

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—*Mahoney v. Mahoney*, 91 N.J. 488, 453 A.2d 527 (1982).

One 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.¹ The Supreme Court of New Jersey recently decided this volatile issue in *Mahoney v. Mahoney*,² holding

¹ See Skoloff, *Professional Degree as Property: Can You Take It All With You?*, Nat'l L.J., Jan. 3, 1983, at 18.

² 91 N.J. 488, 453 A.2d 527 (1982). Two companion cases to *Mahoney*, *Lynn v. Lynn*, 91 N.J. 510, 453 A.2d 539 (1982) and *Hill v. Hill*, 91 N.J. 506, 453 A.2d 537 (1982), were decided on the same day. In *Lynn*, the court held that a medical degree and license were not property subject to equitable distribution. *Lynn*, 91 N.J. at 517, 453 A.2d. at 452. The court noted that while the facts in *Lynn* were more complicated than those in *Mahoney*, the legal issues were the same. *Id.* at 512, 453 A.2d at 540.

Robert and Bonnie Lynn were married in 1971. While Robert attended medical school, Bonnie provided for most of the household expenses with the expectation that her husband's education would bring future benefits to the couple. *Id.* at 512-13, 453 A.2d at 540. Bonnie Lynn worked full time to support the household during the first three years of their marriage. *Id.* at 513, 453 A.2d at 540. Her husband made only small financial contributions to the household and for two years earned no income whatsoever. In January of 1978 Robert Lynn filed for divorce and Bonnie counterclaimed for divorce seeking both alimony and an equitable distribution of the marital property. *Id.* Meanwhile, Bonnie's health had deteriorated as a result of Meniere's disease and she was not able to continue to work after September of 1979. *Id.* at 514, 453 A.2d at 540. The chancery division granted the couple a divorce and subsequently the trial court held that professional degrees and licenses were property under New Jersey's equitable distribution statute. *Id.*, 453 A.2d at 541. In so doing the court ordered Robert Lynn to pay Bonnie 20% of the value of his degree and license. *Id.* The court also awarded Bonnie \$125 per week in alimony, the cost of medical coverage and certain medical expenses as well as her attorney fees. *Id.* at 514-15, 453 A.2d at 541. The New Jersey Supreme Court granted direct certification to hear Robert and Bonnie Lynn's appeal of the trial court's decision. *Id.* at 516, 453 A.2d at 542.

In *Hill*, the second companion case to *Mahoney*, the supreme court upheld the appellate division's reversal of the trial court's treatment of a dental degree and license as property subject to equitable distribution. *Hill*, 91 N.J. at 510, 453 A.2d at 539. Anita Hill, plaintiff-appellant, and Robert Hill, defendant-respondent, were married in 1973. *Id.* at 507, 453 A.2d at 537. Robert had supported his wife for one year while she attended medical school. *Id.* at 507-08, 453 A.2d at 537. In 1975 the couple moved to New Jersey where Robert began dental school. *Id.* at 508, 453 A.2d at 537. During this time the couple was primarily supported by Anita who worked as an assistant scientist and substitute teacher. The couple separated in 1978. *Id.* Subsequently, Robert completed dental school and became a resident in oral surgery while accumulating about \$30,000 in educational loans, and Anita moved to Boston and enrolled in dental school which required her to borrow great amounts of money for her education. *Id.*, 453 A.2d at 538. Anita Hill filed for and was granted a divorce. *Id.* The trial court awarded the plaintiff \$13,000 as reimbursement for one-half of the amount she contributed to the household while her husband was in dental school, minus the contributions he had made. *Id.* at 508-09, 453 A.2d at 538. The

that a professional degree or license is not property subject to partition upon the dissolution of a marriage. The court did, however, hold that a spouse is entitled to "reimbursement alimony" as compensation for supporting a marital partner who has pursued an educational degree or professional training as long as the party seeking compensation can show that both parties expected "increased income and material benefits" from the education.³

