Property Distribution in Domestic Relations Law: A Proposal for Excluding Educational Degrees and Professional Licenses from the Marital Estate

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PROPERTY DISTRIBUTION IN DOMESTIC RELATIONS LAW: A PROPOSAL FOR EXCLUDING EDUCATIONAL DEGREES AND PROFESSIONAL LICENSES FROM THE MARITAL ESTATE

INTRODUCTION

An issue, which has created considerable judicial controversy, is whether to treat an advanced educational degree or a professional license earned by one spouse during a marriage as marital property subject to distribution upon divorce. This issue arises in the common situation where a wife gives up the opportunity to further her education and to enjoy a regular income in order to work and contribute her income to her husband's education, thus enabling him to earn his professional degree. Although a majority of the courts have found

1. An advanced educational degree and a professional license will hereinafter be referred to as "degree."

2. There are two types of statutes which give the courts authority to divide the marital assets between the spouses upon divorce. Eight states—Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington—have a community property system. Property is owned in common by the husband and wife, each having an undivided one-half interest by reason of his or her marital status. Thus, one-half of the earnings of each spouse is considered to be owned by the other spouse. See, e.g., LA. CIV. CODE ANN. arts. 155, 159 (West Supp. 1983); WASH. REV. CODE ANN. § 26.09.080 (West Supp. 1982). Thirty-nine states and Washington, D.C. have an equitable distribution system. The underlying premise of this legislation is that contemporary marriage should be regarded, for economic and property purposes, as a partnership of co-equals. See H. FOSTER, MARITAL PROPERTY § 41 (Supp. 1981). All marital property acquired during the marriage should, upon dissolution of the marriage, be equitably distributed between the spouses in accordance with the state's criteria. Other related economic incidents of the marital partnership, like alimony, should be disposed of on the basis of actual need and ability to pay. See, e.g., N.J. STAT. ANN. § 2A:34-23 (West Supp. 1982-1983); N.Y. DOM. REL. LAW § 236(B) (McKinney Supp. 1982-1983).

The remaining five states—Georgia, Mississippi, Rhode Island, South Carolina, and West Virginia—are common law jurisdictions. Under this system, separate property, determined by title, remains such and the court has little authority to alter these property rights. Only jointly owned property is subject to distribution upon divorce. See, e.g., MISS. CODE ANN. § 93-5-23 (Harrison Supp. 1982). See H. FOSTER, supra note 2, at app. A (Supp. 1981).

3. The opportunity to enjoy a regular income refers to the economic support provided by the other spouse, derived from his full time employment.

4. In keeping with the factual situation common to most cases, see, e.g., cases cited infra note 5, this note will treat the situation where the wife works to further her husband's career and educational goals. The same analysis should apply, however, in the situation where the spouses' roles are reversed.
that a professional degree is not a marital asset, several courts have held that the degree, or its potential to increase its holders' earning capacity, is a form of property in which the spouse who contributed to its attainment is entitled to share. The courts favoring the latter approach have either awarded the contributing spouse a share in the value of the education, or have ordered that she be reimbursed for her monetary investment in the degree. Unlike most courts, commentators have favored the approach which treats the degree as a marital asset. These commentators have proposed compensation schemes, which some courts have begun to adopt, such as awarding the wife a part of the degree's determined monetary value, or a


8. See Inman v. Inman, 578 S.W.2d 266 (Ky. Ct. App. 1979), aff'd, 9 Fam. L. Rep. (BNA) 2131 (Ky. Sup. Ct. Nov. 23, 1982); Moss v. Moss, 80 Mich. App. 693, 264 N.W.2d 97 (1978); DeLa Rosa v. DeLa Rosa, 309 N.W.2d 755 (Minn. Sup. Ct. 1981); Mahoney v. Mahoney, 91 N.J. 488, 453 A.2d 527 (1982); Hubbard v. Hubbard, 603 P.2d 747 (Okla. Sup. Ct. 1979). The cases cited supra note 7, which hold that the degree is an asset of the marriage, have not distinguished between a professional degree and future earning capacity. The courts which have held either the degree or the earning potential to be property, see cases cited supra note 6, have not explained why one is valued as a marital asset and the other is not. See Comment, Professional Education as a Divisible Asset in Marriage Dissolutions, 64 Iowa L. Rev. 705, 710 n.51 (1979). For the purposes of this note, it is assumed that courts valuing the degree itself and those awarding a portion of future earnings made possible by the degree are basing their decisions on the same property distribution concepts. At least one commentator has taken this approach. Moore, Should a Professional Degree be Considered a Marital Asset Upon Divorce?, 15 Akron L. Rev. 543 (1982). Moore grouped both types of holdings into a single category. Id. at 544. See also Comment, The Interest of the Community in a Professional Education, 10 Cal. W.L. Rev. 590 (1974).

9. See supra note 5.

10. See infra notes 11, 12.

11. E.g., Krauskopf, Recompense for Financing Spouse's Education: Legal Protection

http://scholarlycommons.law.hofstra.edu/hlr/vol11/iss4/8
restitutinal solution which reimburses the wife for her out of pocket expenses.¹²

This note suggests that the best and most practical approach is to treat an educational degree as personal to its bearer. It should not be considered marital property, and therefore, should not be subject to distribution upon divorce. Part I of this note presents rationales favoring the treatment of a professional degree as a marital asset. Part II examines the reasoning of those courts which refuse to consider an educational degree as property. This note then analyzes these competing rationales and concludes that the professional degree should not be treated as marital property subject to distribution under any circumstances.

I. PROFESSIONAL DEGREES AS MARITAL PROPERTY

A. Awards based on the Monetary Value of the Degree

Several courts have treated the degree as marital property.¹³ In Reen v. Reen,¹⁴ a Massachusetts trial court, holding that the husband's dental school degree was itself an asset of the marriage and therefore subject to distribution upon divorce, placed a value of $800,000 on the degree and awarded the wife $120,000 as her share

For The Marital Investor In Human Capital, 28 KANSAS L. REV. 379 (1980); Recent Development, Divorce—The Effect of a Spouse’s Professional Degree on a Division of Marital Property and Award of Alimony, Hubbard v. Hubbard, 603 P.2d 747 (Okla. 1979), 15 TULSA L.J. 378 (1979). See also infra text accompanying notes 31-53.

¹². Erickson, Spousal Support Toward the Realization of Educational Goals: How the Law Can Ensure Reciprocity, 1978 WIS. L. REV. 947, 948 n.4; Moore, supra note 8, at 555; Note, Graduate Degree Rejected as Marital Property Subject to Division Upon Divorce: In Re Marriage of Graham, 11 CONN. L. REV. 62, 73 (1978). See also infra text accompanying notes 83-98.

