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Moore, Professional Degree as Marital Asset

SHOULD A PROFESSIONAL DEGREE BE CONSIDERED A MARITAL ASSET UPON DIVORCE?

by

DR. MARVIN M. MOORE*

I. INTRODUCTION

IT HAS BEEN a common practice in this country during recent decades for a wife to put her husband through college and/or professional school. As one writer notes, “[p]utting hubby through’ college, law school, medical school, or other education program (‘getting a Ph.T.’ as it is sometimes called), appears to be a firmly entrenched American institution. . . .”¹ As several courts have observed, however, the marriages of these upwardly-mobile young couples often founder and terminate shortly after the husband has completed his education.² Typically, there are few tangible assets to be distributed between the parties upon divorce because most of the couple’s income (generated exclusively or principally by the wife) has been expended for living and educational expenses.³ This situation—where a divorce takes place shortly after the husband obtains a professional or graduate degree—presents the divorce court with a difficult problem. How can the court divide the parties’ limited assets in a way that will fairly compensate the wife for having enabled her husband to become a professional person or executive?⁴

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¹ Erickson, *Spousal Support Toward the Realization of Educational Goals: How the Law Can Ensure Reciprocity*, 1978 Wis. L. REV. 947, 948 n.4 (1978).

² See, e.g., *Graham v. Graham*, 194 Colo. 429, 434, 574 P.2d 75, 78 (1978) (Carrigan, J., dissenting) (“This case presents the not-unfamiliar pattern of the wife who, willing to sacrifice for a more secure family financial future, works to educate her husband, only to be awarded a divorce decree shortly after he is awarded his degree.”); *Moss v. Moss*, 80 Mich. App. 693, 694, 264 N.W.2d 97, 98 (1978) (“This case presents the not uncommon situation of a wife who, having worked so that her husband could obtain a professional education, finds herself left by the roadside before the fruits of that education can be harvested.”).

³ “Thus, the ‘educational partnership’ marriage is . . . one in which the only [significant] asset acquired during the marriage is the professional degree.” Greene, *Dissolution of the ‘Educational Partnership’ Marriage*, 55 FLA. B.J. 292, 293 (1981).

⁴ This question presupposes that the court has the authority to divide the parties’ assets between them upon divorce. The court does have such authority in a majority of states. Thirty-nine states and Washington D.C. follow the equitable distribution system and confer authority upon the court to distribute all or some of the property owned by the couple at the time of the divorce in accordance with guidelines set forth in an applicable state statute. This group includes Ohio. Freed & Foster, *Divorce in the Fifty States: An Overview as of August 1, 1980*, 6 FAM. L. REP. 4043, 4051 (1980). Eight states and Puerto Rico have a community property system. Under this arrangement, title to all property acquired during marriage, with limited exceptions, vests in the marital community and is divisible upon divorce. Comment, *Family Law: Ought a Professional Degree be Divisible as Property Upon Divorce?* 22 WM. & MARY L. REV. 517, 523 (1981). Finally, five states follow the strict common law rule, under which property division is determined by title alone and the divorce court has little or no authority to distribute property in accordance with special equities. *Id.* at 520.

Basically four different responses are possible.

a. *Degree as Marital Property Response.* One approach is to treat the husband's professional degree (or license) as a form of marital property, to evaluate it by some formula that takes into account the husband's projected earnings (over all or some portion of his anticipated professional lifetime), and to award the wife a part of the degree's thus-determined monetary value.⁵

b. *Restitutional Response.* A second response is, as before, to treat the husband's degree as a marital asset but to simply award the wife, as restitution, a sum approximating the monies she directly or indirectly contributed to the acquisition of the degree.

c. *Alimony Response.* A third approach is to compensate the wife solely by means of an alimony award.

d. *Equitable Division of Tangible Assets Response.* This approach simply divides, as equitably as possible, whatever few tangible assets the parties have accumulated, however, inadequately this may compensate the wife, making the philosophical judgment that she made her contributions of her own volition and in effect assumed the risk that her marriage would last.⁶