Melvin and June Lee Mahoney were married in Indiana in 1971.⁴ At that time Melvin had earned a degree in engineering and June Lee held a bachelor of science degree.⁵ Except for the period of time between September of 1975 and January of 1977, when Melvin attended the University of Pennsylvania in pursuit of a Masters of Business Administration degree (M.B.A.), the couple shared all household expenses until they separated in October of 1978.⁶ While her husband was a student, June Lee contributed approximately \$24,000 to the household and Melvin made no financial contribution.⁷ His educational expenses, which totalled about \$6,500, were paid by Air Force and other veterans' benefits.⁸ Upon receiving his M.B.A., Melvin became employed by Chase Manhattan Bank as a commercial lending officer.⁹

Melvin sued for divorce in March of 1979, and his wife counter-claimed for the same relief.¹⁰ In May of 1980, the trial court granted dual judgments of divorce on the basis of an eighteen month continuous separation.¹¹ The only significant issue presented at trial was June Lee's reimbursement claim for the amount of support which she provided her husband while he was an M.B.A. student.¹² June Lee claimed entitlement to one-half of her \$24,000 contribution to their household while her husband was a student plus one-half of her husband's \$6,500

appellate division reversed and remanded the case back to the trial court for a determination of rehabilitative alimony. *Id.* at 509, 453 A.2d at 538. Anita Hill appealed and the supreme court granted certification. *Id.*

³ *Mahoney*, 91 N.J. at 502-03, 453 A.2d at 535.

⁴ *Id.* at 492, 453 A.2d at 529.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* In 1976 June Lee Mahoney began a graduate program at Rutgers University while continuing to work full time. *Id.* at 493, 453 A.2d at 529. Her educational expenses were paid by her employer. June Lee received a master's degree in microbiology one year after the separation from her husband. *Id.*

¹⁰ *Id.*

¹¹ *Id.* At the time of trial Melvin and June Lee's incomes were \$25,600 and \$21,000, respectively. The couple had partitioned their personal property by agreement and owned no real property. No claim for alimony was made. *Id.*

¹² *Id.*, 453 A.2d at 529-30.

tuition expense.¹³ The trial court, in accepting June's position, held that "the education and degree obtained by plaintiff, . . . constituted a property right subject to equitable offset upon dissolution of the marriage."¹⁴ The trial court ordered the plaintiff to reimburse the defendant in the amount of \$5,000, to be paid in monthly installments.¹⁵

The appellate division reversed, holding that a professional license or educational degree is not property subject to equitable distribution¹⁶ and that a spouse is not entitled to reimbursement for contributions made toward the financial support of a marriage partner who is in the process of earning an educational degree.¹⁷ The appellate division relied primarily upon the New Jersey Supreme Court's decision in *Stern v. Stern*,¹⁸ in which the court held that an individual's increased earning capacity, even when aided by the efforts of his or her spouse, is not "property" under New Jersey's equitable distribution statute.¹⁹

The appellate division in *Mahoney* noted that "if the enhanced earning capacity itself is not distributable property, then neither is the license or degree which is merely the memorialization of the attainment of the skill, qualifications and educational background which is the prerequisite of the enhanced earning capacity and on which it is predicated."²⁰ The court further suggested that equity could be achieved for the supporting spouse through the trial judge's consideration of earn-

¹³ *Id.* at 493, 453 A.2d at 530.

