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The Professional Education Earned During Marriage: The Case for Spousal Support

Divorce is without question a great personal tragedy for both parties involved.¹ Added to the personal trauma of the dissolution of a marriage is the economic hardship that characteristically accompanies divorce in our society.² Great concern has arisen among legal commentators, legislatures, and courts about the disproportionate share of the economic hardships that fall upon women following divorce.³ Recent research reveals that when a couple had been married less than ten years, the post-divorce per capita family income⁴ of the wife may be only 48% of the pre-divorce per capita family income.⁵ At the same time, the post-divorce income of the husband may be as high as 201% of the pre-divorce per capita income.⁶

Although many social and economic factors contribute to the dispar-

1. In addition to the personal havoc wreaked upon married couples and their families who undergo a divorce, the impact of divorce on our society is similarly distressing. The rate of marriages per 1,000 population in the United States has remained relatively stable from 1950 (11.1) to 1976 (10.6). Bureau of the Census, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1981 at 80 (102d ed. 1981). During the same period, the rate of divorces per 1,000 population more than doubled from 2.6 to 5.4. *Id.* Each year over one million American marriages end in divorce. Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 U.C.L.A. L. REV. 1181, 1183 (1981). Projections indicate that by 1990 only 56% of the children in the United States will spend their entire childhood with both natural parents. Glick, *Children of Divorced Parents in Demographic Perspective*, 35 J. Soc. ISSUES 170, 175 (1979); Weitzman, *supra* at 1183 n.4.

2. Weitzman, *supra* note 1, at 1241-64. The economic efficiency of two individuals working together as husband and wife is destroyed upon divorce with both former spouses bearing some of the financial loss occasioned by the dissolution. *See id.* at 1249-50 (during the period from 1968-1974 divorced men as a group experienced a 19% decline in real income and divorced women experienced a 29% decline in real income while married couples experienced a 22% increase).

3. *Inman v. Inman*, 578 S.W.2d 266, 268 (Ky. Ct. App. 1979); *Greer v. Greer*, 510 P.2d 905, 906 (Colo. App. 1973); Weitzman, *supra* note 1, at 1188-1264; Krauskopf, *Recompense for Financing Spouse's Education: Legal Protection for the Marital Investor in Human Capital*, 28 KANS. L. REV. 379, 380-88, 393-402 (1980); Comment, *Equity and Economics: A Case for Spousal Support*, 8 GOLDEN GATE L. REV. 443, 443-51 (1979).

4. Per capita family income is determined by dividing the total household income by the number of persons in the household. Weitzman, *supra* note 1, at 1244. Any spousal support and child support ordered by a court are subtracted from the total income of the husband and added to the total income of the wife for the purpose of determining the per capita post-divorce income. *Id.*

5. *Id.* at 1241-60.

6. *Id.*

ity of post-divorce incomes between men and women, one situation involves inequities that are particularly distressing. This is the situation that occurs when one spouse, typically the wife, works to support the couple while the other spouse, typically the husband, obtains professional education or training that substantially increases his earning capacity.⁷ If divorce occurs shortly after the education is completed, the student spouse leaves the marriage with all the benefits of the increased earning capacity, while the working spouse shares in none of the expected benefits that would have belonged to the community had the marriage endured.⁸ Under California law, equal division of the accumulated community assets of the couple⁹ is mandated upon divorce.¹⁰ Most divorcing couples have few community assets to

7. Although precise statistics on the exact proportion of cases in which the wife works to support the husband while he is in professional school rather than the reverse situation are difficult to obtain, the overwhelming consensus is that the husband usually is the spouse who receives the education while the wife works to support the couple. See Krauskopf, *supra* note 3, at 387; *Recent Developments, Professional Degrees as Marital Property*, 6 HARV. WOMEN'S L.J. 208, 209 (1983) [hereinafter cited as *Recent Developments*]. This conclusion also is supported by the fact that no major case dealing with the issue involves a situation in which the wife was in school while the husband worked to support the couple. Comment, *Til Degree Do Us Part: The Community Property Interest In a Professional Degree*, 18 U.S.F.L. REV. 275, 276 n.9 (1983); see also *Mahoney v. Mahoney*, 442 A.2d 1062, 1067 n.4 (N.J. 1982) "[B]ecause that has been the actual situation in all reported cases, the contributing spouse is referred to as the wife." *Id.* The disproportionate hardship placed upon women in this situation also is confirmed by statistics demonstrating a greater disparity of post-divorce incomes between former spouses whose pre-divorce income level was relatively high. Weitzman, *supra* note 1, at 1242-43. This greater disparity can be explained by the fact that the husband in this situation characteristically leaves the marriage with a fully developed career that often is the result of an education obtained during the marriage, while the wife has sacrificed opportunities to enhance her own earning capacity to devote herself to domestic duties or support of the husband while he obtained his education. *Id.* at 1210-21; Krauskopf, *supra* note 3, at 385-88. Perhaps the most compelling reason for seeking some remedy to the inequitable situation that exists after dissolution of a marriage during which one spouse contributed to the education of the other spouse is that these economic sacrifices typically are made by the wife and failure to provide an adequate remedy only aggravates the disproportionate financial burden resulting from divorce that women as a group already bear. *Recent Developments, supra*, at 212; Weitzman, *supra* note 1, at 1249-60, 1264-68. This author addresses the inequities existing in the particular situation involving the treatment of the professional degree upon divorce in large part because the inequities do fall disproportionately on women as a group. Inequities also may exist, however, when a husband supports a wife in obtaining a professional education or training only to be deprived of the expected benefits due to a divorce occurring shortly after the completion of the wife's education. Therefore, this author will use the term "working spouse" to refer to the spouse who works to support the couple while the other spouse obtains an education. The spouse who obtains the education will be referred to as the "student spouse."

8. *In re Marriage of Sullivan*, 8 Fam.L.Rep. (BNA) 2165 (Cal. Ct. App., 4th Dist., 1982), modified 134 Cal. App. 3d 634, 184 Cal. Rptr. 796, reversed and remanded 37 Cal. 3d 762, 691 P.2d 1020, 209 Cal. Rptr. 354 (1984); *In re Marriage of DeLa Rosa*, 309 N.W.2d 755, 758 (Minn. 1981); *Mahoney v. Mahoney*, 453 A.2d 527, 529-35 (N.J. 1982); see Bruch, *The Definition and Division of Marital Property in California: Towards Parity and Simplicity*, 33 HASTINGS L.J. 769, 814-15 (1982).

9. CAL. CIV. CODE §687 (definition of community property).

10. *Id.* §4800(a).

divide.¹¹ This usually is the case when the couple has made sacrifices in their standard of living to put one spouse through professional school or training.¹² The couple who decides to put one spouse through professional school often will spend most of the community income on educational and living expenses rather than acquiring any significant community property.¹³ Therefore, the enhanced earning capacity of the student spouse typically is far more valuable than any tangible asset the couple owns.¹⁴ Recognizing the potential value of the education or training one spouse received during marriage, many commentators argued for the recognition of a property interest in the education or training that could be divided between the spouses upon divorce.¹⁵ To provide some relief for a contributing spouse upon divorce, courts in some jurisdictions have recognized a property interest in an education or training obtained during marriage.¹⁶

California courts, however, have refused to recognize a professional education obtained by the student spouse during marriage as property subject to division upon divorce.¹⁷ Consequently, under California case law, the student spouse has been allowed to leave the marriage with the enhanced earning capacity resulting from an education obtained during the marriage.¹⁸ The working spouse, on the other hand, has been denied any benefit from the enhanced earning capacity of the student spouse that the couple expected to share at the time the education was obtained.¹⁹

11. Weitzman, *supra* note 1, at 1188-99. The median value of the total community property owned by divorcing couples in California based on research done in 1978 was \$10,900. *Id.* at 1189. Almost 60% of the couples involved in the research had less than \$20,000 net worth. *Id.* at 1191. In a 1978 national survey, divorced women who reported receiving property received a median award of \$4,647. Bureau of the Census, U.S. Dep't of Commerce, *Child Support and Alimony: 1978, Current Population Reports*, Series P-23, No. 106 at 9 (1980).

12. Comment, *supra* note 7, at 282; *Recent Developments*, *supra* note 7, at 209.

13. *Recent Developments*, *supra* note 7, at 209; California Law Revision Commission, *Recommendation Relating to Reimbursement of Educational Expenses*, 17 CAL. L. REVISION COMM'N REPORTS 229, 233 (1983).

14. Weitzman, *supra* note 1, at 1210-11; Krauskopf, *supra* note 3, at 381-84.

15. Weitzman, *supra* note 1, at 1210-11; Bruch, *supra* note 8, at 813-21.

16. *See infra* notes 64 to 80 and accompanying text.