Although all four responses have their advocates, it appears that treating the degree as marital property is the most popular response among legal writers⁷ and the alimony response is the one most frequently utilized by

⁵ In the recent unpublished New Jersey case of *Lynn v. Lynn*, No. M-9842-77 (Sup. Ct. 1981), the Superior Court of Bergen County held that the husband's medical degree was a divisible marital asset valued at \$308,886. Greene, *supra* note 3, at 295. In *In re Marriage of Horstmann*, 263 N.W.2d 885, 891 (Iowa 1978), where the wife, Donna, had worked at a bank to help her husband through law school, the Iowa Supreme Court affirmed an \$18,000 award to Donna, as part of the property division, explaining "(i)t 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."

⁶ Although this writer found no case that *openly* invoked an assumption of risk theory against recovery by the wife, cases were found where the court's decision left the wife with very little property and the court's opinion seemed to reflect an assumption of risk point of view. See, e.g., *Graham v. Graham*, 194 Colo. 429, 574 P.2d 75 (1978); *In re Marriage of McManama*, 399 N.E.2d 371 (Ind. 1980).

⁷ Comment, *Horstmann v. Horstmann: Present Right to Practice A Profession as Marital Property*, 56 DEN. L.J. 677, 678 (1979) ("To the extent the Iowa court [in *In re Marriage of Horstmann*, 263 N.W.2d 885 (Iowa 1978)] views the joint acquisition of a license to practice law in the nature of a franchise to be considered in a division of property, the author agrees it is within the equitable powers of the court to recognize that interest."); Note, *Divorce After Professional School: Education and Future Earning Capacity May Be Marital Property*, 44 Mo. L. REV. 329, 339-40 (1979) ("There is a need to go beyond the constraints of the traditional, narrow concepts of property so that courts will not remain impotent in the midst of this social dilemma and can rectify present inequities. *Horstmann* [*In re Marriage of Horstmann*, 263 N.W.2d 885 (Iowa 1978)] . . . has taken the first step toward this goal in ruling that a spouse's potential earning capacity acquired during marriage with the aid of the other spouse's efforts is a marital asset subject to property division upon dissolution."); Note, *In re Marriage of Graham: Education Acquired During Marriage - For Richer or Poorer?* 12 J. MAR. J. PRAC. & PROC., 709, 729 (1979) ("With alimony unavailable and no property to divide, the potentially needy spouse is left unprotected. Where

the courts.⁸ It is the position of this writer that the fairest and most practical solution is the restitutional response: to treat the husband's professional degree as a form of marital property and to award the wife restitution for her contributions to its acquisition.

II. ARGUMENTS AGAINST TREATING A PROFESSIONAL DEGREE AS A MARITAL ASSET

Although treating the degree as marital property differs significantly from the restitutional response, both remedies are grounded on the assumption that a husband's professional degree is a form of property in which the contributing wife is entitled to share in some manner upon divorce. To date, a majority of the courts which have passed on the issue have been unwilling to treat a professional degree (or license) as a divisible marital asset.⁹ These courts have advanced five arguments in defense of their position:

1. *A professional degree or license lacks some customary attributes of property — such as transferability and objective market value — and it would be inappropriate and unreasonable for a divorce court to consider such an intangible and personal possession to be a form of property.*

In *Graham v. Graham*,¹⁰ the wife, an airline stewardess, had provided

such threatened deprivation is evidenced, the only accessible item from which to seek relief may be the collectively-attained, though singularly-possessed, education.”); Comment, *Family Law: Ought a Professional Degree Be Divisible as Property Upon Divorce?* 22 WM. & MARY L. REV. 517, at 519 (1981) (“This Note contends that to allow a court to classify an advanced educational degree or license as marital property subject to division upon divorce is both reasonable and necessary. . . . If through the working spouse's effort the degreed spouse becomes unjustly enriched, the courts as a matter of equity must value and distribute the professional degree as a marital asset.”).

