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TREATMENT OF A PROFESSIONAL DEGREE OR LICENSE IN A MARITAL DISSOLUTION

Ron Nelson

I. INTRODUCTION

Marital dissolutions often involve heated disputes over the division of tangible property. Fortunately, the Montana Legislature has provided a scheme for the division of tangible property.¹ The problems involved in a marital dissolution increase significantly when the dissolution occurs shortly after one spouse obtains a professional degree or license. The Washington Supreme Court has aptly described the typical situation:

A husband and wife make the mutual decision that one of them will support the other while he or she obtains a professional degree. The educational years will be lean ones for the family not only because of the heavy educational expenses, but also because the student spouse will be able to earn little or nothing. Moreover, the supporting spouse may be called upon to postpone his or her own education or to forgo promotions and other valuable career opportunities in order to find a job near the student spouse's school. These sacrifices are made in the mutual expectation that the family will enjoy a higher standard of living once the degree is obtained. But dissolution of the marriage intervenes. Because the family spent most of its financial resources on the degree, there may be few or no assets to be distributed. The student spouse has the degree and the increased earning potential that it represents, while the supporting spouse has only a dissolution decree.²

The inherent equitable, legal, and practical problems involved in this typical situation are obvious. Consequently, "[o]ne of the most intensely debated issues in matrimonial law today is whether a professional degree or license is property subject to equitable distribution upon divorce."³ The Montana Supreme Court has not squarely addressed this issue. This comment surveys the positions taken by other jurisdictions with respect to the treatment of a pro-

1. Montana has enacted the Uniform Marriage and Divorce Act which, *inter alia*, provides for the division of property upon dissolution. See MONT. CODE ANN. §§ 40-4-101 to 40-4-225 (1985).

2. Washburn v. Washburn, 101 Wash. 2d 168, 173-74, 677 P.2d 152, 155 (1984).

3. Note, *Matrimonial Law—Equitable Distribution—Nature of a Professional Degree—Traditional Alimony Can be Restructured to Provide Reimbursement to a Spouse Who Supports His or Her Partner in the Quest for an Advanced Degree*, 14 SETON HALL 437 (1984).

fessional degree or license in a marital dissolution,⁴ and discusses how present law in Montana may influence the Montana Supreme Court.

II. OTHER JURISDICTIONS

Although a large number of jurisdictions have addressed the treatment of a professional degree or license in a marital dissolution, there is no uniform rule.⁵ Where the question is one of first impression, supporting spouses have typically argued that a professional degree or license is property subject to equitable distribution. Courts rarely accept this argument. Only a few opinions and notable dissents have adopted this position. On the other end of the scale, only a few opinions completely disregard the existence of a spouse's professional degree or license. The majority of cases hold that a professional degree or license is not property, but provide for some consideration of the degree or license.

A. Professional Degree or License as Property

1. *The Minority View: Existence of Property Rights in a Professional Degree or License*

The obvious value of a professional degree or license is the enhanced earning capacity which attaches to the degree or license.⁶ It is this aspect of a professional degree or license which supporting spouses seek to capture by characterizing a degree or license as "property." As mentioned above, only a few cases and dissenting opinions characterize a professional degree or license as "property."⁷ Although these decisions clearly represent the minority po-

4. Several states now have statutes which specifically address the treatment of a professional degree or license in a marital dissolution. Consequently, some of the case law mentioned in this article may be superceded by statute. Because Montana does not have a similar provision (and none is on the legislative horizon), this article will focus solely on the judicial development of rules.

5. Comment, *Equitable Interest in Enhanced Earning Capacity: The Treatment of a Professional Degree at Dissolution*, 60 WASH. L. REV. 431 (1984). Approximately 70 cases have involved a determination of how to treat a professional degree in a marital dissolution. *Id.* at 432 n.2.

6. See, e.g., *In re Marriage of Aufmuth*, 89 Cal. App. 3d 446, 461, 152 Cal. Rptr. 668, 678 (1979): "The value of a legal education lies in the potential for increase in the future earning capacity of the acquiring spouse made possible by the law degree and innumerable other factors and conditions which contribute to the development of a successful law practice."