¹³. See cases cited supra notes 7, 8; see also In re Neuhaus, 9 FAM. L. REP. (BNA) 2168 (Wash. Sup. Ct. Nov. 29, 1982), where the court ruled that a husband's license to practice dentistry, obtained during the marriage, is divisible community property. The order required the husband to pay his former spouse one-fourth of his net income each year for five years. The marriage lasted five years and there were no children. Judge William L. Brown, Jr., offered this explanation for his decision: "[C]ontributions of the wife toward the acquisition of the education of the husband were substantial" and "[i]t did not seem fair to me that the husband should leave this marriage with an extremely valuable asset, namely, his dental education . . . free and clear from any interests of the wife. I felt it was only fair that the wife be accorded some share of that future economic benefit." Id.; see also Daniels v. Daniels, 20 Ohio Op. 2d 458, 459, 185 N.E.2d 773, 775 (Ohio App. 1961) ("the right to practice medicine, being in the nature of a franchise, constitutes property"). While the court concluded that the education itself was an asset for determining an award of alimony, it did not consider this as "property" subject to equitable distribution. See id.

in its distribution. During the ten year marriage, while Dr. Reen was pursuing his dental training, Mrs. Reen worked to support the couple. When the couple divorced, the only substantial marital asset was Dr. Reen's professional degree. The court, in reaching its decision, reasoned that because the wife had "contributed to the acquisition, preservation and appreciation in value of the [husband's] estate by being the sole contributor of the majority of income to their family unit from the date of their marriage," she had enabled him to acquire his degree and was therefore entitled to part of its value.

In O'Brien v. O'Brien and Kutanovski v. Kutanovski, two New York lower courts held that a wife is entitled to a share of the value of her husband's medical degree. In O'Brien, the court awarded a doctor's wife 40% of her husband's projected earnings over his productive life expectancy. The facts revealed that the wife's entire earnings supported the marriage for nine years while her husband completed college and studied medicine. The court found that the wife's "financial input was substantial; she contributed approximately 76% of the couple's total income and assumed the dominant role of breadwinner so that plaintiff [husband] could achieve his ambition to obtain a medical license." The court, concluding that the wife deserved a portion of the value of her husband's degree since he would not have acquired his professional status without her financial assistance, reasoned that marriage should be considered an economic partnership. It stated that:

There can be no valid distinction made under the Equitable Distribution Law between a degree or professional license acquired during the marriage as compared to a business or professional practice conducted during the course of the marriage where both were enhanced by the financial contributions and efforts of the other spouse.

15. Reen v. Reen, No. 75641, slip op. at 35, 8 Fam. L. Rep. (BNA) 2193 (Mass. Prob. & Fam. Ct. Dec. 23, 1981) (The chart which provides this information can only be found in the slip opinion.).
16. Id.
17. Id.
18. Id.
19. Id.
22. 114 Misc. 2d at 241-42, 452 N.Y.S.2d at 806.
23. Id. at 236, 452 N.Y.S.2d at 803.
24. Id. at 240, 452 N.Y.S.2d at 805. See N.Y. Dom. Rel. Law § 236(B) (McKinney
Since the _O'Brien_ court placed great emphasis on the wife's significant financial contribution to the attainment of her husband's degree, specifically distinguishing cases in which the wife had made little or no financial contributions, its holding that the degree is property should be limited to the facts of that case.

In _Kutanovski_, the court calculated the wife's contribution to her husband's medical degree to be $62,000 and held that the husband must pay her $6,200 a year for ten years. Mrs. Kutanovski met her husband in Yugoslavia after he had obtained his medical degree. When he came to the United States, she tutored him in English and tested him on material to be found on the American licensing exam, thus enabling him to pass the examination. In addition, the wife worked to support the couple. The _Kutanovski_ court extended the _O'Brien_ theory under a "fruits of the license" concept, finding that since Mrs. Kutanovski contributed to her husband's professional career, "the fruits of that contribution" are assets subject to equitable distribution.

In _Kutanovski_, as in _O'Brien_, the court found that the degree was property because of the unique circumstances of the case. Thus under the court's reasoning, an educational degree attained during a marriage would not consistently be held to be property subject to distribution. The wife would have a proprietary interest only if she had made significant monetary contributions to the acquisition of the degree.

The Iowa Supreme Court has also addressed this issue. _Horstmann v. Horstmann_ held that a law degree and license to practice law do not constitute assets of the marriage in and of themselves. Rather, it is the "potential for increase in future earning capacity made possible by the law degree . . . conferred upon the husband with the aid of his wife's efforts which constitutes the asset for distribution . . . ." In _Horstmann_, once the parties were married, the

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25. 114 Misc. 2d at 236, 452 N.Y.S.2d at 803.
26. N.Y.L.J., Aug. 25, 1982, at 12, col. 5. This was in addition to $250 a week maintenance and support for their son. _Id._
27. _Id._ Prior to receiving his wife's help, the husband had failed the examination. _Id._
28. _Id._
29. _Id._
30. 263 N.W.2d 885 (Iowa 1978).
31. _Id._ at 891.
32. _Id._
wife "did not complete her formal education." Instead, while the husband attended law school, the wife worked and contributed her salary to the family expenses.

Strict application of the court's reasoning that future earnings, not the degree itself, are marital property, could produce an anomalous result. If a wife supported her husband through professional school but the husband did not practice in the profession, the wife could be left uncompensated for her contributions to her husband's educational expenses.

In addition, Horstmann's result is inconsistent with its reasoning. The court refused to hold the degree to be property; instead, it declared that the asset is the degree holder's future earning capacity. This argument, however, is circular: The potential for increased earnings does not exist without the degree, yet the degree is not valuable property. Additionally, the trial court had ordered the husband to pay the wife $18,000. When the supreme court affirmed, it stated it was correct to use the cost of education to establish the value of the degree. Thus, in effect, the court was, treating the degree itself as an item of property, notwithstanding its explicit refusal to do so.

In finding that a professional degree acquired during the marriage is marital property subject to equitable distribution, courts are following what they perceive to be the policy behind the various schemes of property distribution: Marriage is an economic partnership and the concept of property should be broad enough to include all of the economic resources acquired during the marriage.

Many commentators agree that a degree should be considered marital property subject to distribution. The reason most frequently offered in support of this position is economic fairness.