¹⁴ *Mahoney v. Mahoney*, 175 N.J. Super. 443, 447, 419 A.2d 1149, 1150-51 (Ch. Div. 1980), *rev'd*, 182 N.J. Super. 598, 442 A.2d 1062 (App. Div.), *aff'd*, 91 N.J. 488, 453 A.2d 527 (1982). The trial court noted that the specific question of whether a professional degree should be property subject to equitable distribution was an issue of first impression in New Jersey. *Id.* at 445, 419 A.2d at 1150. Additionally, the court acknowledged that although other states disagree in answering that question, the majority conclude that neither the education nor the degree itself is quantifiable property subject to partition within a divorce settlement. *Id.* Nevertheless, the trial court accepted the minority view that an educational degree is property subject to equitable distribution as articulated in *In re Marriage of Horstmann*, 263 N.W.2d 885 (Iowa 1978) and in the dissenting opinion of Justice Carrigan in *In re Marriage of Graham*, 194 Colo. 429, 434, 574 P.2d 75. (1978) *Mahoney v. Mahoney*, 175 N.J. Super. 443, 445-47, 419 A.2d 1149, 1150-51 (Ch. Div. 1980), *rev'd*, 182 N.J. Super. 598, 442 A.2d 1062 (App. Div.), *aff'd*, 91 N.J. 488, 453 A.2d 527 (1982).

¹⁵ *Mahoney v. Mahoney*, 175 N.J. Super. 443, 447, 419 A.2d 1149, 1151 (Ch. Div. 1980), *rev'd*, 182 N.J. Super. 598, 442 A.2d 1062 (App. Div.), *aff'd*, 91 N.J. 488, 453 A.2d 527 (1982). The court did not explain its rationale in choosing \$5,000 as the amount of the reimbursement. *Id.*

¹⁶ *Mahoney v. Mahoney*, 182 N.J. Super. 598, 442 A.2d 1062 (App. Div.), *aff'd*, 91 N.J. 488, 453 A.2d 527 (1982).

¹⁷ *Id.*

¹⁸ 66 N.J. 340, 331 A.2d 257 (1975). See *infra* notes 103-09 and accompanying text for a discussion of *Stern*.

¹⁹ *Mahoney v. Mahoney*, 182 N.J. Super. 598, 605, 442 A.2d 1062, 1066 (App. Div.), *aff'd*, 91 N.J. 488, 453 A.2d 527 (1982). See N.J. STAT. ANN. § 2A:34-23 (West Cum. Supp. 1983-1984) for New Jersey's equitable distribution statute; see also *infra* note 32 and accompanying text.

²⁰ *Mahoney v. Mahoney*, 182 N.J. Super. 598, 605, 442 A.2d 1062, 1066 (App. Div.), *aff'd*, 91 N.J. 488, 453 A.2d 527 (1982).

ing capacity in determining alimony and the distribution of marital assets.²¹ On appeal to the New Jersey Supreme Court, the appellate division was affirmed.²²

Traditionally, one method of financially protecting a divorced wife has been through the grant of an alimony award.²³ Alimony is based upon a husband's obligation to support his wife²⁴ and is utilized not only to support the spouse, but to provide for the care of young children, to ensure that the spouse does not become dependent upon public support, and to compensate the wife for services rendered during the marriage.²⁵ Alimony awards may take the form of permanent alimony, which continues until the recipient spouse remarries or either spouse dies, or alimony in gross, which is an award of a definite amount distributed in either a lump sum or installments.²⁶ Permanent alimony may be modified by the courts as circumstances of the parties change, but alimony in gross may not.²⁷

In recent years new variations on this basic theme have developed, with some jurisdictions implementing new forms of alimony such as rehabilitative alimony.²⁸ Rehabilitative alimony, unlike permanent alimony, is a temporary award intended to allow the recipient spouse ample time to find employment or to gain the education or training necessary to compete in the job market and to become self-sufficient.²⁹

²¹ *Id.* at 613, 442 A.2d at 1070. The appellate court suggested that an award of rehabilitative alimony would be appropriate in the situation where a wife defers her own educational objectives in order to provide financial support for her husband during his schooling. *Id.* at 615, 442 A.2d at 1071-72.

²² *Mahoney*, 91 N.J. at 495, 453 A.2d at 530.

²³ The word "alimony" is derived from the Latin "alimonia" which means sustenance. Alimony, therefore, is the "sustenance or support of the wife by her divorced husband . . ." BLACK'S LAW DICTIONARY 67 (rev. 5th ed. 1979).

²⁴ H. CLARK, LAW OF DOMESTIC RELATIONS § 14.1, at 420 (1968).