17. *Todd v. Todd*, 272 Cal. App. 2d 786, 791, 78 Cal. Rptr. 131, 134-35 (1961); *In re Marriage of Aufmuth*, 89 Cal. App. 3d 446, 461-62, 152 Cal. Rptr. 668, 677-78 (1979), *overruled on other grounds In re Marriage of Lucas*, 27 Cal. 3d 808, 815, 614 P.2d 285, 289, 166 Cal. Rptr. 853, 857 (1980); *In re Marriage of Sullivan*, 37 Cal. 3d 762, 691 P.2d 1020, 209 Cal. Rptr. 354 (1984). In reversing *Sullivan*, the California Supreme Court applied a statutory provision governing reimbursement of community expenditures and did not recognize any property interest in the education. 37 Cal. 3d at 765, 691 P.2d at 1021, 209 Cal. Rptr. at 357.

18. *See In re Marriage of DeLa Rosa*, 309 N.W.2d 755, 758 (Minn. 1981); Bruch, *supra* note 8 at 814-15; Comment, *supra* note 7, at 282; *Recent Developments*, *supra* note 7, at 209; Krauskopf, *supra* note 3, at 381-88.

19. Bruch, *supra* note 8 at 814-15; Comment, *supra* note 7, at 282; *Recent Developments*, *supra* note 7, at 209; Krauskopf, *supra* note 3, at 381-88.

In California, spousal support awards generally are based upon the need of one spouse and the ability of the other to pay.²⁰ Under this traditional standard for awarding spousal support, the working spouse who contributed to the education of the student spouse probably would not be awarded any significant spousal support.²¹ The primary reason for this determination is that the working spouse had demonstrated an ability for self-support by supporting the couple while the student spouse was in school.²² Additionally, the depressed standard of living the couple probably had to maintain while the student spouse obtained the education would be considered by the court in determining if spousal support was appropriate.²³ The artificially lowered standard of living the couple maintained would reduce the amount of any spousal support even if support was awarded to the working spouse.²⁴ Thus, under the traditional rationale for spousal support in California, the working spouse was unlikely to receive any significant award of spousal support to ameliorate the disparity between the post-divorce incomes of the spouses.²⁵

In response to the growing awareness of the need to provide protection for the working spouse in this situation, the California Legislature in 1984 passed Assembly Bill 3000 (AB 3000).²⁶ Codified in California Civil Code sections 4800, 4800.3, and 4801, AB 3000 requires reimbursement to the community of funds expended for an education that substantially enhanced the earning capacity of one spouse if the expenditures were made within ten years of the divorce.²⁷ AB 3000 also requires the court to consider, for the purpose of determining spousal support, the extent that the working spouse contributed

20. CAL. CIV. CODE §4801; see also *Sullivan*, 37 Cal. 3d at 770, 691 P.2d at 1025, 209 Cal. Rptr. at 359 (Mosk, J. concurring and dissenting).

21. Comment, *supra* note 7, at 283-84.

22. *Id.* at 283-84; Krauskopf, *supra* note 3, at 399; see CAL. CIV. CODE §4801(a)(5) (court must consider ability of supported spouse to engage in gainful employment without interfering with the interests of dependent children in the custody of the spouse); *In re Marriage of Mason*, 93 Cal. App. 3d 215, 221-23, 155 Cal. Rptr. 350, 353 (1979) (legislative intent that supported spouse seek self sufficiency through employment if able); *In re Richmond*, 105 Cal. App. 3d 352, 356-57, 164 Cal. Rptr. 381, 383 (1980) (purpose of support award may be to encourage self reliance but must be reasonable).

23. CAL. CIV. CODE §4801(a)(8).

24. Krauskopf, *supra* note 3, at 399.

25. Comment, *supra* note 7, at 284.

26. 1984 Cal. Stat. c. 1661, §§1-5, at ____ (amending CAL. CIV. CODE §§4800, 4801; adding CAL. CIV. CODE §4800.3); see *Review of Selected 1984 California Legislation*, 16 PAC. L.J. 643 (1985) (discussing Chapter 1661 provisions).

27. CAL. CIV. CODE §4800.3. The 10 year limitation is in the form of a rebuttable presumption. *Id.* §4800.3(c)(1). Expenditures made longer than 10 years before the divorce proceedings were commenced are presumed to have already substantially benefitted the community. *Id.* §4800.3(c)(1).

to the education of the other spouse if the education resulted in a substantial increase in the earning capacity of the student spouse.²⁸

Although reimbursement upon divorce of community expenditures for the education of the student spouse does provide some remedy for the working spouse, mere reimbursement of the educational costs is rejected by legal commentators as an inadequate remedy for the working spouse.²⁹ Limiting the remedy of the working spouse to mere reimbursement of the costs of the education does not protect the expectation interest the working spouse had in an increased standard of living.³⁰ The working spouse, in essence, has invested in the enhanced earning capacity or human capital³¹ of the student spouse with the expectation of receiving a return on the investment in the form of a higher standard of living in the future.³² In addition, the out-of-pocket costs of the education usually represent only a fraction of the actual cost to the couple in terms of foregone income and consumption opportunities while the student spouse was in school.³³ The working spouse often has sacrificed significant career or educational opportunities.³⁴ Reimbursement alone will not be adequate to compensate the working spouse for these "opportunity costs" and does not substantially address the basic inequities involved.³⁵

Any meaningful remedy for the working spouse in California must come from the spousal support provision added to Civil Code section 4801 by AB 3000.³⁶ This new provision requires the court to consider the extent the working spouse contributed to the education or training of the other spouse when setting spousal support.³⁷ The unresolved question, however, is whether this new provision is capable of providing adequate relief for the working spouse, given the judicial reluctance to award support if the spouse seeking support has demonstrated even a minimal ability for self support.³⁸ The California

28. *Id.* §4801.

29. *Recent Developments, supra* note 7, at 215; Comment, *supra* note 7, at 294; Krauskopf, *supra* note 3, at 393, 414-15.

30. *Recent Developments, supra* note 7, at 215; Comment, *supra* note 7, at 294; Krauskopf, *supra* note 3, at 393, 414-15.

31. See *infra* notes 48 to 63 and accompanying text (discussing concept of human capital).

32. Krauskopf, *supra* note 3, at 380-88, 391-95; Weitzman, *supra* note 1, at 1217-18.

33. Krauskopf, *supra* note 3, at 384. The "opportunity costs" involved in foregoing the income that the student spouse would have earned had he not been in school may constitute as much as 74% of the total actual costs in acquiring a college education. *Id.*

34. Bruch, *supra* note 8, at 818; Krauskopf, *supra* note 3, at 387.

35. Krauskopf, *supra* note 3, at 387.

36. 1984 Cal. Stat. c. 1661, §3, at ____ (amending CAL. CIV. CODE §4801).

37. CAL. CIV. CODE §4801(a)(1).

38. *In re Marriage of Mason*, 93 Cal. App. 3d 215, 221-23, 155 Cal. Rptr. 350, 353 (1979); *In re Richmond*, 105 Cal. App. 3d 352, 356-57, 164 Cal. Rptr. 381, 383 (1983); *In re Marriage of Winick*, 89 Cal. App. 3d 525, 529, 152 Cal. Rptr. 635, 636-37 (1979).

Supreme Court in *In re Marriage of Sullivan*³⁹ recently acknowledged the requirement that trial courts consider the contribution of the working spouse for the purpose of setting spousal support.⁴⁰ Justice Mosk, however, in a concurring and dissenting opinion, stressed that the issue of support was not before the court and that spousal support generally is awarded on the basis of the needs of one spouse and the ability of the other to pay, implicitly suggesting that the new spousal support provision works no significant change.⁴¹

This author will examine the controversy surrounding the treatment of a professional education upon divorce.⁴² The various approaches taken to this problem in jurisdictions other than California will be surveyed.⁴³ The California position prior to the enactment of AB 3000 will be discussed.⁴⁴ Finally, AB 3000, the statutory response in California, will be considered.⁴⁵ This author contends that the new spousal support provision in AB 3000 is capable of supplying a basis for relief upon divorce for a working spouse who has contributed to the education of a student spouse.⁴⁶

TREATMENT UPON DIVORCE OF A PROFESSIONAL EDUCATION EARNED DURING MARRIAGE

Many courts and commentators have wrestled with the question of the treatment upon divorce of a professional education earned during marriage. The concern over unduly encumbering the career and economic future of the student spouse has been recognized clearly. The following discussion of the concept of human capital as related to investment in a professional education will provide the theoretical basis for protecting the interests of the working spouse.⁴⁷

A. The Professional Education and Investment in Human Capital

During marriage, a couple usually functions as an economic unit, seeking the maximization of benefit to the community rather than

39. 37 Cal. 3d 762, 691 P.2d 1020, 209 Cal. Rptr. 354 (1984).

40. *Id.* at 767, 691 P.2d at 1023, 209 Cal. Rptr. at 357.

41. *Id.* at 770, 691 P.2d at 1025, 209 Cal. Rptr. at 359.

42. *See infra* notes 48 to 124 and accompanying text.

43. *See infra* notes 64 to 80 and accompanying text.

44. *See infra* notes 81 to 124 and accompanying text.

45. *See infra* notes 125 to 145 and accompanying text.

46. *See infra* notes 146 to 188 and accompanying text.