33. Id. at 886.
34. Id.
35. See also Graham v. Graham, 194 Colo. 429, 434, 574 P.2d 75, 78 (Colo. Ct. App. 1978) (Carrigan, J., dissenting) (while the degree was not a divisible property item, increased earning power resulting from the degree was a divisible property item). The majority in Graham held that an educational degree could not be a divisible marital asset because it does not have any of the elements of property in the traditional sense of that term. Id. at 432, 574 P.2d at 77.
36. 263 N.W.2d at 888.
37. Id. at 891.
38. See cases cited supra note 7.
39. See sources cited supra note 11.
40. See, e.g., Comment, supra note 8, at 713; Recent Development, supra note 11, at.
388-89. In conjunction with this argument, it is often urged that there is no need for the courts
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the typical situation, divorce takes place shortly after the husband obtains his degree and thus, the couple has little or no tangible marital property. Treating the degree as a divisible asset is encouraged since there is no other way to achieve economic equality between the spouses. This goal of preventing unjust enrichment by way of quasi-contract principles has compelled one writer to reject limiting the value of the professional degree to a cash award representing dollars invested in the education. He reasons that:

Although the usual measure of the "enrichment" conferred in a quasi-contract action is the cost of the conferring party's investment, the equitable principles applied to prevent unjust enrichment also allow for a proportionate recovery of the increased value conferred on the benefited party when that value can be measured

A second reason offered in support of this position is that the wife who gives up her education and regular economic support in

to adopt a traditional and restrictive view of "property" when assessing the marital assets. In Graham v. Graham, 194 Colo. 429, 574 P.2d 75 (Colo. Ct. App. 1978), the dissent criticized the majority for following traditional narrow concepts of property and concluded that restrictions on remedies would result in an injustice. Id. at 434, 574 P.2d at 78 (Carrigan, J., dissenting). "As a matter of economic reality the most valuable asset acquired by either party during this six year marriage was the husband's increased earning capacity." Id. (Carrigan, J., dissenting). The dissent concluded that the degree itself was not the asset, but that the husband's earning power was an asset achieved by the couple and should therefore be divided. Id. (Carrigan, J., dissenting). See Note, supra note 12, at 70-71; Recent Development, supra note 11, at 382 n.26. In McManama v. McManama, 73 Ind. 836, 399 N.E.2d 371 (1980), Justice Hunter dissented from the majority's holding that a law degree did not constitute a vested present interest and was therefore not property that could be divisible upon dissolution of the marriage. Id. at 373. Justice Hunter criticized the majority for narrowly construing the concept of property. Id. at 373-74. In doing so, Justice Hunter quoted Justice Marshall's dissent in Arnett v. Kennedy, 416 U.S. 134 (1974): "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) (citations omitted). See also Moore, supra note 8, at 546. But see Mahoney v. Mahoney, 91 N.J. 488, 453 A.2d 527 (1982) where the court recognized its frequent holdings giving the word "property" an expansive interpretation, yet went on to distinguish educational degrees from other assets and interests which have been subjected to equitable distribution. In making this distinction, the Mahoney court noted that in Kikkert v. Kikkert, 88 N.J. 4, 438 A.2d 317 (1981), it had previously held that a vested but unmatured private pension was a distributable marital asset. Id. at 5, 438 A.2d at 318. The Mahoney court reasoned, however, that an educational degree represented merely the possibility of enhanced future earnings. 91 N.J. at 496, 453 A.2d at 532. In contrast, the court continued, pensions are representative of benefits already earned and they guarantee the recipient a specific amount of income at a certain date. Id. at 496, 453 A.2d at 531.

41. Moore, supra note 8, at 553.
42. Krauskopf, supra note 11, at 409.
43. Id.
order to finance her husband's professional education\textsuperscript{44} usually does so with the expectation that she will benefit from the increased income that her husband will earn from the practice of his profession.\textsuperscript{45} It is argued that it would be unfair to permit a divorce to deprive the wife of the value of her "investments," since it was the intention of the parties to accumulate and to invest the assets derived from the husband's professional practice for the mutual benefit of the couple.\textsuperscript{46} The investing spouse should therefore recover her share of the value of her spouse's increased earning potential over and above her investment cost.\textsuperscript{47} This argument was recognized in \textit{Prosser v. Prosser},\textsuperscript{48} where the court awarded the wife $6,500, reasoning that her investment in the husband's economic future was for the benefit of both of them and that she "had a right to expect that in the years to come she would share in the benefits derived from the training and ability of the [husband], which she literally helped to bring about."\textsuperscript{49}

Another reason suggested for considering the degree as a marital asset is the husband's increased incentive for divorcing his wife soon after receiving his degree.\textsuperscript{50} A husband who waits to divorce may accumulate substantial assets which will then be subject to distribution by the court. Thus, where the wife cannot be compensated through her husband's degree, the husband is encouraged to seek divorce early in his professional career.\textsuperscript{51}

Those courts and commentators who advocate the treatment of

\textsuperscript{44} Moore, supra note 8, at 553-54.

\textsuperscript{45} Id.

\textsuperscript{46} Id. at 553.

\textsuperscript{47} Krauskopf, supra note 11, at 393. Formulating an award based on the value of the degree or future earning capacity is speculative and may contribute significantly to the courts' reluctance to find a professional degree to be marital property. However, Professor Moore notes:

\begin{quote}
[E]valuating a professional degree does not appear to involve any more speculation or uncertainty than does the assessment of damages for pain, mental distress, or loss of consortium, and for which a majority of courts allow awards. In fact, the courts commonly allow an evaluation of a professional education for the purpose of calculating damages in wrongful death and personal injury cases.
\end{quote}

Moore, supra note 8, at 547. See also Note, supra note 12, at 71 supra text accompanying notes 159-64.

\textsuperscript{48} 156 Neb. 629, 57 N.W.2d 173 (1953).

\textsuperscript{49} Id. at 632, 57 N.W.2d at 175.

\textsuperscript{50} See Moore, supra note 8, at 554; Recent Development, \textit{Domestic Relations-Educational Degree Does Not Constitute Marital Property Subject to Division Between Spouses Upon Divorce}, Graham v. Graham, 574 P.2d 75 (Colo. 1978), 13 Tulsa L. Rev. 646, 651 (1978).

\textsuperscript{51} See Recent Development, supra note 50, at 651.
an educational degree as an item of property follow a broad definition of property. They believe that property is not limited to ownership of chattels or real estate, but rather, that it can take the form of rights which are capable of valuation, division, and distribution. In addition, some take the position that contributions towards an educational degree are analogous to investing in a business that has potential for financial success. As a result, the wife's share of the degree is not limited to the amount of her expenditures; rather, she is entitled to her share of the "future profits," i.e., the potential increased earnings made possible by the degree.

This approach has been used only in a minority of jurisdictions. Most courts, correctly, do not recognize a proprietary interest in intangible items such as an educational degree for purposes of division upon marital dissolution. Classifying a degree as a divisible asset obligates the court to speculate as to the worth of the degree. This will inevitably lead to inequities for both spouses. Additionally, analogizing marital educational financing to investing in a commercial enterprise ignores the personal basis behind the institution of marriage by reducing the marital relationship to an arm's length commercial transaction.