⁸ See *Wheeler v. Wheeler*, 193 Neb. 615, 228 N.W.2d 594 (1975) (wife's aid in the establishment of her husband's career as a veterinarian was deemed significant in assessing alimony); *Magruder v. Magruder*, 190 Neb. 573, 209 N.W.2d 585 (1973) (schoolteacher-wife who had supported the family while her husband attended medical school was awarded alimony of \$833.33 per month for ten years and two months); *Loukota v. Loukota*, 177 Neb. 355, 128 N.W.2d 809 (1964) (wife was awarded \$10,000 alimony where she had put her husband through college and medical school); *Todd v. Todd*, 272 Cal. App. 2d 786, 78 Cal. Rptr. 131 (1969) (wife who had worked full time while her husband was attending college and law school and establishing a practice was awarded alimony of \$200 per month); *Lira v. Lira*, 68 Ohio App. 2d 164, 428 N.E.2d 445 (1980) (wife, a schoolteacher, was awarded alimony of \$250 per month after she had contributed substantially to her husband's support while he was attending medical school in Guadalajara, Mexico); *Daniels v. Daniels*, 20 Ohio Op. 2d 458, 185 N.E.2d 773 (1961) (wife was awarded alimony of \$24,000 where her father's contributions of \$16,000-\$20,000 during the couple's marriage had enabled her husband to complete medical school at Ohio State University); *Diment v. Diment*, 531 P.2d 1071 (Okla. Ct. App. 1974) (wife who had supported her husband through both college and medical school was awarded \$39,600 alimony, not abatable upon remarriage).

⁹ “The courts in those few jurisdictions which have considered the issue presented on this appeal have taken a variety of approaches in dealing with it. The majority of those jurisdictions have held that a professional degree is not ‘property’ subject to division after the dissolution of a marriage.” *Dewitt v. Dewitt*, 98 Wis. 2d 44, 53, 296 N.W.2d 761, 765 (1980).

seventy percent of the couple's financial support while her husband, Dennis, successfully pursued a B.S. and M.B.A. degree. The Supreme Court of Colorado held that Dennis's M.B.A. was not divisible marital property, declaring:

An educational degree, such as an M.B.A., 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 the death of the holder and is not inheritable. It cannot be assigned, sold, transferred, conveyed, or pledged It may not be acquired by the mere expenditure of money. . . . In our view, it has none of the attributes of property in the usual sense of that term.¹¹

A weakness in this argument is that broader definitions of property easily encompass a professional degree. In *In re Marriage of McManama*,¹² Justice Hunter observed in his dissenting opinion:

[M]any courts have found that intangible and nontransferable items should be treated as property for some purposes. As Justice Marshall of the United States Supreme Court has said: "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."¹³

The Supreme Court of Colorado stated in *Las Anemas County High School District v. Raye*:¹⁴ "In short it [property] embraces anything and everything which may belong to a man and in the ownership of which he has a right to be protected by law."¹⁵ Thus, only the more restrictive definitions of property exclude a professional degree, and there does not appear to be any compelling reason why courts should feel constrained to adopt such a restrictive definition.

A more basic criticism of the degree-lacks-property-attributes argument

¹¹ *Id.* at 432, 574 P.2d at 77. *Accord*, *Lira v. Lira*, 68 Ohio App. 2d 164, 167-68, 428 N.E.2d 445, 448 (1980) where the Court of Appeals for Cuyahoga County held: "We rule that, since a medical license cannot be assigned, sold, transferred, pledged, or devised, . . . the trial court did not err in finding that 'plaintiff's medical degree is not subject to division, but is rather one factor to be considered in arriving at an equitable division.'"

¹² 399 N.E.2d 371 (Ind. 1980).

¹³ *Id.* at 374 (Hunter, J., dissenting) (citing *Arnett v. Kennedy*, 416 U.S. 134, 207-08 (1974) (Marshall, J., dissenting)).

¹⁴ 144 Colo. 367, 356 P.2d 237 (1960). (This case involved the reorganization of a school district and whether uncollected tax revenues of the old district were distributable "properties and assets" within the meaning of the applicable statute.)