7. See *In re Marriage of Graham*, 194 Colo. 429, 574 P.2d 75 (1978) (Corrigan, J., dissenting); *In re Marriage of Hortsmann*, 263 N.W.2d 885 (Iowa 1978); *Inman v. Inman*, 578 S.W.2d 266 (Ky. Ct. App. 1979); *Hubbard v. Hubbard*, 603 P.2d 747 (Okla. 1979); *Washburn*, 101 Wash. 2d 168, 677 P.2d 152 (Rossellini, J., dissenting).

sition, they make strong arguments for characterization of a professional degree or license as property.

An early Ohio Court of Appeals case provided the basis for subsequent cases to hold that a professional degree or license may be considered property. In *Daniels v. Daniels*,⁸ the husband had acquired a medical degree and license during the couple's marriage. At the time of dissolution, the couple possessed relatively few tangible assets. In fact, the court noted that the principal marital asset was the husband's education.⁹ Consequently, the trial court based its determination of alimony on the husband's future earning capacity. Upholding the trial court's determination, the Ohio Court of Appeals held, "[T]he right to practice medicine, being in the nature of a franchise, constitutes property which the trial court had a right to consider in making the award of alimony."¹⁰ Although at the time of *Daniels* Ohio had a statute which specifically provided for consideration of earning capacity in determining the amount of alimony granted,¹¹ *Daniels* provided authority for courts to hold that a professional degree or license may be characterized as property subject to division in a marital dissolution.

In *In re Marriage of Hortsmann*,¹² the wife sought to characterize the husband's law degree as property. The Iowa Supreme Court did not expressly hold that a professional degree or license is property subject to division upon dissolution. Instead, the court held, "[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."¹³ Thus, the trial court properly considered the student spouse's future earning capacity in determining a division of marital property or an award of alimony.¹⁴ *Hortsmann*, nevertheless, is often cited for its holding that a degree or license constitutes property.

Perhaps the strongest authority for characterization of a professional degree or license as property is found in the dissenting

8. 20 Ohio App. 2d 458, 185 N.E.2d 773 (1961).

9. *Id.* at ____, 185 N.E.2d at 775.

10. *Id.*

11. OHIO REV. CODE ANN. § 3105.18 (Page 1980) provides: "The court of common pleas may allow alimony as it deems reasonable to either party, having due regard to property which came to either by their marriage, the earning capacity of either and the value of real and personal estate of either, at the time of the decree."

12. *In re Marriage of Hortsmann*, 263 N.W.2d 885 (Iowa 1978).

13. *Id.* at 891.

14. *Id.*

opinion of *In re Marriage of Graham*,¹⁵ the most frequently cited case for the proposition that a degree or license does not constitute property.¹⁶ In *Graham*, the parties sought a joint dissolution after six years of marriage. During the marriage the husband completed his undergraduate degree and obtained an M.B.A. While the husband completed his education, the wife was the principal wage earner and took care of most of the family chores. At the time of the dissolution proceeding, the couple had very few tangible assets. Mrs. Graham claimed that the court should characterize her husband's professional degree as property and divide it accordingly. The trial court agreed with the wife and awarded her a lump sum representing the value of her share of the degree.¹⁷ The Colorado Court of Appeals reversed, holding that a degree is not property, but that it may be considered in determining maintenance or an equitable division of property.¹⁸

In an en banc hearing, the Colorado Supreme Court, by a 4-3 vote, held that the husband's professional degree could not be characterized as property.¹⁹ In the dissenting opinion, Justice Carrigan noted, "As a matter of economic reality the most valuable asset acquired by either party during the six-year marriage was the husband's increased earning capacity."²⁰ He then redefined the issue: "The issue . . . is whether traditional, narrow concepts of what constitutes 'property' render the courts impotent to provide a remedy for an obvious injustice. In cases such as this, equity demands that courts seek extraordinary remedies to prevent extraordinary injustice."²¹ Justice Carrigan noted that Colorado has long held that future earning capacity may be considered in determining property division and maintenance awards.²²

Like the court in *Hortsmann*, the minority in *Graham* held that it is not the degree or license, but the enhanced earning capacity, which constitutes property.²³ The minority then analogized

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

16. The majority's reasoning in holding that a professional degree or license does not constitute property will be discussed *infra*.

17. The trial court determined the value of the husband's degree to be \$82,836 and awarded the wife \$33,134 payable in monthly installments of \$100.

18. *Graham*, 194 Colo. at 430, 574 P.2d at 75.

19. *Id.* at 432, 574 P.2d 77 (professional degree has none of the traditional attributes of property).