B. Restitutional Awards

As an alternative approach, several courts have treated the professional degree as a marital asset but have awarded the wife, as restitution, the approximate dollar value of her investment. Thus, in contrast to courts which have valued the wife's interest in the degree in some proportion to future earnings enhanced by it, these courts have limited the wife's recovery to repayment of the approximate monetary amount she contributed to its acquisition. For example, in Inman v. Inman, the parties were married before the husband began dental school. The wife supported her husband through

52. See, e.g., O'Brien v. O'Brien, 114 Misc. 2d 233, 452 N.Y.S.2d 801 (Sup. Ct. 1982); Moore, supra note 8, at 553-54.
53. See, e.g., Prosser v. Prosser, 156 Neb. 629, 57 N.W.2d 173 (1953); Krauskopf, supra note 11.
54. See cases cited supra note 7.
55. See cases cited supra note 5.
56. See infra text accompanying notes 113-18.
57. See infra text accompanying notes 127-32.
58. See cases cited supra note 8.
school and continued to work throughout the next seventeen years of their marriage. At the time of their divorce, the couple was on the brink of bankruptcy. Although the Inmans were married for many years after the husband became a dentist, the Inman court considered their situation to be analogous to one where the divorce occurs shortly after the degree is attained and there are few or no other possible marital assets from which to make a property distribution. The court held that a professional degree is property when equity so requires for the supporting spouse.

Based upon this standard, the degree would be an appropriate asset for distribution where the marriage dissolves just subsequent to the completion of the education and there are no other assets to distribute, or where there is no possible award of maintenance. In such circumstances, "treating a professional license as marital property is the only way in which a court can achieve an equitable result." The court decided that the best measure of a spouse's interest in the degree is the amount of her monetary contribution to it. The court thus opted for a restitutional approach, holding that "the amount spent for direct support and school expenses during the period of education, plus reasonable interest and adjustments for inflation, should be apportioned to the spouse who provided support when . . . there is little or no marital property . . . ."

The Inman court was most concerned with the lack of traditional marital assets. In fact, the court stated that the degree would not have been treated as an asset if there had been traditional marital property to divide. Thus, the Inman court viewed itself as a court of equity, compelled to disregard traditional legal reasoning in favor of achieving an equitable result.

Another restitutional approach was taken by the Supreme

60. Id. at 267.
61. Id. at 269-70.
62. Id. at 268. The court reasoned that equity compels some form of renumeration for a spouse whose contributions to the marriage have significantly exceeded those of the mate. The court decided that equity was best served by placing a dollar value on the wife's contributions to her husband's degree. Id. at 270.
63. Id. at 268.
64. Id. at 269.
65. Id. at 269-70. See also DeLa Rosa v. DeLa Rosa, 309 N.W.2d 755 (Minn. 1981), where the Minnesota Supreme Court adopted this rationale and followed a similar formula for measuring recovery: The working spouse's financial contributions to joint living expenses and educational costs of the student spouse, less one-half the living expenses. Id. at 759.
66. 578 S.W.2d at 268.
Court of Oklahoma in Hubbard v. Hubbard. In that case, the wife worked to support the couple while the husband completed his undergraduate and medical schooling. Although the court found that the husband's professional degree and license were not marital property, it formulated a remedy premised upon theories of unjust enrichment and quasi-contract. Therefore, although the husband's degree was held to be his own property, the court nonetheless concluded that the wife had "an equitable claim to repayment for the investment she made in [the husband's] education and training."

The Hubbard court believed that a wife in these circumstances had a remedy based on the doctrine of quasi-contract. Thus, the court's equitable solution, used to prevent the husband's unjust enrichment, is limited to the facts of the case. This is underscored by the fact that the court stated it would have fashioned an alternate remedy, such as distribution of traditional assets, if doing so would have compensated the wife sufficiently.

In a recent New Jersey case, Mahoney v. Mahoney, the parties were married for seven years during which time, with the exception of a sixteen month period during which the husband obtained an MBA degree, both contributed to the household expenses. The wife's contributions totaled approximately $24,000 while the husband was attending school. The court, while not treating the educational degree as property, recognized a need to award the wife an amount based on the costs to her while her husband pursued his degree. The court reasoned that the wife had made financial contributions...
towards her husband's education with the expectation that both would enjoy future advantages flowing from the degree. Moreover, the wife made other personal sacrifices, such as reducing her standard of living while her husband was not employed.\textsuperscript{77}

The Mahoney court termed this concept "reimbursement alimony" and stated it 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."\textsuperscript{78} The court opined that this was consistent with the basic purpose of alimony which relates to the quality of economic life to which one spouse is entitled and which becomes the obligation of the other.\textsuperscript{79} The court stressed, however, that not every contributing spouse is entitled to reimbursement. "Only 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."\textsuperscript{80}

Although the Mahoney court rejected the notion of a degree as property and termed its remedy "alimony," the court actually recognized a proprietary interest in the degree. The court found that a wife who expends money towards the acquisition of a degree, anticipating future monetary benefits, has an equitable claim for repayment of her investment.\textsuperscript{81} This, in essence, treats the degree as an asset, merely limiting the award to the amounts actually contributed.

Numerous commentators support the restitution approach.\textsuperscript{82} These writers feel that it is the most equitable and practical solution to ensure a wife's reimbursement for the money expended on her husband's behalf,\textsuperscript{83} and have advanced at least five arguments in favor of it.

The first argument is that principles of equity demand restitution.\textsuperscript{84} "The basic requirements are that one [spouse] has received a

\begin{footnotes}
77. Id.
78. Id. at 501, 453 A.2d at 534 (emphasis in original).
79. See infra note 117.
81. Mahoney, 91 N.J. at 502-03, 453 A.2d at 535.
82. See sources cited supra note 12.
83. Erickson, supra note 12, at 949; Moore, supra note 8, at 545; Note, supra note 12, at 73.
\end{footnotes}
benefit at the expense of another, and that as between them it would be unjust for the recipient to retain the benefit without compensation to the other person.\textsuperscript{86} A benefit can take the form of any advantage, and in the absence of its being conferred gratuitously, failure to restore would be unfair.\textsuperscript{88} Since there are often no other assets at the time of divorce from which the wife could be reimbursed, a refusal to treat the husband's professional degree as marital property for the purposes of restitution would result in the unjust enrichment of the husband.\textsuperscript{87}

Second, the restitututional approach has been considered a means of avoiding the problem of speculation\textsuperscript{88} as to the value of the degree.\textsuperscript{89} A husband would be required to reimburse his wife only for the financial aid she provided toward the acquisition of the degree. Thus, one need only calculate the amount spent on educational expenses (tuition, books, etc.) and one half the couple's living expenses during the schooling years, and require the husband to make restitution to the wife for those expenditures.\textsuperscript{90}