¹⁵ *Id.* at 371, 356 P.2d at 239 (quoting *Ludlow-Saylor Wire Co. v. Wollbrinck*, 275 Mo. 339, 352-53, 205 S.W. 196, 198 (1918)). The English philosopher-reformer Jeremy Bentham defined property as "nothing but a basis of expectation; the expectation of deriving certain advantages from a thing which we are said to possess, in consequence of the relation in which we stand towards it." J. BENTHAM, *THE THEORY OF LEGISLATION* 111-12 (R. Hildreth trans. 2d ed. 1871).

is that it gives insufficient weight to the fact that in the situation under discussion there is usually little other property to distribute to the wife as compensation for having supported her husband through his educational period. One law review writer notes that "[a] scarcity of other assets at the date of dissolution leaves the supporting spouse with little unless she is entitled to share in the [husband's] acquired increase in potential earning capacity."¹⁶ Consequently, a refusal to treat the husband's professional degree as a marital asset would seem to result in the unjust enrichment of the husband.¹⁷

2. *The value of a professional degree or license is too speculative for it to be capable of evaluation and division.*

This argument was advanced in *DeWitt v. DeWitt*¹⁸ and *Todd v. Todd*.¹⁹ In the former case the Supreme Court of Wisconsin reversed a judgment awarding \$14,316 to a wife for having supported her husband through college and law school. The court stated, "We cannot agree . . . that equity is served by attempting to place a dollar value on something so intangible as a professional education, degree, or license . . . Other approaches for valuing a professional degree have been suggested and attempted. We think they share the disadvantage of being wholly speculative."²⁰ In the *Todd* case, the court also declined to treat the husband's legal education as a form of divisible property, finding that "[a]t best, education is an intangible property right, the value of which, because of its character, cannot have a monetary value placed upon it for division between spouses."²¹

A frailty in this argument is that evaluating 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.²² 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.²³

¹⁶ Note, *Divorce After Professional School: Education and Future Earning Capacity May Be Marital Property*, 44 Mo. L. Rev. 329, 333 (1979).

¹⁷ In *Hubbard v. Hubbard*, 603 P.2d 747, 750 (Okla. 1979), where the wife, Delores, had helped support her husband while he attended college and medical school, the Supreme Court of Oklahoma held that Delores was entitled to a cash award for her contributions, saying that "[w]hile it is true that Dr. Hubbard's license to practice medicine is his to do with as he pleases, it is nonetheless also true that Ms. Hubbard has an equitable claim to repayment for the investment she made in his education and training. To hold otherwise would result in the unjust enrichment of Dr. Hubbard."

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

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

²⁰ 98 Wis. at 56-58, 296 N.W.2d at 767-68 (citations omitted).

²¹ 272 Cal. App. 2d at 791, 78 Cal. Rptr. at 135.

²² Regarding pain and mental distress, see E. KIONKA, TORTS IN A NUTSHELL 357-58 (1977); respecting loss of consortium, see W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 125 at 889-90 (4th ed. 1971).

²³ Note, *Graduate Degree Rejected as Marital Property Subject to Division Upon Divorce: In re Marriage of Graham*, 11 CONN. L. REV. 62, 71 (1978). See also *Graham v. Graham*,

Moreover, under the proposal advocated by this writer — to treat the husband's professional degree as a marital asset and to require the husband to make restitution to his wife for her contributions to its acquisition—there is actually no need to determine the husband's probable future professional earnings. One need only ascertain the amounts that wife contributed to husband's educational expenses (tuition, related fees, books, etc.) and require husband to reimburse wife for these outlays. In addition, the husband should be required to compensate his wife for one half the couple's living expenses incurred during his educational period. After all, he would have been compelled to pay the university dormitory and cafeteria (or some private counterparts) for these necessities had he been unmarried. Although some of these expenses may have to be estimated, the difficulty of computation certainly seems surmountable, and the possibility of abuse appears limited by the practical fact that a wife seeking reimbursement for her contributions will have to bear the burden of proof.