20. *Id.* at 434, 574 P.2d 78 (Carrigan, J., dissenting).

21. *Id.*

22. *Id.* The minority observed that the wife did not seek maintenance and presumably would not be eligible for maintenance because she was capable of self-support. *Id.* at 435, 574 P.2d 78-79 (Carrigan, J., dissenting).

23. *Id.*

the treatment of future earning capacity in other areas of the law. It noted that in both tort and wrongful death actions, property rights exist in an individual's future earning capacity.²⁴ Thus, "[t]he day before the divorce the wife had a legally recognized interest in her husband's earning capacity."²⁵ Yet, upon dissolution of the marriage, the nondegree spouse's interest in this asset disappears.

Relying on the *Graham* dissent, the Oklahoma Supreme Court also characterized a spouse's future earning capacity, derived from the attainment of a professional degree or license during the course of a marriage, as a marital asset subject to equitable division. In *Hubbard v. Hubbard*,²⁶ the Oklahoma court noted:

While it is true that Dr. Hubbard's license to practice medicine is his own 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. He would leave the marriage with an earning capacity increased by \$250,000.00 which was obtained in substantial measure through the efforts and sacrifices of his wife. She, on the other hand, would leave the marriage without either a return on her investment or an earning capacity similarly increased through joint efforts.²⁷

Recognizing that it would join a minority of jurisdictions, the court chose to characterize the enhanced earning capacity of a spouse's professional degree or license as marital property.²⁸

In addition to the above cases, two other opinions adopting the minority position are noteworthy. In *Inman v. Inman*,²⁹ the Kentucky Court of Appeals held that property rights may exist in a professional degree or license. Like *Hortsmann* and the *Graham* dissent, courts uniformly cite *Inman* as representative of the minority view. The dissenting opinion from a recent Washington case, *Washburn v. Washburn*,³⁰ may ultimately prove to be the most persuasive authority in support of the minority position. Justice Rosellini, in his dissent, stated that he "would characterize the professional education as a marital asset in the context of in-

24. *Id.*

25. *Id.*

26. 603 P.2d 747, 751 (Okla. 1979).

27. *Id.* at 750-51.

28. *Id.* at 751.

29. 578 S.W.2d 266, 270 (Ky. Ct. App. 1979).

30. 101 Wash. 2d 168, 677 P.2d 152 (Rosellini, J., dissenting).

creased earning capacity subject to distribution.”³¹ He argued that other accepted positions fail to take into account the supporting spouse’s expectation of future economic benefit and that the majority view overstates the conceptual and practical problems of valuation.³²

2. *The Minority View: Valuation*

Once a court recognizes property rights in a professional degree or license, it must choose a method of valuation. Although several methods have been suggested, the minority jurisdictions have, for the most part, followed the method adopted by the Kentucky Court of Appeals in *Inman*. Under this method, the supporting spouse receives an amount equal to “the amount spent for direct support and school expenses during the period of education, plus reasonable interest and adjustments for inflation.”³³ The minority view treats the supporting spouse’s interest in the student spouse’s degree or license as an investment which the supporting spouse may recapture along with inflationary growth and a reasonable return.

Addressing the problem of valuation, the dissent in *Washburn* recommended a method of valuation similar to that used in wrongful death actions. Although Justice Rosellini looked to the nonstudent spouse’s expectation in contributing to the student spouse’s degree, he did not propose to rely on a quantitative determination of the nonstudent spouse’s contribution to the professional degree. Instead, he proposed that the value of the degree or license be determined by comparing “the student spouse’s earning capacity at the time of marriage with that at the time of dissolution or permanent separation.”³⁴ Justice Rosellini noted that this method of valuation is common, and it presents problems with which the courts have already dealt. “Because this method of calculation is akin to the method used to ascertain damages for loss of earnings in a tort or wrongful death action, a body of knowledge already exists in the field of economics to make this type of determination.”³⁵

31. *Id.* at 190, 677 P.2d at 164.

32. *Id.* at 191, 677 P.2d at 165.

33. *Inman*, 578 S.W.2d at 269.

34. *Washburn*, 101 Wash. 2d at 192, 677 P.2d at 165 (Rosellini, J., dissenting). Justice Rosellini also noted that with the passage of time after the degree is obtained, the nonstudent spouse realizes increasing benefit from the professional degree or license. This realization of benefit, he argued, should be taken into account in determining the nonstudent spouse’s share of the professional degree or license. *Id.* at 193, 677 P.2d at 165.