47. *See infra* notes 48 to 63 and accompanying text.

either individual.⁴⁸ By pooling resources of time and skill, providing support and encouragement, and allowing for specialization of duties, the family economic unit ideally provides the individual spouses a higher standard of living than they would be able to enjoy separately.⁴⁹ In furtherance of this goal, a married couple often decides to concentrate on developing the human capital of one of the spouses.⁵⁰

Human capital is a form of wealth widely recognized by economists that can be described as the acquired useful skills and knowledge of an individual.⁵¹ The working spouse supporting the couple while the other spouse obtains an education or training that will provide a substantially enhanced earning capacity, in effect, is making an investment in the human capital of the student spouse and the family unit as a whole.⁵² If not for the working spouse, the student spouse would have to obtain capital to invest in the education from other, more expensive sources such as banks, and the cost of the education might become prohibitive.⁵³

The typical working spouse/student spouse situation has four basic characteristics.⁵⁴ First, the couple shares the loss of the foregone earnings of the student spouse during the period of the education.⁵⁵ Since most student spouses seeking a professional education or training already possess undergraduate degrees, the couple may sacrifice substantial earnings while the student spouse is in school. Second, the working spouse provides the financial capital that allows the student spouse to forego those earnings.⁵⁶ Third, the working spouse may forego opportunities to develop his or her own earning capacity.⁵⁷ Finally, both spouses expect to gain a return on the full costs of the investment through a higher standard of living during the marriage.⁵⁸

When divorce occurs shortly after the education is completed, the expectation the working spouse had of sharing in the higher standard of living is frustrated. Conversely, the student spouse leaves the mar-

48. Krauskopf, *supra* note 3, at 381-88.

49. *Id.*

50. *Id.* at 380, 384-88; Weitzman, *supra* note 1, at 1210-12.

51. 1979 Nobel Prize winner Theodore W. Schultz has maintained that much of the rise in economic output in this country is attributable to a real growth in worker productivity resulting from the steadily growing amount of human capital per worker. Krauskopf, *supra* note 3, at 381.

52. *Id.* at 386-88; Weitzman, *supra* note 1, at 1210-11.

53. Krauskopf, *supra* note 3, at 384-85.

54. *Id.* at 380-86.

55. *Id.*

56. *Id.*

57. *Id.*; see, e.g., *Lynn v. Lynn*, 453 A.2d 539, 542 (N.J. 1982). At the time of their marriage, both husband and wife were interested in pursuing graduate degrees but only the husband obtained a professional education during their nine years of marriage. *Id.*

58. Krauskopf, *supra* note 3, at 380-86.

riage with all the benefits of the enhanced earning capacity that the education provides. Since most working spouses in this situation are women,⁵⁹ the failure to provide any significant remedy for the working spouse further aggravates the post-divorce disparity of incomes between men and women.⁶⁰ Leaving the working spouse without an adequate remedy appears contrary to the interests of justice and may discourage the beneficial investment in professional educations by working spouses.⁶¹

Most commentators, utilizing the theoretical basis of investment in human capital, have argued that the legitimate expectation of the working spouse should be protected either by recognition of a property interest in the professional education of the student spouse⁶² or by providing compensation to the working spouse.⁶³ Courts of various jurisdictions have struggled with the problem of providing a fair solution for both parties involved. The following section briefly examines some of the solutions prescribed by courts in jurisdictions other than California.

B. *Judicial Treatment of the Professional Education Upon Divorce*

Courts in numerous jurisdictions have been called upon to provide relief for a working spouse claiming some interest in the professional education of a student spouse. A majority of the courts considering this issue have held that the professional education is not property⁶⁴ and that the working spouse has little or no financial interest in the degree.⁶⁵ The refusal to recognize a property interest in the profes-

59. See *supra* note 7 and accompanying text.

60. See *supra* note 4 and accompanying text; Weitzman, *supra* note 1, at 1241-59; Krauskopf, *supra* note 3, at 395-409.

61. Krauskopf, *supra* note 3, at 395; Weitzman, *supra* note 1, at 1210. *But see In re Marriage of Sullivan*, 134 Cal. App. 3d 634, ____, 184 Cal. Rptr. 796, 801-02 (1982) *partially reversed and remanded*, 37 Cal. 3d 762, 691 P.2d 1020, 209 Cal. Rptr. 354 (1984) (concurring opinion by Kaufman, Acting P.J.) (expenditure of community funds for the education of one spouse is made with a donative intent and not with the expectation of receiving compensation upon divorce).

62. Weitzman, *supra* note 1, at 1210-21; Bruch, *supra* note 8, at 813-21. As community property, the value of the professional degree would be divisible upon divorce. CAL. CIV. CODE §4800(a).

63. Krauskopf, *supra* note 3, at 398-416; Comment, *supra* note 7, at 293-99; *Recent Developments*, *supra* note 7, at 216-19.

64. Comment, *supra* note 7, at 279.

65. *Wisner v. Wisner*, 631 P.2d 115, 122 (Ariz. Ct. App. 1981) (the intangible character of an education meant value could not be characterized as property subject to division); *Frausto v. Frausto*, 611 S.W.2d 656, 659 (Tex. Civ. App. 1981) (professional education acquired during marriage is not a property right and is not divisible upon divorce); *In re Marriage of Graham*, 574 P.2d 75, 77 (Colo. 1978) (educational degree has none of the attributes of property and

sional education is attributable to the view that a professional education fails to fit within traditional definitions of property.⁶⁶ Furthermore, a professional education is difficult to value,⁶⁷ and courts hesitate to encumber the future earnings of the educated spouse.⁶⁸ In a recent Florida decision, the court expressed concern that awarding a wife a vested interest in the education of the husband "would transmute the bond of marriage into the bonds of involuntary servitude contrary to the [thirteenth amendment] of the United States Constitution."⁶⁹

Other courts, however, have been more responsive to the plight of the working spouse.⁷⁰ Growing judicial inclination to provide some remedy for the working spouse upon divorce is exemplified by a New Jersey Supreme Court opinion stating: "Marriage should not be a free ticket to professional education and training without subsequent obligations. This Court should not ignore the scenario of the young professional who after being supported through graduate school leaves his mate for supposedly greener pastures."⁷¹

A few courts sympathetic to the predicament of the working spouse have found a property interest in the professional education earned during marriage or the enhanced earning capacity the education represents.⁷² The courts recognizing the professional education as property, however, usually have limited the remedy of the working spouse to the cost of the education.⁷³ The method for evaluating the amount

cannot be distributable as marital property); *In re Marriage of Goldstein*, 423 N.E.2d 1201, 1204 (Ill. App. 1981) (enhanced earning capacity represented by degree is not marital property); *Lesman v. Lesman*, 452 N.Y.S.2d 935, 938 (1982) (enhanced earning capacity earned during marriage is not vested but is a mere expectancy dependent upon future success and efforts and is not marital property subject to distribution upon divorce); *DeWitt v. DeWitt*, 296 N.W.2d 761, 767 (Wis. Ct. App. 1980) (cannot put dollar value on a professional education or degree).

66. *Wisner v. Wisner*, 631 P.2d 115, 122 (Ariz. Ct. App. 1981) (education too intangible for value to be characterized as property); *Frausto v. Frausto*, 611 S.W.2d 656, 659 (Tex. Civ. App. 1981) (professional education acquired during marriage is not a property right).

67. *DeWitt v. DeWitt*, 296 N.W.2d 761, 767 (Wis. Ct. App. 1980).

68. See *Recent Developments*, *supra* note 7, at 215-16.

69. *Severs v. Severs*, 426 So. 2d 992, 994 (Fla. Dist. Ct. App. 1983).

70. *Inman v. Inman*, 578 S.W.2d 266 (Ky. Ct. App. 1979); *In re Marriage of Horstman*, 263 N.W.2d 885 (Iowa 1978); *Colvert v. Colvert*, 568 P.2d 623 (Okla. 1977); *Hubbard v. Hubbard*, 603 P.2d 747 (Okla. 1979); *DeLa Rosa v. DeLa Rosa*, 309 N.W.2d 755 (Minn. 1981).

71. *Mahoney v. Mahoney*, 453 A.2d 527, 535 (N.J. 1982).

72. *Inman v. Inman*, 578 S.W.2d 266, 268 (Ky. Ct. App. 1979); *In re Marriage of Horstman*, 263 N.W.2d 885, 891-892 (Iowa 1978); *Lynn v. Lynn*, 7 Fam.L.Rep. (BNA) 3001 (N.J. Super. Ct., Ch. Div. 1981) *reversed and remanded* 453 A.2d 539 (N.J. 1982); *O'Brien v. O'Brien*, 452 N.Y.S.2d 801 (Sup. Ct. 1982).