Two cases that followed this restitutional response are *DeLa Rosa v. DeLa Rosa*²⁴ and *Inman v. Inman*.²⁵ In the first case, the parties were married while the husband, Pedro, was attending college in California. The wife, Elena, worked full time and supported Pedro through the remainder of his undergraduate education and through two and one-half years of medical school. Pedro then sued for a dissolution. The Minnesota Supreme Court awarded \$11,400 to Elena as "restitutionary relief,"²⁶ saying:

It is this Court's view that the award should have been limited to the monies expended by respondent for petitioner's living expenses and any contributions made toward petitioner's direct educational costs. To achieve this result, we subtract from respondent's earnings her own living expenses. This has the effect of imputing one-half of the living expenses and all the educational expenses to the student spouse.²⁷

In *Inman* the couple was married prior to the entry of the husband, John, into dental school. The wife, Sue, taught school while John was in dental school and throughout most of the parties' seventeen-year marriage. Because of heavy indebtedness, the couple's net worth at the time of their divorce was "zero, give or take a few hundred dollars."²⁸ Although reversing, in part, a specific restitutional award to Sue and remanding for additional findings of fact, the Kentucky Court of Appeals held that it was proper

194 Colo. 429, 435, 574 P.2d 75, 79 (Colo. 1978) where dissenting Justice Carrigan notes that "[w]here a husband is killed, his widow is entitled to recover for loss of his future support damages based in part on the present value of his anticipated future earnings, which may be computed by taking into account probable future increases in his earning capacity."

²⁴ 309 N.W.2d 755 (Minn. 1981).

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

²⁶ 309 N.W.2d at 759.

²⁷ *Id.*

²⁸ 578 S.W.2d at 267.

for the trial court to award Sue restitution for her contributions to the attainment of John's dental degree. The court stated:

In most cases, we feel that the best measure of a spouse's interest in such a degree should be measured by his or her monetary investment in the degree . . .

Thus 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, as in the case of the Inmans', there is little or no marital property . . .

. . .

In summation, we affirm in principle the Meade Circuit Court's allowance of a professional degree (or the increased earning capacity that it represents) as marital property.²⁹

3. *To treat a professional degree as marital property subject to division or compensation unduly restricts the personal freedom of the husband because it compels the husband to pursue the career envisioned by the court which evaluated the degree.*

This argument was articulated in *DeWitt v. DeWitt*.³⁰

A person qualified by education for a given profession 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. The potential worth of the education may never be realized for these or many other reasons. 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. The potential for inequity to the failed professional or one who changes careers is at once apparent; his or her spouse will have been awarded a share of something which never existed in any real sense.³¹

A law review writer expressed the same point more tersely: "[i]mpingement upon personal freedom to utilize such a skill or professional ability speaks

²⁹ 578 S.W.2d at 269-70. *Accord* Mahoney v. Mahoney, 175 N.J. Super. 443, 419 A.2d 1149 (1980), where the wife, June, had been solely responsible for supporting the couple throughout a sixteen-month period during which the husband, Melvin, successfully pursued an M.B.A. The court ordered Melvin to "reimburse" June in the amount of \$5,000, saying:

The court holds that the education and degree obtained by plaintiff, under the circumstances of this case, constitute a property right subject to equitable offset upon the dissolution of the marriage. Some reasonable sum as a credit should be allowed by the court on behalf of the maintenance of the household and the support of plaintiff during the educational period.

Id. at 447, 419 A.2d at 1150-51.

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

³¹ *Id.* at 58, 296 N.W.2d at 768.

strongly to the exclusion of such an intangible property from division upon divorce."³²

As an objection to the response which treats the degree as marital property (evaluating the husband's professional degree and then awarding wife a substantial fraction of the dollar computation), this argument undeniably has force. But it clearly has no application as an objection to the restitutionary response, advocated by this writer. Whatever 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.