Third, the restitututional approach eliminates the possibility of a division of the husband's post-divorce earnings, a problem that may occur if the degree is treated as a distributable marital asset.\textsuperscript{91} One commentator notes that if the wife had received a duly executed promissory note in exchange for lending her husband tuition costs, she would be able to collect on the note even after the marriage dissolved.\textsuperscript{92} "The fact that the note would have to be paid off out of the husband's post-divorce earnings would not render it uncollectable. Surely a divorcing wife's right to reimbursement . . . should not rest on the technicality of whether she had . . . procured from her husband a formally executed promisory note."\textsuperscript{93}

Fourth, if a professional degree is held to be marital property

\textsuperscript{85} Krauskopf, \textit{supra} note 11, at 391 (emphasis in original).
\textsuperscript{86} \textit{Id.}
\textsuperscript{87} Note, \textit{supra} note 84, at 519.
\textsuperscript{88} The courts will rarely achieve equitable results for both parties because valuation of the degree will inevitably be inaccurate since the earning capacity of the degree-holder will vary according to individual circumstances and factors. \textit{See infra} text accompanying notes 112-18.
\textsuperscript{89} \textit{See supra} note 47. However, the valuation may prove grossly inequitable if the spouse with the special degree does not pursue a professional career. \textit{See infra} text accompanying notes 113-18.
\textsuperscript{90} Moore, \textit{supra} note 8, at 548.
\textsuperscript{91} \textit{Id.} at 552.
\textsuperscript{92} \textit{Id.} at 553.
\textsuperscript{93} \textit{Id.}
subject to distribution, the husband may be compelled to practice his profession; he may therefore be denied the freedom of choice to abandon that career.\textsuperscript{94} The restitutionary response, however, may avoid this result: The wife would receive only the amounts expended by her during the time her husband attained his degree. Thus,"[w]hatever use the husband decides to make of his professional training, it should not be unduly burdensome to require him to reimburse his wife for her contributions to its acquisition."\textsuperscript{95}

Fifth, a wife's contribution to the acquisition of her husband's degree has been analogized to the situation where a man gives a ring to his fiancee in contemplation of marriage.\textsuperscript{96} If the engagement is broken, the man is entitled to the return of his present, if it was given contingent upon marriage. The rationale is that the marriage, which was the condition of the gift, did not occur.\textsuperscript{97} In the same way, a wife's contributions to her husband's professional training may be considered contingent upon the marriage lasting long enough for the wife to benefit financially from her husband's professional status: "Since an early divorce has prevented this condition from being satisfied, the wife should be allowed restitution for the value of her contributions."\textsuperscript{98}

Thus, both the courts and commentators advocating the restitutio
al approach feel that simple justice demands that a wife be reasonably compensated for her contributions to the acquisition of her husband's degree. They conclude that the fairest solution is to reimburse the wife for her financial expenditures.\textsuperscript{99} Some opinions limit restitution to situations where there is no other traditional property available for division,\textsuperscript{100} while others merely require the wife to have had a reasonable expectation that she would be rewarded for her contributions.\textsuperscript{101}

While these equitable solutions are understandably popular in the situation where the newly divorced wife gets neither a substantial

\textsuperscript{95} Moore, \textit{supra} note 8, at 550.
\textsuperscript{96} \textit{Id.} at 554.
\textsuperscript{97} \textit{Id.}
\textsuperscript{98} \textit{Id.}
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property distribution nor alimony, it is not the function of the courts to disregard well established legal theory in order to satisfy their own sense of fairness. The idea of finding property interests only in the absence of traditional marital assets requires a case-by-case analysis, inevitably resulting in doctrinal confusion and inequity to the parties.\(^\text{102}\)

II. REFUSING TO TREAT THE DEGREE AS MARITAL PROPERTY

The majority of courts addressing the issue of whether a professional degree should be considered a marital asset have answered the question in the negative. The general view is that a degree is not property and that a wife who contributes to the attainment of her husband's professional degree may not, upon divorce, be awarded a share of it as part of property distribution.\(^\text{103}\) The case of *Lesman v. Lesman*\(^\text{104}\) presented this question as one of first impression to the appellate courts of New York State. The majority held that a spouse's professional degree and/or future earnings are not, under any circumstances, divisible marital property.\(^\text{105}\)

In *Lesman*, the parties were married after the husband graduated from college. Two days after their marriage, the couple moved to Mexico where the husband attended medical school. The wife did not work during their 3½ years there. The husband's education was paid for by various educational and personal loans as well as by the husband's savings. At one point between 1972 and 1973, the wife returned to New York for approximately five months and worked, earning $25 per week. The court found no evidence that she gave any of this money to her husband.\(^\text{106}\) When the couple returned to New York after the husband had received his degree, he worked in a non-salaried position for one year. During this year and for the fol-

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102. See infra text accompanying notes 119-26.
104. *Id.*
106. 88 A.D.2d at 154, 452 N.Y.S.2d at 936-37. This finding should have resulted in the end of the court's inquiry. The typical case which raises the issue of a professional degree as distributable marital property involves the wife sacrificing her schooling or standard of living in order to finance her husband's education. These courts have been faced with the task of achieving an equitable result for the contributing wife when the couple divorces. In the *Lesman* case, however, since the wife did not make any monetary contributions to her husband's medical education, there was no basis for her to claim the degree as marital property. It was unnecessary, therefore, for the court even to analyze the issue.
lowing six months, the wife worked and earned $115 per week.\textsuperscript{107}

The \textit{Lesman} court declined to value the husband’s professional degree and refused to consider it as marital property subject to equitable distribution.\textsuperscript{108} The court reasoned that even the most extensive reading of the concept of property does not encompass an educational degree.\textsuperscript{109} The court stated that a degree

"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 pledged. An advanced degree is a cumulative product of many years of previous education, combined with diligence and hard work. It may not be acquired by the mere expenditure of money. It is simply an intellectual achievement that may potentially assist in the future acquisition of property. In our view, it has none of the attributes of property in the usual sense of that term."\textsuperscript{110}

The \textit{Lesman} court also reasoned that to consider a professional degree a marital asset subject to equitable distribution would necessitate treating the potential earning power that may result from that degree as property. The court stated that "[e]nhanced earning capacity is not property. It is not vested, it is only an uncertain expectancy, for it is dependent upon the future success and efforts of the degree holder."\textsuperscript{111} Additionally, the calculation of future earnings

\begin{footnotes}
\item[107] \textit{Id.}
\item[108] \textit{Id.} at 155, 452 N.Y.S.2d at 939.
\item[109] \textit{Id.}
\item[110] \textit{Id.} at 157, 452 N.Y.S.2d at 938 (quoting Graham v. Graham, 194 Colo. 429, 432, 574 P.2d 75, 77 (1978)). \textit{See also} Mahoney v. Mahoney, 91 N.J. 488, 453 A.2d 527 (1982), where the court described a professional degree as a personal achievement of the holder which cannot be sold nor accurately valued. The \textit{Graham} court noted that in drafting the equitable distribution statute, the Colorado legislature intended that the concept of property be broadly inclusive. The court stated, however, that there were necessary limits to what may be considered property and that \"[w]e do not find any indication in the Act that the concept as used by the legislature is other than that usually understood to be embodied within the term.\" 194 Colo. at 431-32, 574 P.2d at 76-77. The court then cited the following definition of property: \"[E]verything that has an exchangeable value or which goes to make up wealth or estate.\" \textit{Id.} at 432, 574 P.2d at 77 (quoting \textit{BLACK'S LAW DICTIONARY} 1382 (rev. 4th ed. 1968)).