73. *Inman v. Inman*, 578 S.W.2d 266, 268-69 (Ky. Ct. App. 1979); *In re Marriage of Horstmann*, 263 N.W.2d 885, 891-92 (Iowa 1978). The trial court in *Lynn v. Lynn*, 7 Fam.L.Rep. (BNA) 3001 (N.J. Super. Ct., Ch. Div. 1981) *reversed and remanded* 453 A.2d 539, utilized a capitalization of earnings approach to arrive at the award for a wife who had worked to support her husband while the husband attended medical school and performed his internship.

awarded often has been ambiguous.⁷⁴ The limitation of the remedy to the cost of the professional education seemingly is inconsistent with the definition of the education as property.⁷⁵ This inevitably results in tortured reasoning. In a Kentucky appellate decision, for example, the court held that a professional degree falls within the definition of property *only* in cases when divorce occurs early in the marriage and little property has been acquired.⁷⁶

Other courts have avoided making a determination that the professional education is marital property subject to division upon divorce. Instead, these decisions have provided a remedy of compensation for the contributions of the working spouse on the basis of restitutionary interests to prevent unjust enrichment.⁷⁷ Jurisdictions that utilize equitable restitutionary principles such as implied contract broadly interpret property division or spousal support statutes to allow compensation for contributions to the welfare of the other spouse.⁷⁸

In California, compensating a spouse for contributions to the welfare of the other spouse generally is not considered with regard to property division⁷⁹ or spousal support.⁸⁰ Civil Code section 4801, as amended by AB 3000, provides an exception to this general principle in the case of contributions by a working spouse to the education of a student spouse. The next two sections will examine the absence of a remedy in California for the working spouse prior to the enactment of AB 3000. This lack of remedy primarily resulted from the reluc-

Id. The trial court calculated the value of the education by determining the earning differential between an average person with the husband's current level of education and the average person with the level of education the husband had prior to the marriage, but the New Jersey Supreme Court reversed and opted for the remedy of reimbursement. 453 A.2d at 541. *See also* Mahoney v. Mahoney, 453 A.2d 527, 533 (N.J. 1982) (case decided the same day as *Lynn* providing reimbursement alimony upon divorce for a wife's contributions to her husband's education).

74. *See supra* note 73.

75. *Recent Developments, supra* note 7, at 214; Krauskopf, *supra* note 3, at 413-16.

76. *Inman v. Inman*, 578 S.W.2d 266, 269 (Ky. Ct. App. 1979).

77. *See, e.g., Colvert v. Colvert*, 568 P.2d 623, 627 (Okla. 1977) (nonterminable alimony of \$35,000 awarded to wife who supported spouse while he was in medical school); *Hubbard v. Hubbard*, 603 P.2d 747, 750-51 (Okla. 1979) (traditional equitable principles for prevention of unjust enrichment justify compensation to a wife for her investment in her husband's education); *Magruder v. Magruder*, 209 N.W.2d 585, 587 (Neb. 1973) (gross alimony of \$100,000 awarded wife as compensation for contributions to husband's increased earning capacity, conditioned on wife not remarrying); *DeLa Rosa v. DeLa Rosa*, 309 N.W.2d 755, 758 (Minn. 1981) (equities heavily in favor of providing a remedy for the working spouse).

78. Krauskopf, *supra* note 3, at 403-09.

79. *See* CAL. CIV. CODE §4800(a) (community property divided equally upon divorce). California has emphasized developing independence between the spouses based on principles of equality. 6 B. WITKIN, *SUMMARY OF CALIFORNIA LAW, Husband and Wife*, §162, at 5030-31 (8th ed. 1974).

80. Weitzman, *supra* note 1, at 1221-31; Comment, *supra* note 7, at 283-85, 293-94; Comment, *supra* note 3, at 444-69.

tance of California courts to recognize the professional education as property.

C. California Case Law

California courts have been hostile to the recognition of any property interest in a professional education or the enhanced earning capacity the education represents.⁸¹ This position is based upon an adherence to the definition of property decided upon in *Franklin v. Franklin*.⁸² The *Franklin* court held that property divided in a divorce action must have certain attributes, namely, being susceptible to ownership in common, to transfer, and survival.⁸³ Under this narrow definition of property, a professional degree could not be classified as property of any kind, since the degree cannot be alienated, is personal to the holder, and has no value independent of the future efforts of the person holding the degree.⁸⁴

The court in *Todd v. Todd*,⁸⁵ applied the restrictive *Franklin* concept of property subject to division upon divorce in holding specifically that a professional education was not property. The *Todd* court relied upon the fact that the professional education had none of the attributes of traditional property and held that the education was too difficult to value for purposes of division.⁸⁷ The reasoning in *Todd* was followed in the case of *In re Marriage of Aufmuth*.⁸⁸ The *Aufmuth* court refused to allow the introduction of evidence to prove the value of the legal education earned by the husband during the marriage, holding that the education was not community property.⁸⁹ Relying

81. *Todd v. Todd*, 272 Cal. App. 2d 786, 791, 78 Cal. Rptr. 131, 135 (1969); *In re Marriage of Aufmuth*, 89 Cal. App. 3d 446, 461, 152 Cal. Rptr. 668, 677 (1979) *reversed on other grounds In re Marriage of Lucas*, 27 Cal. 3d 808, 815, 614 P.2d 285, 289, 166 Cal. Rptr. 853, 857 (1980); *In re Marriage of Sullivan*, 134 Cal. App. 3d 484, _____, 184 Cal. Rptr. 796, 800 (1982) *reversed and remanded* 37 Cal. 3d 762, 768, 691 P.2d 1020, 1023, 209 Cal. Rptr. 354, 357 (1984).

82. 67 Cal. App. 2d 717, 155 P.2d 637 (1945). The issue before the *Franklin* court involved a cause of action the husband had acquired for personal injuries. *Id.* at 719-20, 155 P.2d at 638-39.

83. *Id.* at 725, 155 P.2d at 641.

84. See *Todd*, 272 Cal. App. 2d at 791, 78 Cal. Rptr. at 135; *Aufmuth*, 89 Cal. App. 3d at 461, 152 Cal. Rptr. at 677, *reversed on other grounds In re Marriage of Lucas*, 27 Cal. 3d 808, 815, 614 P.2d 285, 289, 166 Cal. Rptr. 853, 857 (1980); *Sullivan*, 134 Cal. App. 3d at _____, 184 Cal. Rptr. at 800, *reversed and remanded* 37 Cal. 3d at 768, 691 P.2d at 1023, 209 Cal. Rptr. at 357.

85. 272 Cal. App. 2d 786, 78 Cal. Rptr. 131 (1969).

86. *Id.* at 791, 78 Cal. Rptr. at 134-35.

87. *Id.*

88. 89 Cal. App. 3d 446, 152 Cal. Rptr. 668 (1979), *reversed on other grounds In re Marriage of Lucas*, 27 Cal. 3d 808, 614 P.2d 285, 166 Cal. Rptr. 853 (1980).

89. 89 Cal. App. 3d at 461, 152 Cal. Rptr. at 677-78.

on *Todd*, the *Aufmuth* court held that the legal education of the husband was "manifestly of such character that a value for division cannot be placed upon it."⁹⁰

*In re Marriage of Sullivan*⁹¹ is the most recent California case to consider whether a working spouse who has helped the other spouse obtain an education during marriage is entitled to compensation or an interest in the education itself.⁹² *Sullivan* involved a husband who had obtained his medical degree and completed his internship and residency while his wife worked to support the family.⁹³ Upon divorce, the trial court refused to admit evidence regarding the value of the medical degree.⁹⁴ The original opinion of the court of appeal held that while a professional education or license is not community property,⁹⁵ the education or license may be the separate property of the student spouse.⁹⁶ The appellate court further held that the trial court should determine whether the degree has an economic value, and, if so, the community should be entitled to at least a reimbursement of the costs of the degree.⁹⁷

Upon rehearing, however, the court of appeal modified the original opinion in the case.⁹⁸ The second decision of the court held that a professional education acquired during marriage is not community property or separate property of the individual who earned the degree.⁹⁹ The court of appeal in the modified decision relied upon the definition of property expounded in *Franklin*, *Todd*, and *Aufmuth*, holding that a professional education does not possess the requisite attributes of property subject to division.¹⁰⁰ The concurring opinion stated that a spouse who assists the other spouse in obtaining an education generally does not do so with the expectation of compensation.¹⁰¹ The concur-

90. *Id.*

91. 37 Cal. 3d 762, 691 P.2d 1020, 209 Cal. Rptr. 354 (1984).

92. *Id.* at 765-766, 691 P.2d at 1021-23, 209 Cal. Rptr. at 355-57.

93. *Id.* at 765-66, 691 P.2d at 1021-22, 209 Cal. Rptr. at 355-56.

94. *Id.*

95. 127 Cal. App. 3d 656, 8 Fam.L.Rep. (BNA) 2165 (Calif. Ct. App., Jan. 8, 1982), *modified on reh'g* 134 Cal. App. 3d 634, 184 Cal. Rptr. 796 (1982), *partially reversed and remanded* 37 Cal. 3d 762, 691 P.2d 1020, 209 Cal. Rptr. 354 (1984).

96. 8 Fam.L.Rep. (BNA) at 2166. The education or license could not be community property because the degree is merely the culmination of a life-long educational process and therefore cannot be said to have been acquired during the marriage. *Id.* See also the modified court of appeal decision in *Sullivan*, 134 Cal. App. 3d at ____, 184 Cal. Rptr. at 803-04 (Ziebarth, J., concurring and dissenting).

97. 8 Fam.L.Rep. (BNA) at 2166.

98. 134 Cal. App. 3d 634, 184 Cal. Rptr. 796 (1982), *partially reversed and remanded* 37 Cal. 3d 762, 691 P.2d 1020, 209 Cal. Rptr. 354 (1984).