4. *Alimony is a better means of compensating the wife for her assistance in the attainment of the husband's professional education.*

Beyond doubt alimony is a popular method of repaying a wife who has aided her husband in obtaining a professional degree.³³ Two recent cases which adopted the alimony response are *Moss v. Moss*³⁴ and *Colvert v. Colvert*.³⁵ In the former case the wife, Susan, had worked as a school guidance counselor throughout the parties' seven-year marriage. During this period, the husband attended medical school and completed his internship. At the time of their divorce the couple had not accumulated any substantial assets. The Court of Appeals of Michigan affirmed a judgment awarding Susan \$15,000 alimony in gross, observing that "[i]t was impossible to award the wife a portion of the husband's medical degree, the only substantial asset acquired during coverture. An [alimony] award of \$15,000 fairly represents the wife's contribution to the acquisition of that asset, financial and otherwise."³⁶

In *Colvert*, where the husband was also a medical student, the wife, Cynthia, was the couple's principal breadwinner from 1971 until shortly before the parties' divorce, in January of 1976. At that time the husband was only six months away from attainment of his M.D. degree. The Supreme Court of Oklahoma affirmed a judgment awarding Cynthia \$35,000 in alimony payable in monthly installments, finding this a reasonable award. The court explained:

In the present case, prior to marital problems, the family unit made an investment, not in personal or real property, but in the husband's professional education as a doctor. That effort was enhanced and made

³² Note, *In re Marriage of Graham: Education Acquired During Marriage - for Richer or Poorer?* 12 J. MAR. J. PRAC. & PROC. 709, 728-29 (1979).

³³ See *supra* note 8 and cases listed.

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

³⁵ 568 P.2d 623 (Okla. 1977) *rev'd on other grounds*, Hubbard v. Hubbard, 603 P.2d 747, 752 (Okla. 1979).

³⁶ 80 Mich. App. at 695, 264 N.W.2d at 98.

possible by the wife becoming the principal support for the family through her own education, profession, and work. . . .³⁷

Two advantages to compensating the wife through alimony (rather than through any system of property division) are that a husband cannot escape alimony obligations by going through bankruptcy³⁸ and that alimony can be modified up or down as the husband's income rises or falls.³⁹ However, there are several offsetting disadvantages to a reliance on alimony as a means of compensating a wife who put her husband through professional school.

First, alimony is commonly based on need,⁴⁰ and a wife who has supported her spouse through college and/or professional school has normally demonstrated that she is capable of supporting herself.

Superficially, an award of permanent, periodic alimony would seem a plausible resolution. However, such awards are necessarily predicated upon a need on the part of the recipient spouse for support. . . .

. . . The wife in such a relationship, is ordinarily, by definition, capable of self-support: it was she who supported the family unit during the educational period.⁴¹

Secondly, in assessing alimony the courts are usually expected to give weight to the duration of the marriage,⁴² and in the situation under discussion, the marriage typically has been relatively brief.

Thirdly, in awarding alimony the courts traditionally have considered the standard of living enjoyed by the couple during their marriage,⁴³ and in the situation in question, that standard of living was usually relatively spartan.

Fourthly, unlike a division of property, alimony is never a matter of entitlement, but is instead discretionary with the judge or referee,⁴⁴ and

³⁷ 568 P.2d at 626.

³⁸ Erickson, *supra* note 1, at 965.

³⁹ "As a safeguard, modification of the [alimony] award is available should extenuating circumstances arise, a feature unavailable to the division of property." Note, *supra* note 32, at 721.

⁴⁰ H. CLARK, *THE LAW OF DOMESTIC RELATIONS* 444 (1968).

⁴¹ Greene, *supra* note 3, at 294.

⁴² "[A] generous alimony award following a short-lived marriage is disfavored." Comment, *Horstmann v. Horstmann: Present Right to Practice a Profession as Marital Property*, 56 DEN. L.J. 677, 683 (1979). An illustrative statute is OHIO REV. CODE ANN. § 3105.18 (B) (Page 1980), which provides, in part: "In determining whether alimony is necessary, and determining the nature, amount, and manner of payment of alimony, the court shall consider all relevant factors, including . . . 5. The duration of the marriage. . . ."

⁴³ "[C]ourts also base awards of alimony upon such considerations as . . . their standard of living; . . . Clark, *supra* note 40, at 446. OHIO REV. CODE ANN. § 3105.18(B) (Page 1980) states, in part: "In determining whether alimony is necessary, . . . the court shall consider . . . : 7. The standard of living of the parties established during the marriage. . . ."