²⁵ *Id.* § 14.5, at 441-42. Although today many jurisdictions allow husbands alimony awards, there exists no reciprocal common law duty for a wife to support her husband. *Id.* § 14.6, at 448; see *Blaine v. Blaine*, 96 N.J. Super. 460, 233 A.2d 212 (Ch. Div. 1967).

²⁶ BLACK'S LAW DICTIONARY 67 (rev. 5th ed. 1979). All forms of alimony must be authorized by statute. H. CLARK, *supra* note 24, § 14.1, at 421. Temporary alimony, or alimony *pendente lite*, is available to a spouse for temporary support in a divorce or separate maintenance action pending the issuance of a judicial decree. *Id.* § 14.2, at 422-23. Attorney's fees may also be awarded in such cases. *Id.* at 428.

²⁷ H. CLARK, *supra* note 24, § 14.5, at 447.

²⁸ See *Pfohl v. Pfohl*, 345 So. 2d 371 (Fla. Dist. Ct. App. 1977).

²⁹ *Erickson, Spousal Support Toward the Realization of Educational Goals: How the Law Can Ensure Reciprocity*, 1978 WIS. L. REV. 947, 951. Significantly, a rehabilitative award is not dependent upon the recipient spouse's financial contributions to his or her partner's education or to the household in general. It is especially useful for relatively young spouses who have the capacity to make a lifestyle transition. See *Turner v. Turner*, 158 N.J. Super. 313, 385 A.2d 1280 (Ch. Div. 1978).

Similarly, reimbursement alimony sometimes has been used by the courts.³⁰ Under this remedy a reimbursement is awarded as compensation for contributions made by one spouse to the other spouse's educational expenses based upon equitable principles, including contract, quasi-contract and constructive trust theories.³¹

In New Jersey, alimony is authorized by statute and is available to either spouse.³² The statute specifies three factors as considerations in determining whether alimony should be awarded and, if so, the amount awarded: actual need, the ability of the parties to pay, and the duration of the marriage.³³ Additionally, the court is empowered to consider all other factors that are "fit, reasonable and just" in determining an alimony award.³⁴ These considerations include age, education, mental and physical health, income, earning potential, assets of the party, marital fault, tax impact of an alimony award, previous *pendente lite* payments, the public interest in keeping divorced spouses from receiving public support funds, and the standard of living to which the couple was accustomed during their marriage.³⁵ In the past, New

³⁰ *E.g.*, *In re Marriage of Horstmann*, 263 N.W.2d 885 (Iowa 1978); *Hubbard v. Hubbard*, 603 P.2d 747 (Okla. 1979).

³¹ *Erickson*, *supra* note 29, at 968-70.

³² N.J. STAT. ANN. § 2A:34-23 (West Cum. Supp. 1983-1984). The statute provides in part:

Pending any matrimonial action brought in this State or elsewhere, or after judgment of divorce or maintenance, whether obtained in this State or elsewhere, the court may make such order as to the alimony or maintenance of the parties, . . . as the circumstances of the parties and the nature of the case shall render fit, reasonable and just, and require reasonable security for the due observance of such orders. Upon neglect or refusal to give such reasonable security, as shall be required, or upon default in complying with any such order, the court may award and issue process for the immediate sequestration of the personal estate, and the rents and profits of the real estate of the party so charged, and appoint a receiver thereof, and cause such personal estate and the rents and profits of such real estate, or so much thereof as shall be necessary, to be applied toward such alimony and maintenance as to the said court shall from time to time seem reasonable and just; or the performance of the said orders may be enforced by other ways according to the practice of the court. Orders so made may be revised and altered by the court from time to time as circumstances may require.

In all actions brought for divorce, divorce from bed and board or nullity the court may award alimony to either party, and in so doing shall consider the actual need and ability to pay of the parties and the duration of the marriage.

Id.