The dissent argued, however, that the court in \textit{Graham} did not follow the legislature's broad concept of property when it evaluated the professional degree. \textit{See Graham}, 194 Colo. at 434, 574 P.2d at 78 (Carrigan, J., dissenting).
\item[111] 88 A.D.2d at 157, 452 N.Y.S.2d at 938. This fact was also recognized by the New Jersey Supreme Court in Mahoney v. Mahoney, 91 N.J. 488, 453 A.2d 527 (1982), which maintained that \"a [person's] 'earning capacity, even where its development has been aided and enhanced by the other spouse, . . . should not be recognized as a separate particular item of property.'\" \textit{Id.} at 497, 453 A.2d at 532 (quoting Stern v. Stern, 66 N.J. 340, 331 A.2d 257
\end{footnotes}
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can be valid only if the husband actually utilizes the degree for its intended purpose. Awarding the wife a portion of future income symbolically locks the husband into a specific career and denies him the choice to abandon the profession in which he earned his degree.112

The Lesman court also considered the problem of calculation that is inherent in any attempt to value such a speculative asset. The court opined that

[i]t is almost impossible to predict what amount of enhanced earnings, if any, will result from a professional education. The degree of financial success attained by those holding a professional degree varies greatly. Some, even, may earn less from their professional practices than they could have earned from non-professional work.113

Other courts have also recognized the potential for inequity to the spouse who never practices his profession. In DeWitt v. DeWitt,114 the court stated that a spouse “will have been awarded a share of something which never existed in any real sense.”115 The court continued:

An award based upon the prediction of the degree holder’s success at the chosen field may bear no relationship to the reality he or she faces after the divorce. Unlike an award of alimony, which can be adjusted after divorce to reflect unanticipated changes in the parties’ circumstances, a property division may not.116

Thus, gross inequities may result from awarding the wife the potential value of the degree, since such a property settlement, unlike alimony,117 may not be modified to meet future realities.118

(1975)).

112. Greene, supra note 94, at 296-97. See also Moore, supra note 8, at 549-50.
113. 88 A.D.2d at 157, 452 N.Y.S.2d at 938. Accord Mahoney v. Mahoney, 91 N.J. 488, 496, 453 A.2d 527, 531 (1982), (the court stated it “has never subjected to equitable distribution an asset whose future monetary value is as uncertain and unquantifiable as a professional degree or license.”). Mahoney recognized that many unforeseen events remain that could affect a person’s earning potential and that one practicing a profession “‘may fail at it, or may practice in a specialty, location or manner which generates less than the average income enjoyed by fellow professionals.’” Id. at 498, 453 A.2d at 532 (quoting DeWitt v. DeWitt, 98 Wis. 2d 44, 52, 296 N.W.2d 761, 768 (Ct. App. 1980)).
114. 98 Wis. 2d 44, 296 N.W.2d 761 (Ct. App. 1980).
115. Id. at 52, 296 N.W.2d at 768.
116. Id.
117. Alimony, traditionally, has been regarded as an extension of the husband’s common law duty of support. The purpose of alimony is to ensure that the standard of living to which one spouse is entitled becomes the obligation of the other. Alimony is tailored to individual
A fourth reason expounded by the Lesman court, in support of its holding, was a desire to avoid "doctrinal chaos" which would result from characterizing an educational degree as property under some circumstances and not under others.\textsuperscript{119} The court explained that the termination of a marriage before the wife's expectations of financial benefits are realized—because the couple has not yet accumulated a substantial marital estate—is a relatively common situation.\textsuperscript{120} Under these circumstances, some courts hold the degree to be marital property so as to restore to the wife the amount she has contributed.\textsuperscript{121} However, if the marriage endures beyond the time the husband graduates and his increased earning potential becomes a reality, the wife's original expectations are thereby realized: "[A]s the result of the husband's enhanced earnings, the parties will have accumulated [at the time of divorce] marital property in which the divorced wife will share and thereby receive a return on her investment."\textsuperscript{122} In this situation, courts following \textit{Inman v. Inman}\textsuperscript{123} and \textit{Mahoney v. Mahoney}\textsuperscript{124} would hold that the degree is not property.\textsuperscript{125} The Lesman court, however, refused to follow the reasoning that the professional degree is property in some situations but not others, stating that "[i]f a license or degree or its enhanced earning potential is not property five or ten or twenty years after graduation, circumstances, particularly relating to the financial status of the parties. If there is a change in actual need or ability to pay, the court will make adjustments as it sees fit, reasonable and just. See H. CLARK, THE LAW OF DOMESTIC RELATIONS 420-22 (1968).

An alternative approach utilized by some courts is rehabilitative alimony. Unlike traditional alimony which is expected to continue until the wife remarries or dies, the rehabilitative alimony award is intended to last only until the wife adjusts to her new circumstances and becomes self-supporting. For example, in Lepis v. Lepis, 83 N.J. 139, 416 A.2d 45 (1980), the court approved the concept of rehabilitative alimony where a short-term or lump-sum award would enable the former spouse to complete the preparation necessary for economic self-sufficiency. See also Hill v. Hill, 91 N.J. 506, 453 A.2d 537 (1982).