99. 134 Cal. App. 3d at ____, 184 Cal. Rptr. at 800.

100. *Id.*

101. *Id.* at ____, 184 Cal. Rptr. at 801-02.

rence considered this assistance to be made with donative intent, giving rise to a presumption of gift.¹⁰²

Justice Ziebarth, who authored the original court of appeal opinion in *Sullivan*, dissented from the modified decision, arguing that the majority adopted too restrictive a definition of property.¹⁰³ The dissent contended that the refusal to recognize the professional education as an asset did not comport with other California decisions recognizing various intangible assets as property.¹⁰⁴ The dissent also complained of the great injustice of denying at least some compensation to the working spouse upon divorce.¹⁰⁵ Finally, the dissent disputed the claim that the degree or the proper measure of remedy would be too difficult to value.¹⁰⁶

The California Supreme Court did not decide *Sullivan* for two years after granting a hearing in 1982. The final decision of the court, rendered on December 31, 1984, held that AB 3000, which had been passed in 1984, controlled the disposition of the issue in *Sullivan*.¹⁰⁷ Before examining the specific provisions of AB 3000, this author will analyze briefly the California position regarding a remedy for the working spouse prior to the enactment of the legislation.

D. Analysis of the California Position Prior to Assembly Bill 3000

Several reasons may be advanced to explain the refusal of California courts to recognize a professional degree as property subject to division at divorce. First, as expressed by the leading cases, a professional degree does not fit the traditional definition of property.¹⁰⁸ The degree cannot be alienated, is personal to the holder, and has no value independent of the efforts of the person holding the degree.¹⁰⁹

Under the principle of equal division of community assets,¹¹⁰ classi-

102. *Id.*

103. *Id.* at ____, 184 Cal. Rptr. at 804-12.

104. *Id.* at ____, 184 Cal. Rptr. at 806-814 (examples of intangible assets recognized by courts are non-vested pension rights, contingent retirement benefits, and term life insurance benefits).

105. *Id.* at ____, 184 Cal. Rptr. at 811-25.

106. *Id.* at ____, 184 Cal. Rptr. at 814-25.

107. 37 Cal. 3d 762, 691 P.2d 1020, 209 Cal. Rptr. 354 (1984).

108. *Todd*, 272 Cal. App. 2d at 791, 78 Cal. Rptr. at 135; *Aufmuth*, 89 Cal. App. 3d at 461, 152 Cal. Rptr. at 677; *Sullivan*, 134 Cal. App. 3d at ____, 184 Cal. Rptr. at 800, *reversed and remanded*, 37 Cal. 3d 762, 691 P.2d 1020, 209 Cal. Rptr. 354 (1984).

109. *Todd*, 272 Cal. App. 2d at 791, 78 Cal. Rptr. at 135; *Aufmuth*, 89 Cal. App. 3d at 461, 152 Cal. Rptr. at 677, *reversed on other grounds In re Marriage of Lucas*, 27 Cal. 3d 808, 614 P.2d 285, 166 Cal. Rptr. 853 (1980).

110. CAL. CIV. CODE §4800(a). The result of this classification presumably would apply regardless of whether the non student spouse supported the student spouse while the latter

fication of the professional degree as community property would entitle the non-educated spouse to a one-half interest in the increased earning capacity represented by the degree.¹¹¹ This result is viewed by California courts as creating a hardship on the educated spouse by mortgaging away one-half of the future earnings of the educated spouse.¹¹² The educated spouse may not be successful or may not wish to remain in the profession.¹¹³ In these cases, an award of one-half the present value of the enhanced earning capacity seems harsh.

Under California community property law, recognition of a community property interest in the enhanced future earning capacity represented by an education is inconsistent with the community property principle that income earned after separation is separate property.¹¹⁴ One court, while applying the separate income principle to the valuation of another intangible asset, business goodwill, stated: "Since the philosophy of the community property system is that a community property interest can be acquired only during the time of the marriage, it would then be inconsistent with that philosophy to assign to any community interest the value of the post-marital efforts of either spouse."¹¹⁵

Many legitimate concerns surround the recognition of a marital property interest in the professional education earned during marriage. These concerns, however, do not justify the refusal to provide some remedy for the working spouse. Additionally, many of the arguments against recognizing a property interest in the enhanced earning capacity are subject to criticism.

The fact that a professional degree does not fit within the narrow confines of the traditional definitions of property does not necessarily preclude recognition of a property interest or some alternative remedy. California courts have recognized several intangible assets for distribution upon divorce.¹¹⁶ Since the rule of equal division of com-

obtained the degree. Krauskopf, *supra* note 3, at 415-16. If the degree or education is property acquired during the marriage, then the education is community property in which both spouses have "present, existing, and equal interests." See CAL. CIV. CODE §5105 (nature of interests of parties in community property).

111. Weitzman, *supra* note 1, at 1210-21; Bruch, *supra* note 8, at 813-21.

112. *Aufmuth*, 89 Cal. App. 3d at 461, 152 Cal. Rptr. at 677, *reversed on other grounds* *In re Marriage of Lucas*, 27 Cal. 3d 808, 614 P.2d 285, 166 Cal. Rptr. 853 (1980). See also California Law Revision Commission, *supra* note 13, at 234.

113. See *Lesman v. Lesman*, 452 N.Y.S.2d 935, 938 (App. Div. 1982) (enhanced earning capacity resulting from an advanced education or professional degree is merely an uncertain expectancy dependent upon future success and efforts).

114. See CAL. CIV. CODE §§5118 (earnings of separated spouse are separate property); 5119 (earnings after legal separation are separate property).

115. *In re Marriage of Fortier*, 34 Cal. App. 3d 384, 388, 109 Cal. Rptr. 914, 918 (1973).

116. *E.g., id.* (business goodwill); *In re Marriage of Brown*, 15 Cal. 3d 838, 841-48, 544 P.2d 561, 562-66, 126 Cal. Rptr. 633, 634-39 (1976) (nonvested pension rights).

munity assets precludes major adjustments to the property distribution to avoid an inequitable disparity of incomes following divorce,¹¹⁷ courts should look beyond the traditional property definitions to determine whether an asset actually is a form of wealth created by community efforts.¹¹⁸ Refusal to classify the professional education as community property may not preclude recognition of the degree as the separate property of the student spouse.¹¹⁹ The alleged difficulty of valuing the professional degree has not prevented courts from evaluating potential earning capacities or other contingent expectations in tort or contract actions.¹²⁰ Numerous commentators and courts have suggested formulas and methods for providing an accurate valuation of the interest or of the compensation required for the working spouse.¹²¹

The fundamental defect of the California position prior to 1984 was that by attempting to avoid possible inequitable treatment of the student spouse, the courts ignored the needs of the working spouse, who ultimately was deprived of any repayment for contributions to the enhanced earning capacity of the student spouse.¹²² Since most

117. See CAL. CIV. CODE §§4800(b)(1) (court allowed to award any asset to one party to effect a substantially equal division of the property), 4800(b)(2) (court allowed to make adjustment from party's share for any sum determined to have been deliberately misappropriated to the exclusion of the community or quasi-community property interest of the other party), 4800(b)(3) (court allowed to award all assets to one party if total amount is less than \$5,000 and the other party cannot be located).

118. See Bruch, *supra* note 8, at 818-21; Comment, *supra* note 7, at 278-79, 286-87; *Recent Developments*, *supra* note 7, at 210-211.

119. *Sullivan*, 134 Cal. App. 3d at ____, 184 Cal. Rptr. at 802-25 (concurring and dissenting opinion by Ziebarth, J.) *reversed and remanded* 37 Cal. 3d 762, 691 P.2d 1020, 209 Cal. Rptr. 354 (1984).

120. See Krauskopf, *supra* note 3, at 388-90 (investments in human capital protected); see also *Thrifty Drug Stores, Inc. v. Workers Comp. Appeals Bd.*, 95 Cal. App. 3d 937, 157 Cal. Rptr. 459 (1979) (calculating future earning capacity in workman's compensation case); *Rodriguez v. McDonnell Douglas Corp.*, 87 Cal. App. 3d 626, 151 Cal. Rptr. 399 (1978) (calculating lifetime earning capacity in personal injury case).

121. Krauskopf, *supra* note 3, at 401; Weitzman, *supra* note 1, at 1218-21; Comment, *supra* note 7, at 287-91. See generally Fitzpatrick & Ducette, *Can the Economic Value of an Education Really be Measured? A Guide for Marital Property Dissolution*, 21 J. FAM. LAW 511, 514-524 (1983) (value of degree based on incremental change in earning capacity); Mullenix, *The Valuation of an Educational Degree at Divorce*, 16 LOY. L.A.L. REV. 227, 268-83 (1983) (value of degree based on labor theory of value). Justice Ziebarth, in his dissent to the modified appellate court decision in *Sullivan*, suggested three alternative measures of recovery: (1) the actual expenditures of community funds and efforts for the education, (2) the value of income foregone by the community by reason of having the student spouse in school, and (3) the differential between the earning capacity of the student spouse at the time of the marriage and at the time of the divorce proceedings. *Sullivan*, 134 Cal. App. 3d at ____, 184 Cal. Rptr. at 815.