³³ *Id.* Two other factors are also specified but these only apply in certain circumstances. First, in all matrimonial actions other than those based upon the ground of separation, "the court may consider also the proofs made in establishing such ground in determining an amount of alimony" Second, where a divorce "is granted on the ground of institutionalization for mental illness the court may consider the possible burden upon the taxpayers of the State" *Id.*

³⁴ *Id.*

³⁵ G. SKOLOFF & L. CUTLER, *NEW JERSEY FAMILY LAW PRACTICE* (4th ed. 1982) § 5.3, at 36-61. Recently, there has been an attempt to amend New Jersey's alimony provisions. S. 600, 200th

Jersey courts had generally awarded permanent alimony, which terminates when the recipient spouse remarries or when either spouse dies.³⁶ This stance has been eroded in recent years. In *Turner v. Turner*,³⁷ the chancery court accepted the novel and somewhat revolutionary concept of rehabilitative alimony.³⁸ In that case, rehabilitative alimony was defined as "alimony payable for a short, but specific and terminable period of time, which will cease when the recipient is, in

N.J. Legis., 1st Sess. (1982), if passed, would affect New Jersey's alimony provisions in two ways. First, the bill would prescribe that an alimony award can be either temporary or permanent in nature. *Id.* at 2. This would codify the practices that the courts have utilized in the past based upon judicial discretion. Second, the bill would list the factors that a court could consider in determining alimony. The criteria are illustrative rather than comprehensive since other nonspecified factors can be considered by the court. One factor presently found in N.J. STAT. ANN. § 2A:34-23 is the duration of the marriage. Significantly, the bill would also include as criteria:

the age, physical and emotional health of the parties; the standard of living established in the marriage and the likelihood that the party seeking maintenance can become self-supporting at a reasonably comparable standard of living, the earning capacities, educational levels, vocational skills, and employability of the parties; the length of absence from the job market and custodial responsibilities for children of the party seeking maintenance; the time and expense necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment; and the history of the contributions to the marriage by each party including contributions to the care and education of the children and interruption of personal careers or educational opportunities.

S. 600, 200th N.J. Legis., 1st Sess. (1982).

³⁶ G. SKOLOFF & L. CUTLER, *supra* note 35, § 5.5, at 68. Historically, New Jersey alimony laws are based upon early English common law. *Parmly v. Parmly*, 125 N.J. Eq. 545, 5 A.2d 789 (Ct. Err. & App. 1939). A divorce was granted by the English ecclesiastical courts or, in certain cases, by act of Parliament. *Lynde v. Lynde*, 64 N.J. Eq. 736, 52 A. 694 (Ct. Err. & App. 1902). At common law an ecclesiastical court could only grant a divorce under grounds that would make the marriage *void ab initio*. *Id.* at 751, 52 A. 700. No alimony was granted in such a case since no valid marriage was recognized. A divorce *a mensa et thoro*, however, could be granted in situations where a husband and wife could no longer live together. In such cases an alimony award was permissible based upon the wife's need and the husband's ability to pay. *Id.* In New Jersey, however, jurisdiction was given by statute to the chancery courts over matters concerning divorce. Paterson's Laws, Act of Dec. 2, 1794, ch. 514, 1794 N.J. Laws 968, 969, § 7. This Act also provided that the chancery courts "shall and may, in every such divorce, take such order touching the care and maintenance of the children of that marriage, and also touching the maintenance and alimony of the wife, or any allowance to be made to her, and, if any, the security to be given for the same, as, from the circumstances of the parties, and nature of the case, may be fit, equitable and just." *Id.* Subsequently, the provisions for alimony payments were liberalized as alimony was allowed in cases of a legal separation and as the grounds for divorce were expanded. *Lynde v. Lynde*, 64 N.J. Eq. 736, 752-53, 52 A. 694, 700 (Ct. Err. & App. 1902).

³⁷ 158 N.J. Super. 313, 385 A.2d 1280 (Ch. Div. 1978).