\textsuperscript{119} 88 A.D.2d at 157, 452 N.Y.S.2d at 940.
\textsuperscript{119} Id. at 158, 452 N.Y.S.2d at 939.
\textsuperscript{120} Id.
\textsuperscript{121} Id. at 157-58, 452 N.Y.S.2d at 939.
\textsuperscript{122} Id. at 158, 452 N.Y.S.2d at 939.
\textsuperscript{123} 578 S.W.2d 266 (Ky. Ct. App. 1979), aff'd, 9 FAM. L. REP. (BNA) 2131 (Ky. Sup. Ct. Nov. 23, 1982).
\textsuperscript{124} 91 N.J. 488, 453 A.2d 527 (1982).
\textsuperscript{125} The \textit{Inman} court stated that in a marriage where there are sizable traditional marital assets, the wife would receive a substantial property award and therefore the professional license would not have to be evaluated as property. 578 S.W.2d at 268. The \textit{Mahoney} court stated "where the parties to a divorce have accumulated substantial assets during a lengthy marriage, courts should compensate for any unfairness to one party who sacrificed for the other's education, not by reimbursement alimony but by an equitable distribution of the assets. . . ." 91 N.J. at 503, 453 A.2d at 535, 536.
it cannot be property on graduation day either.'" 126

While the Lesman court was sympathetic to the situation where the wife sacrifices and supports her husband only to be deserted shortly after he attains his educational degree, it nonetheless refused to fashion an equitable remedy of restitution to repay the wife for the contributions she had made, reasoning that marriage is more than an economic endeavor.127 The parties follow a self-determined and mutual plan to provide financial support and non-financial services to each other, and they do not place values on their respective contributions, nor do they expect to pay each other for those contributions. Every unsuccessful marriage results in the disappointment of expectations, financial as well as non-financial, but it does not result in a financial loss in a commercial sense.128

The Wisconsin Court of Appeals in DeWitt v. DeWitt129 elaborated on this notion when it rejected the claim of special recompense for financing a spouse's education.130 Dewitt specifically rejected this approach since the court believed that equity is not served by placing a monetary value on the intangible degree.131 The court stated that to do so "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. We do not think that most marital planning is so coldly undertaken."132

Similarly, the Arizona Court of Appeals in Wisner v. Wisner133 rejected an equitable remedy based upon a theory of unjust enrichment. The court refused to treat a marriage, absent any specific agreement, "as an arm's length transaction by allowing a spouse to come into court after the fact and make legal arguments regarding unjust enrichment by reason of the other spouse receiving further

127. 88 A.D.2d at 159, 452 N.Y.S.2d at 939.
128. 98 Wis. 2d 44, 296 N.W.2d 761 (Ct. App. 1980).
129. Id.
130. Id.; see also Mahoney v. Mahoney, 91 N.J. 488, 500, 453 A.2d 527, 533 (1982) (marriage is not like a commercial situation in which the husband and wife record their financial obligations and contributions for the purpose of settlement upon divorce).
131. 98 Wis. 2d at 50, 296 N.W.2d at 767.
education during coverture." The court reasoned that the spouses decide what each one will contribute to the marriage and that the choice to support the husband's pursuit of a professional degree is "mutual, consensual and made with full understanding of the sacrifices that necessarily accompanied the decision." The Wisner court concluded, therefore, that there was no basis for a claim of unjust enrichment upon divorce.

Thus, the courts that refuse to treat a professional degree as marital property subject to distribution upon divorce reason that although the failure of the marriage may mean disappointment of future financial and nonfinancial expectations, divorce does not represent a commercial investment loss. Since the terminated expectations cannot be recompensed by a monetary claim, these courts have concluded that there is no basis on which to value each spouse's contributions to the marriage. This compensation, therefore, will not be made by valuing the professional degree as a marital asset.

III. Why the Professional Degree Should Not Be Considered Marital Property

Courts that have concluded that the professional degree is not marital property subject to distribution upon divorce have done so based upon sound reasoning. First, an educational degree does not constitute property in any traditional sense. It is only by stretching the concept of property beyond well established principles that a degree can be regarded as property because it lacks the common and inherent traits of property such as exchange or transferable value, assignability or inheritability.

It has been argued that an educational degree is no different than other intangible items of property in which proprietary status has been found. Several courts, including the United States Supreme Court in Hisquierdo v. Hisquierdo, have found that non-vested pension benefits are distributable in a property division upon marriage dissolution. Similarly, the Uniform Services' Former

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134. Id. at 341, 631 P.2d at 123 (emphasis in original).
135. Id.
136. Id.
137. See supra notes 108-10 and accompanying text.
138. For a list of the courts holding that an educational degree is not property, see cases cited supra note 5.
140. See, e.g., In re Marriage of Brown, 154 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr.
Spouse’s Protection Act\(^\text{141}\) makes federal military retirement pay subject to state divorce laws.\(^\text{142}\) An educational degree is distinguishable, however, from these other intangible assets, thus making its classification as property inappropriate.\(^\text{143}\) The Supreme Court of New Jersey in *Mahoney v. Mahoney*\(^\text{144}\) recognized this difference. After noting that it had previously held military retirement pay and disability benefits to be distributable marital property,\(^\text{145}\) the court stated:

>This court has never subjected to equitable distribution an asset whose future monetary value is as uncertain and unquantifiable as a professional degree or license. . . .

. . . A professional . . . degree represents the opportunity to obtain an amount of money only upon the occurrence of highly uncertain future events. By contrast, the vested but unmatured pension . . . entitle[s] the owner to a definite amount of money at a certain future date.\(^\text{146}\)

A second reason for refusing to hold a degree as a distributable asset is that its value lies in the enhanced earning potential of the acquiring spouse. If the degree is treated as property, this results in treating the earning capacity as property as well. Several courts have correctly noted that future earning power is not property since it is not vested and is of uncertain amount due to innumerable factors contributing to the success of its bearer.\(^\text{147}\) This was well illustrated in *Mahoney* where the court declined to hold the potential for increased future earnings, made possible by the professional degree, to be property subject to distribution. The *Mahoney* court concluded that the husband’s earning capacity should not be recognized as a separate item of property within the meaning of the equitable distribution statute.\(^\text{148}\) The court stated that finding earning capacity to

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142. Id. § 1408 (e)(1).
143. See supra note 40; see also supra text accompanying notes 109-10.
144. 91 N.J. 488, 453 A.2d 527 (1982).
145. Id. at 495, 453 A.2d at 531 (citing Kruger v. Kruger, 73 N.J. 464, 468, 375 A.2d 659, 661 (1977)).
146. Id. at 496, 453 A.2d at 531.
148. 91 N.J. at 496, 453 A.2d at 531.
be property would result in distribution of "income that the degree holder might never acquire. The amount of future earnings would be entirely speculative. Moreover, any assets resulting from income for professional services would be property acquired after the marriage; the statute restricts equitable distribution to property acquired during the marriage."\footnote{149}

A similar result was reached in \textit{Aufmuth v. Aufmuth}\footnote{150} where, under California's community property system, the court found that a community interest exists in property acquired during the marriage but not in post-marital earnings.\footnote{151} The court stated that to hold the income potential of the degree as an asset for purposes of community property would require awarding a share of the post-marital earnings.\footnote{152} These post-dissolution earnings, however, "are by definition the separate property of the acquiring spouse."\footnote{153} The court reasoned that since community interest can only be acquired during the marriage,\footnote{154} it would be inconsistent with the purpose of that system to include the results of post-marital efforts in the distributable marital estate.\footnote{155}

A third reason why a professional degree should not be considered marital property is that the actual value of the degree is not as easily assessable as tangible property such as a car or a piece of reality. Since the degree has none of the traditional attributes of property that can be valued,\footnote{156} any computation would inherently be pure speculation. As noted by the court in \textit{DeWitt v. DeWitt},\footnote{157} many factors render it virtually impossible to make an accurate measurement of the degree's worth.\footnote{158} For example, there is no guarantee that the professional spouse would actually practice in the field in which he earned his degree, or that his earnings would equal what the court projected as anticipated income.