122. *Recent Developments*, *supra* note 7, at 215-16; see California Law Revision Commission, *supra* note 13, at 233-34; Weitzman, *supra* note 1, at 1210-21; Bruch, *supra* note 8, at 813-21; Comment, *supra* note 7, at 282-85.

working spouses in this situation are women,¹²³ a failure to provide an adequate remedy increases the disproportionate financial burdens of divorce that women bear.¹²⁴

In response to these problems, California passed Assembly Bill 3000. AB 3000 provides for reimbursement of community expenditures for the education of the student spouse and requires the court to consider the extent to which one spouse has contributed to the education of the other for purposes of setting spousal support. The provisions of AB 3000 will be analyzed to determine if this enactment provides a fair and adequate remedy for the working spouse.

ASSEMBLY BILL 3000

At the root of the hardships facing the working spouse following divorce are the disproportionate income levels likely to result between the student spouse and the working spouse. Providing an adequate solution to this problem necessitates acknowledging the harsh economic realities facing the working spouse following divorce. The California Legislature attempted to ameliorate the inequities facing the working spouse with the enactment of AB 3000.

A. AB 3000 Provisions

The dissent in the second appellate decision in *Sullivan* argued that a spouse who worked to support the other spouse in obtaining an education resulting in an enhanced earning capacity should be entitled, upon divorce, at least to reimbursement of the community funds expended for the costs of the education.¹²⁵ In 1983, the California Law Revision Commission recommended the remedy of reimbursement to the community of funds expended for the education of the student spouse.¹²⁶ The Commission considered reimbursement to be the most equitable remedy for both parties,¹²⁷ since a more substantial remedy would create a windfall for the working spouse.¹²⁸

123. See *supra* note 7 and accompanying text.

124. Weitzman, *supra* note 1, at 1241-68; *Recent Developments*, *supra* note 7, at 216-19.

125. 134 Cal. App. 3d at ____, 184 Cal. Rptr. at 814.

126. California Law Revision Commission, *supra* note 13, at 233-36.

127. *Id.* at 235. "The Commission does not believe that it would be either practical or fair to classify the value of the education, degree, or license, or the enhanced earning capacity as community property and to divide the value upon marriage dissolution. Classification of these items as community property would create problems involving management and control, creditors rights, taxation, and disposition at death, not to mention the complexities involved in valuation at dissolution." *Id.* at 234.

128. *Id.* at 234. The Commission also declined to advocate any change in the established support scheme attempting to rectify any discrepancies in the earning capacities between the

In response to the recommendations of the Law Revision Commission, the California Legislature passed AB 3000,¹²⁹ which added section 4800.3 to the Civil Code. Section 4800.3 provides that upon divorce, the community must be reimbursed for community contributions to the education or training of a spouse that results in a substantially increased earning capacity.¹³⁰ The reimbursement may be reduced or modified as justice requires.¹³¹ If the education does not enhance substantially the earning capacity of the student spouse, any expenditures of community funds do not come under the reimbursement provision and the student spouse is not forced to pay for a valueless degree.¹³² Moreover, reimbursement would not be required if the education increases the income of the spouse who would otherwise require support.¹³³ In this situation, the supporting spouse already has received a benefit from the education the student spouse received because the spousal support burden is reduced.¹³⁴

The Law Revision Commission advised against disrupting the spousal support system to deal with the problem of the treatment of the professional education upon divorce, stating that the reimbursement provision alone would be the best solution.¹³⁵ The legislature, however, amended section 4801 of the Civil Code which requires the court to consider various factors surrounding the circumstances of the parties in determining whether and in what amount spousal support should be awarded.¹³⁶ One of the factors the court is required to consider

two former spouses. *Id.* The Commission did note the possibility that the existing support scheme requires the student spouse to support the working spouse while the working spouse receives an equivalent education. *Id.* at 234 n.6; *see* CAL. CIV. CODE §4801(a)(9) (court required to consider any other factors deemed just and equitable for purpose of spousal support).

129. 1984 Cal. Stat. c.1661, §§1-5, at ____.

130. CAL. CIV. CODE §4800.3. "Community contributions" include payments made with community property for education, training, or repayment of a loan incurred for education or training. *Id.*

131. *Id.* §4800.3(c). Several circumstances may warrant a reduction or modification. *Id.* The community already may have substantially benefited from the community contributions. *Id.* §4800.3(c)(1). Section 4800.3 establishes rebuttable presumptions that the community has not substantially benefited from the contributions if made less than 10 years prior to the commencement of the dissolution proceeding and that the community has benefited substantially if the contributions were made more than 10 years prior to the commencement of the proceeding. *Id.* §4800.3(c)(1). The education or training received by a party may be offset by education or training received by the other party for which community contributions have been made. *Id.* §4800.3(c)(2). Finally, the education or training may enable the educated party to engage in gainful employment that substantially reduces the need of the party for support that would otherwise be required. *Id.* §4800.3(c)(3).

132. California Law Revision Commission, *supra* note 13, at 235.

133. *Id.* at 236.

134. *Id.*

135. *Id.* at 234-35.

136. In addition to the earning capacities of each party the court must consider the needs of each party, the obligations and assets of each party, the duration of the marriage, the ability

is the earning capacity of each spouse.¹³⁷ When considering the earning capacities of the spouses under the new provision, the court must take into account "the extent to which the supported spouse contributed to the attainment of an education, training, or a license by the other spouse."¹³⁸

Section 4800.3 of the Civil Code specifically provides that reimbursement to the community is the exclusive remedy for expenditures made for the education or enhancement of earning capacity of one spouse.¹³⁹ This section, however, also provides that this exclusive reimbursement remedy is not intended to limit the consideration of the effect of the education on the circumstances of the parties for purposes of setting spousal support.¹⁴⁰ Commentators have maintained that mere reimbursement of the actual funds expended by the working spouse is an inadequate compensatory remedy.¹⁴¹ The out-of-pocket costs of the education usually are not as great in value as the foregone opportunities for greater income during the marriage if the student spouse worked rather than attended school.¹⁴² The costs of the education also do not reflect the opportunities for education or training that the working spouse passed up in order to support the student spouse.¹⁴³ These "opportunity costs" reflect the true cost of the education the student spouse receives and usually far exceed the out-of-pocket expenses incurred for the education.¹⁴⁴ Additionally, mere reimbursement of educational costs does not begin to address the gross inequities regarding the disparate post-divorce incomes of men and

of the supported spouse to engage in gainful employment, the time required for the supported spouse to acquire appropriate education, the age and health of the parties, and any other factors that the court deems just and equitable. CAL. CIV. CODE §4801(a); see *In re Marriage of Rosen*, 24 Cal. App. 3d 885, 101 Cal. Rptr. 245 (1972) (court must consider circumstances of parties).

137. CAL. CIV. CODE §4801(a)(1). In making this consideration, the court is required to take into account the extent to which the earning capacity of the supported spouse has been impaired by reason of unemployment during the marriage to allow the supported spouse to devote time to domestic duties. *Id.*

138. *Id.*

139. *Id.* §4800.3(d)

140. *Id.*

141. Weitzman, *supra* note 1, at 1210-21; Krauskopf, *supra* note 3, at 395-409; Bruch, *supra* note 8, at 816-21; *Recent Developments*, *supra* note 7, at 215-18; Comment, *supra* note 7, at 293-99.

142. Krauskopf, *supra* note 3, at 386-88; Bruch, *supra* note 8, at 818-19.

143. Krauskopf, *supra* note 3, at 386-88; Bruch, *supra* note 8, at 818-19; Weitzman, *supra* note 1, at 1210-11.

144. The opportunity costs may amount to as much as 74% of the total investment costs in acquiring a college education. Krauskopf, *supra* note 3, at 384. The working spouse may incur other types of opportunity costs as well. For example, Janet Sullivan quit a full-time job to move with her husband as he pursued his internship and residency following medical school. *Sullivan*, 37 Cal. 3d at 765-66, 691 P.2d at 1021-22, 209 Cal. Rptr. at 355-56 (1984).

women.¹⁴⁵ If the working spouse is to have any substantial recompense for the benefit conferred upon the student, the working spouse must look to the new spousal support provision in Civil Code section 4801.

B. Spousal Support Under Assembly Bill 3000

Spousal support in California generally is awarded on the basis of the inability of the supported spouse to provide self-support and the ability of the supporting spouse to pay.¹⁴⁶ Courts encourage independence and complete separation of the parties by limiting the amount and duration of spousal support.¹⁴⁷ Contrary to the popular myth that a divorcee lives comfortably on the income of her former spouse, research indicates that spousal support is awarded to women only in approximately 17% of divorce cases.¹⁴⁸ The amounts awarded increasingly are smaller and limited to a shorter period.¹⁴⁹ Additionally, Civil Code section 4806 prohibits a spousal support award when there are no children from the marriage and an award would be wholly unnecessary to provide for the proper support of the supported spouse.¹⁵⁰ Any award of spousal support to the working spouse under AB 3000 must overcome the judicial reluctance to award support to a spouse who has demonstrated an ability to work.¹⁵¹ If the spouse

145. *Recent Developments, supra* note 7, at 212. Professor Weitzman found that the disparity of post-divorce incomes between men and women was greatest in the higher income levels where the husbands were more likely to have a professional education. Weitzman, *supra* note 1, at 1242-44.