35. *Id.* at 193, 677 P.2d at 165-66.

B. *The Majority View: Professional Degree or License Is Not Property*

The courts generally base their refusal to characterize a spouse's professional degree or license as property on a combination of factors. First, by its nature, a professional degree or license is uniquely personal. Thus, it lacks one of the fundamental characteristics of property—the ability to separate ownership from the owner. Although a spouse may provide financial and emotional support, the degree is largely the result of the student spouse's efforts and background. The student spouse may sell or transfer the product of his degree or license. Yet, he cannot sell or transfer his education or the consequent enhanced earning capacity. Second, most courts are reluctant to treat the marital relationship as a business venture. The majority of courts argue that characterizing the professional degree or license as property would reduce the marriage to an investment in which the nonstudent spouse invests in the student spouse's education. Finally, the courts also emphasize the speculative nature of a professional degree or license. It is, at best, difficult to fix the future value of a professional degree or license. Further, if a court fixes the value of the student spouse's degree or license before the benefits of the degree or license are realized, the student spouse could be forced to pay for an asset that may never exist.

Although most courts refuse to characterize a professional degree or license as property, typically, they will consider the supporting spouse's contribution to the student spouse's attainment of his degree or license. Recognizing that marital dissolution is an equitable proceeding, the courts have fashioned remedies to prevent clear inequities. Thus, while an attempt to characterize a professional degree or license as property may fail, the supporting spouse has other remedies available.

*In re Marriage of Graham*³⁶ is the leading case following the majority view that a professional degree or license does not constitute marital property. In *Graham*, the wife supported the husband and contributed substantially to his education throughout most of the marriage.³⁷ At the time of the dissolution, the parties had no significant marital assets.³⁸ Thus, the wife urged the trial court to

36. 194 Colo. 429, 574 P.2d 75.

37. The length of the marriage was six years. For approximately three and one-half years of the marriage, the wife worked as an airline stewardess while the husband obtained an engineering degree and eventually an M.B.A. Shortly after the husband obtained his M.B.A., the parties filed a joint petition for dissolution. *Id.* at 431, 574 P.2d at 76.

38. *Id.*

characterize her husband's professional degree as property which the court should distribute. The trial court agreed, holding that "an education obtained by one spouse during a marriage is jointly-owned property to which the other spouse has a property right."³⁹

On appeal, the Colorado Supreme Court noted that the definition of property was intended to be broad. "[I]t 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."⁴⁰ The court, however, also noted that there must be limits on what may be included in the definition of property.⁴¹ The court refused to extend the limits of the definition of property to include a professional degree.

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 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.⁴²

Although the court held that the definition of property does not include a professional degree or license, it did provide the supporting spouse a remedy. In dicta, the court noted that the trial court could consider a spouse's contribution to the other spouse's education in determining the property division or the amount of maintenance.⁴³

The New Jersey Supreme Court has expanded the reasoning of *Graham*. In *Mahoney v. Mahoney*,⁴⁴ the court noted that its legislature also intended the term "property" to be broadly defined.⁴⁵ Yet, the definition was not so broad as to include a professional degree or license.⁴⁶ Although the court cited language from *Graham*, its major emphasis was on the speculative nature of a profes-

39. *Id.*

40. *Id.* at 432, 574 P.2d at 76 (quoting *Las Animas County High School Dist. v. Raye*, 144 Colo. 367, 356 P.2d 237 (1960)).

41. 194 Colo. at 432, 574 P.2d at 76.

42. *Id.*, 574 P.2d at 77.

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

44. 91 N.J. 488, 453 A.2d 527 (1982).

45. *Id.* at 495, 453 A.2d at 531.