³⁸ *Id.* at 323, 385 A.2d at 1285. The court noted that the purposes of rehabilitative alimony are to enable a wife to develop skills necessary to join the work force, to give the husband some idea as to when his obligation to his wife will cease, and to grant the court leave to decide when alimony responsibilities will end. *Id.* at 314-15, 385 A.2d at 1280-81. The court further observed

the exercise of reasonable efforts, in a position of self-support."³⁹ Subsequently, in *Lepis v. Lepis*,⁴⁰ the New Jersey Supreme Court expressed its approval of the use of rehabilitative alimony in appropriate circumstances.⁴¹

In addition to making determinations regarding alimony,⁴² the courts are responsible for effectuating a division of marital assets.⁴³ Courts are empowered to transfer the property in specie or require the transfer of cash, representing the value of such property, in either lump sum or installment payments.⁴⁴ Unlike permanent alimony, a property division once made may not be modified.⁴⁵

New Jersey is one of approximately forty states that have enacted in the common law tradition, equitable distribution statutes.⁴⁶ The New Jersey statute provides that in the case of divorce or divorce from bed and board⁴⁷ the court may "effectuate an equitable distribution of the

that the use of rehabilitative alimony would actually encourage divorced women to acquire training and to seek employment. *Id.* at 317, 385 A.2d at 1282.

³⁹ *Id.* at 314, 385 A.2d at 1280.

⁴⁰ 83 N.J. 139, 416 A.2d 45 (1980).

⁴¹ *Id.* at 155 n.9, 416 A.2d at 53 n.9. The court opined that rehabilitative alimony is an available option but only after the trial court has made an investigation into the wife's employment capabilities. *Id.*

⁴² H. CLARK, *supra* note 24, § 14.8, at 449. There is a significant interrelationship between alimony and equitable distribution. The primary purpose of alimony is to aid in the support of a spouse while the function of property distribution is to acknowledge the contribution that each spouse has made in the acquisition of marital property. G. SKOLOFF & L. CUTLER, *supra* note 35, § 5.1, at 9.

⁴³ There are two fundamental systems in the United States which classify marital property and dictate its treatment. Eight states have community property systems: Louisiana, Texas, New Mexico, Arizona, California, Washington, Idaho, and Nevada. All other states are common law jurisdictions. Hennell, *Community Property with Right of Survivorship*, 20 SAN DIEGO L. REV. 779 n.1 (1983); see generally W. DE FUNIAK & M. VAUGHN, *PRINCIPLES OF COMMUNITY PROPERTY* (2d ed. 1971).

In community property jurisdictions, the purpose of the division is to divide the property of the community and to give each spouse his or her share. H. CLARK, *supra* note 24, at 450. While property owned before marriage and property acquired gratuitously after marriage remain the separate property of the recipient, any assets procured during the marriage are classified as community property. J. CRIBBET, *PRINCIPLES OF THE LAW OF PROPERTY* 92 (2d ed. 1975). Alternatively, in strict common law property jurisdictions each spouse owns what he or she individually acquires, whether before or after the marriage. Only property obtained with joint funds are subject to division upon a divorce. Erickson, *supra* note 29, at 961. Nevertheless, many common law and community property states have enacted statutes which state that property subject to division is allocated in such a manner as is fair and equitable. H. CLARK, *supra* note 24, at 451. This scheme generally provides that all property acquired during marriage in states based on a common law tradition is divisible equitably, while community property jurisdictions provide that only assets designated as community property are subject to equitable distribution. The exact procedures vary from state to state. *Id.*

⁴⁴ H. CLARK, *supra* note 24, at 452.

⁴⁵ *Id.* at 449.

⁴⁶ G. SKOLOFF & L. CUTLER, *supra* note 35, § 6.1, at 4.

⁴⁷ A divorce from bed and board is "(a) partial or qualified divorce, by which the parties

property, both real and personal, which was legally and beneficially acquired by [both], or either of them during the marriage."⁴⁸ Since there is no legislative history dealing with equitable distribution under the Divorce Reform Act,⁴⁹ and since the Act provides no specific standards, the trial courts possess broad discretion in its application.⁵⁰

The purpose of New Jersey's equitable distribution law is to permit the courts to partition the marital assets equitably between the spouses.⁵¹ Assets subject to a division include most property that has been acquired by either spouse, or both spouses jointly, during their

are separated and forbidden to live or cohabit together, without affecting the marriage itself." BLACK'S LAW DICTIONARY 431 (rev. 5th ed. 1979).

