, 453 A.2d at 538.

188. 91 N.J. 510, 453 A.2d 539 (1982).

189. *Id.* at \_\_\_, 453 A.2d at 542.

190. *See, e.g.*, COLO. REV. STAT. § 14-10-114 (1973 & Supp. 1982); MINN. STAT. ANN. § 518.552 (West 1980).

191. 309 N.W.2d 755 (Minn. 1981).

192. *Id.* at 759.

advanced education on a full-time basis . . . [t]he equities weigh heavily in favor of providing a remedy to the working spouse . . . .<sup>193</sup> The court rejected the argument that a remedy in circumstances such as these is limited to statutorily prescribed relief in cases of marriage dissolution. It further explained that cases considering an advanced degree or an increase in earning capacity were "inapposite" because at the time of the divorce Dr. DeLa Rosa had not completed his medical training.<sup>194</sup> The *DeLa Rosa* court thus awarded the wife the amount she had spent on her husband's education and living expenses, but did not award her her own living expenses.<sup>195</sup>

The restitutionary recovery in *DeLa Rosa* is similar to the reimbursement type of alimony used to compensate the supporting spouse in other jurisdictions. The award is merely premised upon a different legal theory in order to provide appropriate relief to the supporting spouse without denying her a remedy under the Minnesota divorce statutes.<sup>196</sup>

Restitution is also a remedy used to prevent unjust enrichment under the contractual principles of quasi-contract.<sup>197</sup> Although the parties may not have mutually agreed to invest in the husband's education, it is implied at law that such assent existed.<sup>198</sup> In order to compensate the working spouse, a court may employ the theory of quasi-contract to compensate the supporting spouse when a construction of its property division and maintenance statutes prevents relief under a jurisdiction's divorce code. The husband has received the benefit of his wife's support, but at the expense of his wife making career sacrifices in addition to foregoing a higher standard of living. She has an expectation of repayment which will not be fulfilled as a result of the divorce.

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193. *Id.* at 758.

194. *Id.* at 758-59.

195. *Id.* at 759.

196. *Id.* at 757.

197. See 5 A. CORBIN, CORBIN ON CONTRACTS §§ 1103, 1105 (1964).

198. See *Roberto v. Brown*, 107 Wis. 2d 17, 20, 318 N.W.2d 358, 359 (1982).



The amount of the recipient's benefit is ordinarily the expense or cost to the person conferring the benefit.<sup>199</sup>

### *E. As a Tort Remedy*

The law of torts may also provide a remedy. Although there was no recovery for wrongful death at common law, most jurisdictions today have some type of statutory remedy for wrongful death.<sup>200</sup> When there is an action for recovery for wrongful death, the earning capacity of the deceased is at issue. Since divorce is the death of a marriage, damages to the supporting spouse could be made based on the estimated amount of earnings over the remainder of the professional spouse's life expectancy and awarded to the supporting spouse as compensation.

## IV. CONCLUSION: THE PARADOX

The courts continue to be presented with the problem of compensating the spouse who has foregone personal goals, a higher standard of living and status in order that the other spouse can secure a professional degree. If the marriage breaks up before the parties are fully able to benefit from the fruits of the professional degree, the spouse with the advanced degree has the training to enable him to have an increased earning capacity and enhanced status. But when the supporting spouse fails to receive these benefits this results in an inequitable situation upon the dissolution of the marriage. The American judicial system, as well as the Wisconsin Constitution,<sup>201</sup> recognizes that every wrong has a remedy in our courts. The dilemma is how to bring about a just resolution to this situation. The paradox is that the court's jurisdiction is limited to dividing the marital estate of the parties at the time of the dissolution, but the professional degree or license is not property in the legally accepted sense. Many jurisdictions cannot make an award of maintenance since their statutory schemes do not allow such an award in instances where the spouse is self-supporting.

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199. RESTATEMENT OF RESTITUTION §§ 150-59 (1937). *Accord* DeLa Rosa v. DeLa Rosa, 309 N.W.2d 755, 759 (Minn. 1981).

200. *See* J. GHIARDI & J. KIRCHER, PUNITIVE DAMAGES: LAW AND PRACTICE § 5.19 (1981 & Supp. 1982).

201. Wis. CONST. art. I, § 9.

Likewise, maintenance is generally based upon the standard of living during the marriage and not upon anticipated increased future income. Thus, the dilemma versus the paradox. This situation is not unlike that of a man who makes an agreement with a boat owner to take him and his car across a lake in return for a promise to give the boat owner a ride to the city upon reaching the other side. On disembarking, the man refuses to take the boat owner along in his car. The man has received his passage across the lake, but the boat owner, relying on the man's promise, has not received the benefits of the services he provided.

An innate sense of justice must pervade any consideration of this issue of compensating a working spouse, for there must be some remedy for the wrong. The theory of recovery may vary, but the theme appears to be constant, pointing in the direction of recompense.