46. *Id.* at 496-97, 453 A.2d at 532.

sional degree. The court held that distribution of a professional degree would require distribution of property that the student spouse may never acquire.⁴⁷ In addition, it would involve distribution of assets which would be acquired after termination of the marriage rather than during marriage as required by statute.⁴⁸ Because the value of a professional degree is so speculative and so personal in nature the court concluded that treatment of the degree as property would be unfair to the student spouse.⁴⁹ The court expressed reluctance to treat the marriage as a "business arrangement in which the parties keep track of debits and credits, their accounts to be settled upon divorce."⁵⁰

Similarly, the court in *Mahoney* recognized that the courts must give some consideration to a spouse's contribution to the student spouse's professional degree. "Marriage should not be a free ticket to professional education and training without subsequent obligations."⁵¹ Thus, the court held the equities of each case must be examined and "where a spouse has received from his or her partner financial contributions used in obtaining a professional degree or license with the expectation of deriving material benefits for both marriage partners, that spouse may be called upon to reimburse the supporting spouse for the amount of contributions received."⁵²

As an alternative theory, some supporting spouses have argued that a remedy should be predicated on unjust enrichment.⁵³ This theory has not met with wide acceptance. The theory of unjust enrichment carries with it notions of fault. At least one court has stated that it will not "invite the introduction of evidence as to who was at fault in the termination of the marriage before the fruits of the degree could be realized."⁵⁴

The Washington Supreme Court has provided the most comprehensive treatment of a professional degree in a dissolution proceeding. In *Washburn*, the court held that the provisions of Washington's Dissolution of Marriage Act⁵⁵ provide sufficient flexibility to compensate the supporting spouse for contributions to the other

47. *Id.* at 497, 453 A.2d at 532.

48. *Id.*

49. *Id.* at 500, 453 A.2d at 533-34.

50. *Id.*, 453 A.2d at 533.

51. *Id.* at 503, 453 A.2d at 535.

52. *Id.* at 505, 453 A.2d at 536.

53. *See, e.g., Dela Rosa v. Dela Rosa*, 309 N.W.2d 755 (Minn. 1981); *Hubbard*, 603 P.2d 747.

54. *Washburn*, 101 Wash. 2d at 176, 677 P.2d at 157.

55. WASH. REV. CODE ANN. §§ 26.09.011-.09.902 (1986).

spouse's education without defining a professional degree or license as property.⁵⁶ The court held:

When a person supports a spouse through professional school in the mutual expectation of future financial benefit to the community, but the marriage ends before that benefit can be realized, that circumstance is a "relevant factor" which must be considered in making a fair and equitable division of property and liabilities pursuant to RCW 26.09.080, or a just award of maintenance pursuant to RCW 26.09.090.⁵⁷

The court did not provide a precise formula for dividing property or awarding maintenance. Instead, it left this determination to the discretion of the trial courts.⁵⁸ The court, however, directed the

56. *Washburn*, 101 Wash. 2d at 1767, 677 P.2d at 157.

57. *Id.* at 178, 677 P.2d at 158. WASH. REV. CODE ANN. § 26.09.080 (1986) provides:

In a proceeding for dissolution of the marriage, legal separation, declaration of invalidity, or in a proceeding for disposition of property following dissolution of the marriage by a court which lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the court shall, without regard to marital misconduct, make such disposition of the property and the liabilities of the parties, either community or separate, as shall appear just and equitable after considering all relevant factors including, but not limited to:

- (1) The nature and extent of the community property;
- (2) The nature and extent of the separate property;
- (3) The duration of the marriage; and

(4) The economic circumstances of each spouse at the time the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to a spouse having custody of any children.

WASH. REV. CODE ANN. § 26.09.090 (1986) provides:

(1) In a proceeding for dissolution of marriage, legal separation, declaration of invalidity, or in a proceeding for maintenance following dissolution of the marriage by a court which lacked personal jurisdiction over the absent spouse, the court may grant a maintenance order for either spouse. The maintenance order shall be in such amounts and for such periods of time as the court deems just, without regard to marital misconduct, after considering all relevant factors including but not limited to:

(a) The financial resources of the party seeking maintenance, including separate or community property apportioned to him, and his ability to meet his needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party as custodian;

(b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find employment appropriate to his skill, interests, style of life, and other attendant circumstances;

(c) The standard of living established during the marriage;

(d) The duration of the marriage;

(e) The age, physical and emotional condition, and financial obligations of the spouse seeking maintenance; and

(f) The ability of the spouse from whom maintenance is sought to meet his needs and financial obligations while meeting those of the spouse seeking maintenance.

58. *Washburn*, 101 Wash. 2d at 179, 677 P.2d at 158.

trial courts to consider the following four factors in exercising their discretion:

(1) The amount of community funds expended for direct educational costs, including tuition, fees, books, and supplies

(2) The amount which the community would have earned had the efforts of the student spouse not been directed toward his or her studies

(3) Any educational or career opportunities which the supporting spouse gave up in order to obtain sufficiently lucrative employment. . . .