⁴⁸ N.J. STAT. ANN. § 2A:34-23; see *supra* note 32 for text of statute.

⁴⁹ Act of June 14, 1971, ch. 212, 1971 N.J. Laws 1022. The Divorce Reform Act was a comprehensive attempt by the state legislature to review New Jersey's divorce law. See *Painter v. Painter*, 65 N.J. 196, 203, 320 A.2d 484, 487-88 (1974). Most of the changes in the divorce law dealt with the revision and expansion of the grounds for divorce. *Id.* The provision for the equitable distribution of property was included in the Divorce Reform Act by amendment without specific mention within the title of the Act. *Id.* at 207, 320 A.2d at 490. Prior to the passage of New Jersey's equitable distribution statute there was no provision for distribution of marital assets. Note, *New Jersey Courts Make First Equitable Distribution of Property Under New Divorce Act*, 4 SETON HALL L. REV. 311 (1972). The sole responsibility of the trial court before the adoption of the distribution provision was merely to determine the separate property of each spouse and to divide equally the property held jointly. *Id.* at 313.

⁵⁰ G. SKOLOFF & L. CUTLER, *supra* note 35, § 6.1, at 4.

⁵¹ Although N.J. STAT. ANN. § 2A:34-23 provides no guidelines for the granting of an equitable distribution of property, case law has attempted to fill the void. In *Painter v. Painter*, 65 N.J. 196, 320 A.2d 484 (1974), Justice Mountain listed with approval several factors which the trial court had considered in making an equitable distribution of marital property upon the granting of a divorce. *Id.* at 211, 320 A.2d at 492. These factors included:

- (1) Respective age, background and earning ability of the parties;
- (2) duration of the marriage;
- (3) the standard of living of the parties during the marriage;
- (4) what money or property each brought into the marriage;
- (5) the present income of the parties;
- (6) the property acquired during the marriage by either or both parties;
- (7) the source of acquisition;
- (8) the current value and income producing capacity of the property;
- (9) the debts and liabilities of the parties to the marriage;
- (10) the present mental and physical health of the parties;
- (11) the probability of continuing present employment at previous earnings or better in the future;
- (12) effect of distribution of assets on the ability to pay alimony and support, and
- (13) gifts from one spouse to the other during the marriage.

Id. Justice Mountain also added tax consequences and trust fund provisions as additional factors to be considered. *Id.* at 212-13, 320 A.2d at 493. Recently, an attempt was made in the legislature to codify the factors that should be considered by judges in making an equitable distribution award. S. 600, 200th N.J. Legis., 1st Sess. (1982) would amend N.J. STAT. ANN. § 2A:34-23 and would take into consideration factors such as the duration of the marriage, the age and health of the parties, income and property of each of the parties, earning capacity, tax consequences and liabilities.

marriage.⁵² Property owned by the husband or wife before marriage is not subject to equitable distribution.⁵³

In *Rothman v. Rothman*,⁵⁴ the New Jersey Supreme Court extensively examined the conceptual underpinnings of equitable distribution for the first time.⁵⁵ The *Rothman* court noted that equitable distribution effectuates at least two public policy concerns. First, equitable distribution protects a spouse by acting as an alternative or complement to court ordered alimony.⁵⁶ Alimony alone may not sufficiently protect a spouse because under this scheme, payments may be discontinued permanently if the party responsible for making such payments dies, or may be temporarily interrupted if financial difficulties prevent the payor from meeting the obligation.⁵⁷ Second, the concept of equitable distribution "gives recognition to the essential supportive role played by the wife in the home, acknowledging that as a homemaker, wife and mother she should clearly be entitled to a share of family assets accumulated during the marriage."⁵⁸