146. CAL. CIV. CODE §4801. The court considers the earning capacity of the spouses, the extent to which one spouse contributed to the education of the other resulting in an enhanced earning capacity, the needs of each party, their obligations and assets, the duration of the marriage, the ability of the supported spouse to engage in meaningful employment, the time required for the supported spouse to acquire education, training and employment, the age and health of the parties, the standard of living of the parties and any other factors the court deems just and equitable. *Id. See also* Weitzman, *supra* note 1, at 1184-85 (focus of support law shifted from fault to issues of ability to pay and financial need); Comment, *supra* note 3, at 452-56, (factors considered in setting spousal support).

147. *In re Marriage of Mason*, 93 Cal. App. 3d 215, 155 Cal. Rptr. 350 (1979) (legislative intent for supported spouse to be encouraged to seek employment); *In re Richmond*, 105 Cal. App. 3d 352, 164 Cal. Rptr. 381 (1980) (support award may be structured to encourage self reliance).

148. Weitzman & Dixon, *The Alimony Myth: Does No-Fault Divorce Make a Difference*, 14 FAM.L.Q. 141, 143 (1980); Bruch, *supra* note 8, at 774.

149. Weitzman & Dixon, *supra* note 148, at 142-46; Comment, *supra* note 3, at 443, 451-69.

150. CAL. CIV. CODE §4806. Section 4806 also permits a court to refuse to award support out of the separate property of one party if the other spouse has a separate estate or income sufficient for support. *Id.*

151. Comment, *supra* note 7, at 284. In his concurring and dissenting opinion in *Sullivan*, Justice Mosk reacted to the possibility of spousal support under AB 3000 by stating: "I point out that the issue framed in this case does not involve the element of spousal support. That is to be awarded generally on the basis of the needs of one spouse and the ability of the other to pay. . . ." 37 Cal. 3d at 770, 691 P.2d at 1025, 209 Cal. Rptr. at 359.

seeking support has demonstrated the capacity for self-support, the court is not likely to award spousal support.¹⁵² This is true even though the consequence may result in a gross disparity of income following divorce.¹⁵³

Another factor the court will consider when setting spousal support is the standard of living the couple enjoyed during the marriage.¹⁵⁴ When a couple has made economic sacrifices during marriage to put one spouse through school, the marital living standard probably will be depressed artificially, further discouraging a court from awarding spousal support.¹⁵⁵ The duration of the marriage in these cases typically is short, lessening the likelihood of a significant award of spousal support.¹⁵⁶ Additionally, estimating the earning capacity of the student spouse at dissolution of a shorter marriage, before the student spouse has attained peak earning potential, may not provide an award commensurate with the actual financial situation of the parties.¹⁵⁷

The new provision in Civil Code section 4801 requires the court, when setting spousal support, to consider the extent the working spouse has contributed to the attainment of an education.¹⁵⁸ To have any independent significance, this new provision must have effect when necessary to avoid injustice regardless of the demonstrated ability of the supported spouse for self-support.¹⁵⁹ If the employment of a working spouse effectively will preclude any award of spousal support, the new language in Civil Code section 4801(a)(1) is meaningless.¹⁶⁰ The resulting denial of spousal support would be the same under the previous version of section 4801(a)(1).¹⁶¹ Although the new provision

152. *In re Marriage of Kelly*, 64 Cal. App. 3d 82, 95, 134 Cal. Rptr. 259, 266 (1976); Comment, *supra* note 7, at 284; Comment, *supra* note 3, at 452-71; Comment, *Rehabilitative Spousal Support: In Need of a More Comprehensive Approach to Mitigating Dissolution Trauma*, 12 U.S.F.L. REV. 493, 508-13 (1978)[hereinafter cited as Comment, *Rehabilitative*].

153. See Weitzman, *supra* note 1, at 1251 (men experience 42% improvement in standard of living while women experience 73% decline following divorce).

154. CAL. CIV. CODE §4801(a)(8).

155. Comment, *supra* note 7, at 284; Comment, *Rehabilitative*, *supra* note 152, at 502-05.

156. See, e.g., *In re Marriage of Sullivan*, 37 Cal. 3d 762, 691 P.2d 1020, 209 Cal. Rptr. 354 (1984) (marriage lasted 10 years); *Mahoney v. Mahoney*, 453 A.2d 527 (N.J. 1982) (eight years); *Lynn v. Lynn*, 453 A.2d 539 (N.J. 1982) (seven years); *DeLa Rosa v. DeLa Rosa*, 309 N.W.2d 755 (Minn. 1981) (six years).

157. Comment, *Rehabilitative*, *supra* note 152, at 499-502.

158. See CAL. CIV. CODE §4801(a)(1) (consideration of earning capacity); Comment, *Rehabilitative*, *supra* note 152, at 505-08 (earning capacity of the supporting spouse).

159. Krauskopf, *supra* note 3, at 399.

160. CAL. CIV. CODE §4801(a)(1).

161. See 1983 Cal. Stat. c. 302, §7, at ____ (amending CAL. CIV. CODE §4801). Under prior law section 4801(a)(1) required the court to consider only: "The earning capacity of each spouse, taking into account the extent to which the supported spouse's present and future earning capacity is impaired by periods of *unemployment* that were incurred during the marriage to permit the supported spouse to devote time to domestic duties." *Id.* See also CAL. CIV.

does not represent a sweeping change in the California spousal support scheme, the legislature clearly has recognized that mere reimbursement to the community does not address adequately the inequities existing in this situation.¹⁶² In *Sullivan*, the California Supreme Court recognized the availability of spousal support based, at least in part, upon consideration of the extent of the contributions of the working spouse.¹⁶³

The spousal support provision in AB 3000 is only one consideration among several that the court must take into account.¹⁶⁴ Any reluctance to award justified spousal support ignores the reality of the economic consequences of divorce, particularly as they impact upon women.¹⁶⁵ Courts must develop some policy basis for addressing spousal support under the new Civil Code section 4801 provision. Judicial inability to define objectives clearly may result in continued denial of support to working spouses.

1. Basis for Awarding Spousal Support

In California, spousal support cannot protect the full expectation interest of the working spouse who supported a student spouse in obtaining an education.¹⁶⁶ To protect the expectation interest, the court would have to award support approximating one-half of the projected value of the enhanced earning capacity of the educated spouse.¹⁶⁷ This result has no basis in the California spousal support scheme.¹⁶⁸ Furthermore, this outcome is tantamount to recognition of a community property interest in the professional education and is precluded by Civil Code section 4800.3, which provides that reimbursement of the

CODE §4801(a)(5) (court required to consider ability of supported spouse to engage in gainful employment).

162. See *Sullivan*, 37 Cal. 3d at 766, 691 P.2d at 1023, 209 Cal. Rptr. at 357 (spousal support available in addition to reimbursement). The legislature added the spousal support provision to AB 3000 even though the Law Revision Commission recommended making no change in the support scheme. See California Law Revision Commission, *supra* note 13, at 234.

163. *Sullivan*, 37 Cal. 3d at 766, 691 P.2d at 1023, 209 Cal. Rptr. at 357. Justice Mosk, however, in his partial dissent, stressed that spousal support was still to be based on the need of the supported spouse and the ability of the other spouse to pay. *Id.* at 770-71, 691 P.2d at 1025, 209 Cal. Rptr. at 359.

164. CAL. CIV. CODE §4801.

165. See generally, Weitzman, *supra* note 1; Weitzman & Dixon, *supra* note 148; Krauskopf, *supra* note 3; Seal, *A Decade of No-Fault Divorce: What It Has Meant Financially for Women in California*, FAM. ADVOCATE 10 (Spring 1979).

166. Comment, *supra* note 7, at 283-85.

167. See Bruch, *supra* note 8, at 810-15; *Recent Developments*, *supra* note 7, at 215-16; Weitzman, *supra* note 1, at 1210-20. See generally Mullenix, *The Valuation of an Educational Degree at Divorce*, 16 LOY. L.A. L. REV. 227, 268-83 (1983).

168. See *In re Marriage of Burlini*, 143 Cal. App. 3d 65, 191 Cal. Rptr. 541 (1983) (purpose of spousal support to provide financial assistance as appropriate).

costs of the education is to be the exclusive remedy of the community.¹⁶⁹

A better analysis for determining standards to implement the new support provision would focus upon the disparity of earning capacities between the two spouses after divorce resulting from the misallocation of the opportunity costs of obtaining the professional education.¹⁷⁰ Both spouses make sacrifices during marriage to allow the student spouse to obtain the professional education.¹⁷¹ As noted earlier, significant opportunities in terms of lost income to the student spouse,¹⁷² and opportunities for enhancement of earning capacity by the working spouse,¹⁷³ often are foregone. Upon divorce, the disparate income levels that often result between the two spouses are a function of the allocation of the opportunity costs incurred during marriage.