(4) The future earnings prospects of each spouse, including the earning potential of the student spouse with the professional degree.⁵⁹

These factors take into account both the supporting spouse's contribution to the student spouse's education and the benefits which the supporting spouse expected to derive from that contribution.

III. TREATMENT OF THE PROFESSIONAL DEGREE OR LICENSE IN MONTANA

In Montana, as in most jurisdictions, the division of property in a marital dissolution rests on principles of equity.⁶⁰ Consequently, the trial courts have much discretion in determining the division of the marital estate.⁶¹ Although the Montana Supreme Court has never considered whether a professional degree or license should be included in the marital estate, it has held that similar interests are property subject to division upon dissolution.

Both the goodwill of a business and a retirement or pension plan have characteristics similar to a professional degree or license. The Montana Supreme Court has held that both of these interests are property subject to division upon the dissolution of a marriage.⁶² The treatment of these two interests as property supports the argument that a professional degree or license should be characterized as property.

59. *Id.* at 179-80, 677 P.2d at 159. The court noted that one means of compensation which might be employed would be to simply grant the supporting spouse "an equal educational opportunity at the student spouse's expense." *Id.* at 181 n.4, 677 P.2d at 159 n.4.

60. MONT. CODE ANN. § 40-4-202 (1985).

61. *In re Marriage of Martens*, ___ Mont. ___, ___, 637 P.2d 523, 526 (1981). "Section 40-4-202 is flexible and it vests a good deal of discretion in the District Court We have stated, before and after the adoption of the statute, that each case must be looked at individually, with an eye to its unique circumstances."

62. *Holston v. Holston*, ___ Mont. ___, 668 P.2d 1048 (1983); *In re Marriage of Laster*, 197 Mont. 470, 643 P.2d 597 (1982); *Kis v. Kis*, 196 Mont. 296, 639 P.2d 1151 (1982).

The Montana Supreme Court has not provided extensive reasoning in holding that a retirement or pension plan is property subject to division upon dissolution of the marital relationship. The court has simply stated that it is property subject to division.⁶³ Like a professional degree or license, a retirement or pension plan typically cannot be transferred to third parties. In addition, a retirement or pension plan represents the right to future income. However, unlike a professional degree or license, a retirement plan is not subject to the degree of speculation that is characteristic of a professional degree or license. Further, the right to specified future benefits from a retirement plan vests at some point in time, while the right to future benefits from a professional degree or license never vests. Realization of the benefits of a professional degree or license depends on the continued efforts of the holder. Simply stated, no exact point in time can be identified as the moment when the holder of a professional degree or license is guaranteed that a specified economic benefit will result from the professional degree or license.⁶⁴

In a recent decision, the Montana Supreme Court found the goodwill of an anesthesiology practice to be property subject to division in a marital dissolution.⁶⁵ The goodwill of a professional practice resembles a professional degree or license in that both are very personal, difficult to value, and usually not readily marketable. In *Hull v. Hull*, the court recognized the difficulties involved in valuing good will, but did not consider that determinative.⁶⁶ The court relied entirely on the Washington Supreme Court's reasoning in *In re Marriage of Fleege*.⁶⁷ In *Fleege*, the court held that difficulty of valuation is not a sufficient reason to hold that the goodwill of a professional practice does not constitute marital property.⁶⁸ Relying on the language of Montana Code Annotated section 40-4-202, which requires a consideration of a multitude of factors, including "the opportunity of the parties for future acquisition of capital assets and income,"⁶⁹ the Montana Supreme Court

63. See *Hull v. Hull*, ___ Mont. ___, 712 P.2d 1317 (1986) (goodwill of a business is a marital asset); *Holston*, ___ Mont. ___, 668 P.2d 1048 (retirement plan is a marital asset); *Laster*, 197 Mont. 410, 643 P.2d 597 (retirement plan is a marital asset); *Kis*, 196 Mont. 296, 639 P.2d 1151 (retirement plan is a marital asset).

64. Compare *Kis*, 196 Mont. at 300, 639 P.2d at 1153; *Holston*, ___ Mont. at ___, 668 P.2d at 1050.

65. *Hull*, ___ Mont. ___, 712 P.2d 1317.