⁴⁴ "Alimony . . . lies within the discretion of the trial court; the 'spouse should not be dependent on the discretion of the court . . . to provide her with the equivalent of what should be hers as a matter of absolute right.'" *In re Marriage of Brown*, 15 Cal. 3d 838, 848,

in practice only about fourteen percent of divorcing wives are awarded any alimony.⁴⁵

Finally, alimony payment obligations generally terminate upon the wife's remarriage or death,⁴⁶ whereas property division liabilities do not.⁴⁷

5. *To treat a professional degree as a divisible or compensable marital asset is, in actuality, to make a property division of the husband's post-divorce earnings, inasmuch as the degree's only value lies in the earning potential conferred by it.*

This argument was advanced in *In re Marriage of Aufmuth*⁴⁸ and *Frausto v. Frausto*.⁴⁹ In *Aufmuth*, where the wife had helped put her husband through Stanford University School of Law, the California Court of Appeals, First District, held that the husband's legal education was not marital property, reasoning:

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. . . . 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.⁵⁰

And in *Frausto*, where the wife, Maria, a schoolteacher, had supported the couple while her husband, Manuel, had gone through medical school, the Texas Court of Civil Appeals reversed a lower court judgment awarding Maria \$20,000 as reimbursement for her share of the expenses of Manuel's education, commenting:

We agree with the jurisdictions that have held a professional educational degree is not divisible upon divorce.

. . .

. . . If the trial court awards monthly payments to be made in the future by one spouse to the other, such payments must be referable to property in existence at the time of marriage.

An award of future monthly payments which is specifically referable to an education received by spouses during marriage, as we have

126 Cal. Rptr. 633, 639 (1976) (quoting *In re Marriage of Peterson*, 41 Cal. App. 3d 642, 651, 115 Cal. Rptr. 184, 191 (1974)).

⁴⁵ BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, CURRENT POPULATION REPORTS SPECIAL STUDIES SERIES P-23, NO. 112, CHILD SUPPORT AND ALIMONY: 1978, 1 (Sept. 1981).

⁴⁶ H. BASS & M. REIN, DIVORCE OR MARRIAGE - A LEGAL GUIDE 125 (1976).

⁴⁷ Note, *supra* note 16, at 333.

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

⁴⁹ 611 S.W.2d 656 (Tex. 1981).

⁵⁰ 89 Cal. App. 3d at 461, 152 Cal. Rptr. at 678.

in the case before us, violates the rules and authorities hereinbefore set forth. . . .⁵¹

This argument, like the third argument⁵² discussed, undoubtedly has merit when raised as an objection to treating the husband's degree as marital property (evaluating husband's professional degree and then awarding wife a sizable fraction of the computed sum), but it has little force when asserted as an objection to the restitutional remedy recommended by this writer. Had the wife formally loaned her husband the money to meet his expenses, receiving a duly executed promissory note in return, she would be entitled to collect on her note, notwithstanding a subsequent divorce regardless of whether the divorce occurred in a community property, equitable distribution, or strict common law jurisdiction.⁵³ 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 for her contributions to her husband's professional education should not rest on the technicality of whether she had, at the outset, procured from her husband a formally executed promissory note.

III. ARGUMENTS FOR TREATING A PROFESSIONAL DEGREE AS A FORM OF MARITAL PROPERTY

In addition to the obvious goal of desiring to prevent unjust enrichment,⁵⁴ there are three arguments for considering a professional degree or license to be a marital asset.

First, the wife of a professional school student commonly — and reasonably — views her efforts as an investment leading to future economic rewards for both parties, and it seems unfair to allow a divorce to render valueless this investment. This argument was well expressed in *Prosser v. Prosser*,⁵⁵ where the wife, Naomi, had worked full time to provide support while her husband, Ernest, attended the University of Nebraska. Shortly after Ernest's graduation the couple was divorced. The Supreme Court of Nebraska awarded Naomi \$6,500, stating:

It is clear that plaintiff [Naomi] made a large investment in defendant's future, with the thought no doubt that it was of joint interest to the

⁵¹ 611 S.W.2d at 659 (citations omitted).

⁵² See text accompanying notes 30-32 *supra*.