It is argued that the speculation rationale, used by courts when they refuse to evaluate an educational degree, is meritless.\footnote{159} For ex-
ample, it is contended that valuation of the professional degree for matrimonial actions involves no more speculation than determining the value of an education in terms of its economic potential in both wrongful death actions and personal injury cases. Important policy differences, however, separate the law of torts from the law of marital property division, thereby precluding application of this rationale to the latter type of action. First, in a tort case, an award based on future earnings is given to the victim for the purpose of compensating what has been wrongfully taken away. In contrast, the purpose of marital property distribution is to divide equitably between the spouses all property accrued during the marriage. Calculating a degree’s potential worth in a matrimonial action should not be done for compensation purposes, since the spouse is not a victim. Providing a spouse something she has been wrongfully deprived of is not the purpose of property distribution. Second, and equally important, awarding projected earnings is the only measurement available to compensate a tort victim. It is the most certain method of giving him what he would have earned had he not been injured. In contrast, a marital estate, however small, can be divided with specificity. This avoids unduly prejudicing the professional husband who may earn less than anticipated. Furthermore, potential earning capacity can be considered by the trial judge in determining the issue of alimony. Thus, future earnings is an uncertain and unnecessary factor in dividing the marital estate.

A fourth reason for not including a professional degree as marital property subject to division is that limiting valuation of the degree only to situations where there are no other assets will result in tremendous inequities and inconsistencies among the cases. By following these guidelines, some wives who supported their husbands through school will receive a share of the degree and others will not, the outcome being determined by the number of years the couple has had to acquire tangible property assets, and the caprice of trial judges. If a degree cannot be classified as property upon dissolution.

160. See id.; supra note 47.
163. Additionally, in tort cases the defendant has intentionally or negligently injured or interfered with the rights of the victim. This situation does not arise in a matrimonial action, especially since many jurisdictions, in deciding property division and alimony, no longer consider the fault of the divorcing spouses. See generally Note, supra note 12, at 71 n.44.
164. See infra notes 172-73; see also Mahoney v. Mahoney, 91 N.J. 488, 504-05, 503 A.2d 527, 535 (1982).
when the holder has practiced his profession for ten years and accumulated substantial assets, then the same degree cannot be property when dissolution occurs shortly after graduation. Concluding otherwise defies logic and is contrary to the principles of legal precedent.

This problem is further underscored when one considers the vast number of cases that will fall between the two extremes of no traditional marital assets and sizeable marital estates. Courts are, in all probability, incapable of drawing an equitable cut-off line. For example, courts would need to set a minimum value for marital estates which would, upon division, equitably compensate wives who financed their husband's educations. The degree would be considered property only when the value of the couple's assets did not reach the minimum figure. There are, however, several problems with this formula. First, it is not appropriate for the court to speculate on what amount would represent a minimally sufficient marital estate. Second, and more importantly, each couple's lifestyle and expectations are different, as is the earning capacity of each degree holder. If the cut-off line was set, for example, at $20,000, one couple married for three years after the attainment of the degree may have saved twice that, while a similar couple may have anticipated accumulating that amount only after ten years. Thus, it will be nearly impossible to set a standard of how much marital property is enough before the wife is "fully compensated" and the professional license can therefore be excluded from property distribution.

This situation has already arisen in Kentucky where the court in Leveck v. Leveck\(^\text{166}\) refused to follow its own precedent of Inman v. Inman,\(^\text{166}\) holding instead that it was unnecessary to treat the husband's medical degree as marital property. The court stated that although the wife supported the couple and paid for the husband's education, she is entitled to maintenance and an equitable result could be reached on that basis.\(^\text{167}\)

Finally, even if the marriage terminates before the expected "fruits" of the education are borne, the wife's financial contributions to the husband's education during marriage should not be evaluated


\(^{167}\) Leveck, 614 S.W.2d at 712. The court specifically distinguished Inman on the basis that in Leveck, the wife had not worked for the seven and one-half years preceding the divorce, and that there was a small marital estate, while in Inman, the only article of value was the husband's degree. Id.
and calculated by the court for the purpose of commercially recom-
pensing the contributions. The principles of restitution, implied loan, unjust enrichment, and quasi-contract should not apply to a marriage. All of these reimbursement approaches treat the couple as business partners, with the investing wife anticipating a monetary return. It would be contrary to public policy to consider marital planning as such a cold endeavor. As the court in Mahoney v. Mahoney noted, "[m]arriage is not a business arrangement in which the parties keep track of debits and credits, their accounts to be settled upon divorce."

CONCLUSION

For the reasons set forth above, a professional degree should not be considered marital property. Neither the money spent in obtaining the degree nor the future earnings enhanced by it accurately represent the degree's value. This approach fails to consider the non-financial efforts of the spouse trying to earn the degree. The relative values of the spouses' individual contributions during the marriage cannot and should not be retrospectively assessed and weighed against each other. Thus, the wife is not entitled to reimbursement for the financial contributions through property distribution statutes. Rather, this compensation should be left to the alimony and maintenance provisions. It is a matter for the legislature, not the courts, to provide that "property" includes an educational degree or the enhanced future earnings it may provide. Courts are empowered to achieve equity by granting maintenance to a wife or by awarding her a large portion of the marital estate. When calculating maintenance, the court can consider the contributions made by the wife to the husband's career and the potential earning capacity of the husband. Thus, if the education allows for greater earning, the equity to the receiving spouse will be reflected in the alimony payments that will be made on the basis of the payer's income. If these compensation devices still result in inequity to some spouses, then it is the legislature's role to provide a remedy. However, until the legisla-

168. See supra text accompanying notes 127-36.
170. Id. at 500, 453 A.2d at 533.
172. See Id.; supra note 117.
174. For example, the Indiana legislature allows the courts to provide restitution to the contributing spouse when there are few marital assets. However, this reimbursement is limited
ture directs the courts to do so, a degree should not be valued as a marital asset subject to distribution upon divorce.

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to direct outlays for the degree, such as tuition and books, and does not extend to future earnings made possible by the degree. See IND. CODE ANN. § 31-1-11.5-11 (West Supp. 1982-83).