66. *Id.* at ___, 712 P.2d at 1321.

67. 91 Wash. 2d 324, 588 P.2d 1136 (1979).

68. *Id.* at 330, 588 P.2d at 1140.

69. MONT. CODE ANN. § 40-4-202(1) (1985).

adopted the reasoning of *Fleege*.⁷⁰

Hull could be very persuasive in arguing that a professional degree or license should be considered marital property. The goodwill of a professional practice is much more analogous to a professional degree or license than a retirement or pension plan. Thus, the Montana Supreme Court has moved very close to the position that a professional degree or license is marital property.

The major factor which may undercut the persuasive authority of *Hull* is that *Hull* relied on the reasoning of *Fleege*. The Washington Supreme Court decided *Fleege* before it decided *Washburn*. The court in *Washburn* did not consider *Fleege*. Yet it adopted a position with regard to a professional degree or license which is contrary to the court's position with regard to the goodwill of a professional practice. Thus, the persuasive authority of *Hull* is undercut to some extent.

The Montana Supreme Court's treatment of a vested remainder interest may provide additional insight into the position the court will take on the issue. In *In re Marriage of Hill*,⁷¹ the court addressed the issue of whether a remainder interest should be included in the marital estate. In *Hill* the husband argued that his remainder interest in certain real estate should not be included in the marital estate because it was subject to divestment.⁷² The court held that "[w]hile the right to possession of a vested future interest is postponed, it is still a property interest that can be distributed."⁷³ "[S]ince such vested interest [can] be sold or otherwise alienated, transferred or mortgaged, the property [has] a present value and should be included [in the marital estate]."⁷⁴ The court's reasoning does not condition its holding on the presence of the above qualities in a remainder interest, but it does indicate that those qualities were persuasive. Thus, the absence of those qualities in a professional degree may be sufficient for the court to hold that a professional degree is not marital property.

Ultimately, the Montana Supreme Court must decide if a sufficient policy justification exists for including a professional degree or license in the marital estate. The most compelling justification for such a position is simple fairness. Most people would find it unfair for one spouse to support a student spouse as he obtains a professional degree or license and then be denied any of the ex-

70. *Hull*, ___ Mont. at ___, 712 P.2d at 1321.

71. 197 Mont. 451, 643 P.2d 582 (1982).

72. *Id.* at 457, 643 P.2d at 586.

73. *Id.* at 459, 643 P.2d at 587.

74. *Id.*

pected benefits of that support when the marriage dissolves shortly after the student spouse obtains the degree. Montana's existing legal framework may have sufficient flexibility to address this problem without the need to characterize a professional degree or license as marital property.

Montana Code Annotated section 40-4-202 directs the trial court to consider a number of factors in determining an equitable division of the marital estate.

In making apportionment, the court shall consider the duration of the marriage and prior marriage of either party; antenuptial agreement of the parties, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and needs of each of the parties; custodial provisions; whether the apportionment is in lieu of or in addition to maintenance, and the opportunity of each for future acquisition of capital assets and income. The court shall also consider the contribution or dissipation of value of the respective estates and the contribution of a spouse as a homemaker or to the family unit

. . . .⁷⁵

These factors should allow a trial court to consider a spouse's professional degree or license in dividing the marital estate. Thus, a trial court should be able to consider the nonstudent spouse's contribution to the other spouse's professional degree or license as well as the failed expectations that result from the dissolution.

Even where the parties have not accumulated sufficient assets to completely address the problem of fairness, Montana's maintenance statute could be interpreted to resolve this issue. In *Washburn*, for example, the Washington Supreme Court formulated a reasonable approach to the problem under a statutory framework similar to Montana's. Montana could use a similar formula to address the unfairness of the typical situation without going so far as to hold that a professional degree or license is marital property.

IV. CONCLUSION

Courts do not agree that a professional degree or license constitutes marital property. Yet, for the most part, the courts do agree that a spouse's contribution towards the attainment of the other spouse's professional degree or license should not be ignored. If the Montana Supreme Court chooses to treat a professional degree or license as marital property, it would be adopting a minority position. Such a position would also run contrary to the very na-

75. MONT. CODE ANN. § 40-4-202(1) (1985).

ture of a professional degree or license. Further, the court can accomplish the same goals under Montana's existing statutory framework without holding that a professional degree or license is property.