⁵³ See *supra* note 4. It is assumed, of course, that the wife does not execute a separation agreement (incorporated in the divorce decree) in which she surrenders her right to collect on the note. "The Married Women's Property Acts ordinarily provide that the married woman's property remains her own notwithstanding the marriage. . . . By far the greater number of states give broad power to the spouses to contract with each other, very often by specific statutory provision." Clark, *supra* note 40, at 224 & 226-27.

⁵⁴ "To ignore the contributions of the sacrificing spouse would be to work an injustice, an unfair advantage to the spouse who has gained the education and degree without obligation. There would be an unjust enrichment of the educated spouse." Mahoney v. Mahoney, 175 N.J. Super. 443, 446, 419 A.2d 1149, 1150 (1980).

⁵⁵ 156 Neb. 629, 57 N.W.2d 173 (1953).

fuere of both. . . . We point out that this wife had a right to expect that in years to come she would share in the benefits derived from the training and ability of the defendant, which she literally helped to bring about.⁵⁶

Secondly, if the contributing wife is not in some manner compensated for the value of her husband's professional degree, then he is actually being rewarded for seeking (or causing) a divorce shortly after graduation in that had he waited a few years before ending the marriage, the couple normally would have accumulated substantial assets, some of which the divorce court would have distributed to the wife.⁵⁷

And thirdly, it seems reasonable to analogize the situation of a young wife who supports her husband through professional school to that of a person who makes a gift to his fiancée in contemplation of marriage. It is well settled that a gift made in direct contemplation of marriage is recoverable if the donee breaks off the engagement.⁵⁸ The rationale is that a fundamental condition of the gift (marriage) has failed to materialize.⁵⁹ Similarly, a wife's efforts in putting her husband through professional school might well be regarded as a conditional gift — the unstated condition being that the marriage will last long enough for the wife to derive some economic benefits from her spouse's advanced education. Since an early divorce has prevented this condition from being satisfied, the wife should be allowed restitution for the value of her contributions.

IV. CONCLUSION

When a divorce occurs shortly after a wife has supported her husband through college and/or professional school, simple justice demands that she be reasonably compensated for her contributions. To award her nothing but a portion of the couple's typically scanty tangible assets will normally fail to adequately reimburse her. At the other extreme, to evaluate and "divide" the husband's degree (*i.e.*, to project husband's professional earnings

⁵⁶ *Id.* at 632, 57 N.W.2d at 175. The \$6,500 granted Naomi was in the form of alimony, however. See also *Hubbard v. Hubbard*, 603 P.2d 747 (Okla. 1979), where the wife, Delores, had helped put her husband through college, medical school, and internship. The Supreme Court of Oklahoma held that Delores was entitled to a cash award in an amount sufficient to compensate her for her investment in her husband's education, reasoning that "Ms. Hubbard's sacrifices in Mr., now Dr., Hubbard's behalf were made with the anticipation that she and the family would ultimately benefit from the increased earning potential that would accompany her husband's license to practice. . . ." *Id.* at 751. "To avoid unnecessary confusion and speculation, we stress that we have done nothing in this action but allow Ms. Hubbard a return on her investment. . . ." *Id.* at 752.

⁵⁷ "Had the parties remained married for a period after the husband's graduation, substantial marital property would have been accumulated. . . . The classic situation . . . where no marital property has been accumulated . . . rewards the husband who petitions for divorce immediately after graduation." Note, *Educational Degree Does Not Constitute Marital Property Subject to Division Between Spouses Upon Divorce*, *Graham v. Graham*, 194 Colo. 429, 574 P.2d 75 (1978), 13 TULSA LJ. 646, 651 (1978).

⁵⁸ Clark, *supra* note 40, at 22-23.

⁵⁹ *Id.* at 22.

over his probable working life and then to award the wife a division of the calculated total) is to rely too heavily on speculation and to unduly burden the husband. To reimburse only by means of an alimony award is to exclude those wives whose situations are not appropriate for alimony. The fairest solution is to acknowledge that the husband's degree is a marital asset and to require him to repay his wife for her direct and reasonably related contributions to his professional education.