The working spouse incurs opportunity costs in terms of a decreased standard of living during the marriage and foregone educational and career opportunities. These opportunity costs are part of the true cost of the education obtained by the student spouse.¹⁷⁴ The working spouse is willing to bear these costs with the expectation of sharing the benefits of the enhanced earning capacity of the student in the future. If divorce occurs before the community has received a substantial benefit from the education, the working spouse leaves the marriage still bearing the opportunity costs. The couple usually accumulates little property for division due to the lower standard of living during the period the education was obtained. Additionally, the working spouse may have sacrificed better opportunities for education or employment. The student spouse, on the other hand, leaves the marriage with the enhanced earning capacity and none of the continuing opportunity costs.¹⁷⁵

AB 3000 properly focuses attention upon the effect of the opportunity costs incurred in obtaining the education on the earning capacities of the spouses.¹⁷⁶ After recognizing that the earning capacities of the spouses have been affected greatly by the opportunity costs that have fallen disproportionately upon the working spouse, courts

169. See *Sullivan*, 37 Cal. 3d at 776-71, 691 P.2d at 1023-26, 209 Cal. Rptr. at 357-60 (Civil Code sections 4800, 4800.3 and 4801 govern issue of compensation for spouse who has contributed to the education of the other during marriage).

170. Krauskopf, *supra* note 3, at 380-88, 413-15.

171. *Id.*

172. See *supra* notes 30 to 35 and accompanying text.

173. Weitzman, *supra* note 1, at 1210; Krauskopf, *supra* note 3, at 386-88.

174. Krauskopf, *supra* note 3, at 386-88.

175. But see CAL. CIV. CODE §4800.3(b)(2) (incorporating former CAL. CIV. CODE §4800(b)(4) (any loans remaining at divorce that were incurred from the student spouse's education are assigned to the student spouse upon divorce)).

176. CAL. CIV. CODE §4801(a)(1).

should have little difficulty developing a basis for a spousal support award designed to apportion the burden of these costs more equitably. Two possible approaches to setting spousal support are suggested in the following section.

2. *Spousal Support Alternatives Under AB 3000*

Courts have broad discretion in making spousal support awards.¹⁷⁷ The alternative methods available to achieve a just support award should remedy any unfair disparity of post-divorce incomes between the spouses attributable to the misallocation of the opportunity costs of the professional education obtained during marriage.¹⁷⁸ Two alternatives a court could employ are considered in this subsection: 1) rehabilitative spousal support; and 2) support based upon the impairment of the earning capacity of the working spouse due to the circumstances of the marriage.

a. *Rehabilitative Spousal Support*

The first alternative a court should consider is rehabilitative spousal support.¹⁷⁹ This would involve requiring the educated spouse to support the non-educated spouse while the non-educated spouse pursues a similar educational or training opportunity.¹⁸⁰ The new support provision in Civil Code section 4801 demonstrates that rehabilitative support is an acceptable application of spousal support.¹⁸¹ If the working spouse has the desire and the ability to pursue an educational opportunity similar to that of the student spouse, rehabilitative support has several advantages. This remedy gives the working spouse the same opportunity to enhance earning capacity that the student spouse was given. The value of the opportunities each spouse receives will be roughly equal. The education or training provided for the working spouse will help eliminate the income disparity following divorce. Support would not be required beyond the period the working spouse is in school if the education or training is successful.¹⁸² This aids in

177. *In re Marriage of McNaughton*, 145 Cal. App. 3d 845, 852-53, 194 Cal. Rptr. 176, 179 (1983) (abuse of discretion setting spousal support will be found only if no judge would reasonably make the same order under similar circumstances).

178. Weitzman & Dixon, *supra* note 148, at 174-76.

179. See California Law Revision Commission, *supra* note 13, at 234 n.6.

180. See *Morgan v. Morgan*, 366 N.Y.S.2d 977 (Sup. Ct. 1975), *modified*, 383 N.Y.S.2d 343 (App. Div. 1976) (trial court ordered husband to support wife while she obtained education similar to that the husband obtained during marriage).

181. CAL. CIV. CODE §4801(a)(1).

182. See *id.* §4801(e). Section 4801(e) allows the court to order a party to submit to an

terminating unnecessary contact between the parties as quickly as possible following divorce. Many working spouses, however, will not be able to take advantage of this type of rehabilitative support due to age, child-care responsibilities, lack of scholastic qualifications, or inclination. Therefore, this remedy will be rather limited in application.

b. The Impaired Earning Capacity of the Working Spouse

The working spouse may have incurred substantial opportunity costs that impaired the earning capacity of the working spouse. The working spouse may have foregone substantial educational or career opportunities. The requirements of the education or career of the student spouse may have necessitated a move that required the working spouse to leave full-time employment in which the working spouse had accumulated seniority or acquired specialized skills.¹⁸³ A court should consider how much the earning capacity of the working spouse was impaired by the circumstances of the marriage.¹⁸⁴ Balancing any impairment of the earning capacity of the working spouse against the earning capacity and the expected standard of living of the student spouse, the court should award support designed to reduce the disparity of post-divorce incomes between the spouses. The income of the working spouse would be included in any support determination.¹⁸⁵ The fact that the working spouse would be capable of self support at a minimal standard of living should not bar an award of spousal support. This support scheme would ameliorate the harsh injustice of allowing only the student spouse to enjoy a much higher standard of living as a result of the education obtained with the assistance of the working spouse.

The new support provision embodied in section 4801 gives more weight to the enhanced earning capacity of the student spouse when the circumstances of the parties are considered. The fact that the student spouse has a greatly enhanced earning capacity due in part to the efforts of the working spouse should outweigh, in many circumstances, the fact the working spouse has demonstrated some ability for self-support. To deny the working spouse support in this situa-

examination by a vocational training consultant. *Id.* This provision could provide the court with the necessary information to determine whether education or training would be successful.

183. See *Sullivan*, 37 Cal. 3d at 765-66, 691 P.2d at 1021-22, 209 Cal. Rptr. at 355-56 (wife left full-time job to follow husband as he pursued his medical internship and residency).

184. The consideration of the impact of the circumstances on the working spouse would be similar to consideration of impairment of earning capacity due to devotion to domestic duties. See CAL. CIV. CODE §4801(a)(1).

185. *Id.*

tion penalizes the working spouse for contributing to the welfare of the couple during marriage.

Section 4801 requires the court to consider all the circumstances of the parties and make explicit findings of fact with regard to the factors enumerated for consideration in the section.¹⁸⁶ Although the court retains broad discretion over the amount of a spousal support award,¹⁸⁷ that amount must be determined by applying the factors enumerated in section 4801.¹⁸⁸ Consequently, a court that ignores the contributions of the working spouse to the education earned by the student spouse, merely because the working spouse is capable of some measure of self-support may be committing an abuse of discretion. If the disparity of post divorce standards of living between the two spouses results from the contributions and sacrifices of the working spouse for the education of the student spouse, the new provision in Section 4801 clearly calls for a substantial award of spousal support to ameliorate the hardship on the working spouse. Two methods of approaching spousal support have been suggested in this comment that a court could employ under new Civil Code sections 4800.3 and 4801 to remedy the inequities in the student spouse/working spouse divorce.

CONCLUSION

A spouse who contributes to the support of a student spouse in the attainment of a professional education or training that substantially enhances the earning capacity of the student spouse incurs opportunity costs that directly affect financial status. The working spouse incurs these costs with the expectation that the marriage will endure and that both spouses will share in the benefits of a higher standard of living as a consequence of their investment in the human capital of the student spouse. When divorce occurs before the community has enjoyed these benefits, the working spouse is deprived of any return on the investment. The student spouse, on the other hand, leaves the marriage with all the benefits of the enhanced earning capacity earned for the student spouse in part by the efforts of the working spouse. Many legal commentators have argued for the recognition

186. *Id.* §4801(a). The court may be required to make factual determinations regarding the circumstances of the parties. *Id.*

187. *In re Marriage of McNaughton*, 145 Cal. App. 3d 845, 852-53, 194 Cal. Rptr. 176, 179 (1983) (abuse of discretion setting spousal support will be found only if no judge would reasonably make the same order under similar circumstances).

188. *In re Marriage of Fransen*, 142 Cal. App. 3d 419, 424-25, 190 Cal. Rptr. 885, 887 (1983) (court must apply section 4801 criteria not just notice them).

of a property interest in the professional education of the student spouse that could be valued and divided upon divorce. California, however, has rejected the notion of the professional education as property that can be divided between the spouses upon divorce. Instead, California enacted Assembly Bill 3000 which provides for reimbursement upon divorce of community funds expended for the educational costs of the student spouse. AB 3000 also requires courts to consider, for the purposes of setting spousal support, the extent the working spouse has contributed to the attainment of the education by the student spouse.

Mere reimbursement of the community for the costs of the education of the student spouse is a very restrictive remedy that in many cases does not address the fundamental inequities the working spouse suffers. Spousal support often has been denied to the working spouse because of a demonstrated capacity for self-support. Assembly Bill 3000 attempts to increase the number of situations in which the working spouse will be awarded significant spousal support. Employed as advocated by this author, the provisions of Assembly Bill 3000 can provide an equitable remedy for the working spouse who has contributed to the professional education of the student spouse.

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