Justice Mountain, writing for a unanimous court in *Rothman*, noted that a trial judge must utilize a three-step process in making an equitable distribution of marital property.⁵⁹ He must first determine the distributable assets of each party; second, he must place a value

⁵² *Painter v. Painter*, 65 N.J. 196, 214, 320 A.2d 484, 493 (1974). In *Painter*, the court included property acquired by "gift, bequest, devise, descent" and other similar ways as eligible for distribution. *Id.*, 320 A.2d at 494. Nevertheless, the legislature subsequently passed an amendment which states in pertinent part that:

all such property, real, personal or otherwise, legally or beneficially acquired during the marriage by either party by gift, devise, or bequest shall not be subject to equitable distribution, except that interspousal gifts shall be subject to equitable distribution.

P.L. 1980, ch. 181.

⁵³ *Painter v. Painter*, 65 N.J. 196, 214, 320 A.2d 484, 493 (1974). The *Painter* court also noted that any increase in value of property separately held by a spouse prior to marriage is immune to distribution. *Id.* Likewise, the court acknowledged that:

the income or other usufruct derived from such property, as well as any asset for which the original property may be exchanged or into which it, or the proceeds of its sale, may be traceable shall similarly be considered the separate property of the particular spouse.

Id.

⁵⁴ 65 N.J. 219, 320 A.2d 496 (1974).

⁵⁵ *Id.* at 228, 320 A.2d at 501.

⁵⁶ *Id.* at 228-29, 320 A.2d at 501.

⁵⁷ *Id.*

⁵⁸ *Id.* at 229, 320 A.2d at 501. The New Jersey statute in existence before the adoption of the equitable distribution provision was deemed inequitable by one New Jersey court because it prevented the wife from sharing in the property of her husband that was acquired while she acted as homemaker, mother, and other roles which assisted the husband in the acquisition of wealth. *Tucker v. Tucker*, 121 N.J. Super. 539, 545, 298 A.2d 91, 94 (Ch. Div. 1972).

⁵⁹ *Rothman*, 65 N.J. at 232, 320 A.2d at 503.

upon each asset; finally, the trial judge must make an equitable allocation of the property.⁶⁰ The court rejected the proposition that each division should begin with the presumption of a fifty-fifty distribution to be adjusted by the various circumstances of the case. Instead it stressed that each situation should be examined individually.⁶¹

While the equitable allocation of the marital property is undoubtedly the most troublesome portion of the *Rothman* three-step process because of its subjective nature, much litigation has occurred regarding the type of "property" contemplated by New Jersey's equitable distribution law.⁶² Before *Mahoney*, the New Jersey Supreme Court had never examined the issue of whether a professional degree was property subject to equitable distribution.⁶³ Other jurisdictions, however, have examined this issue with most courts holding that an advanced degree or a professional license is not property.⁶⁴ Within this group refusing to recognize a property right, there has been a split of opinion concerning the exact treatment of the educational degree. Some jurisdictions have not awarded a spouse any direct compensation for supporting a student spouse except traditional alimony awards and property division.⁶⁵ Others have granted the supporting spouse some form of reimbursement founded upon a variety of theories.⁶⁶ Still other courts have analyzed the problem in terms not of whether a degree itself is

⁶⁰ *Id.*

⁶¹ *Id.* at 232-33 n.6, 320 A.2d at 503 n.6.

⁶² In general the Supreme Court of New Jersey has adopted a very liberal interpretation of the word "property." *Mahoney*, 91 N.J. at 495, 453 A.2d at 531. New Jersey courts have held many types of assets to be subject to equitable distribution including acres of farmland, *Gauger v. Gauger*, 73 N.J. 538, 376 A.2d 523 (1977); a workman's compensation claim, *Hughes v. Hughes*, 132 N.J. Super. 559, 334 A.2d 379 (Ch. Div. 1975); potential recovery of a spouse's negligence action, *Di Tolvo v. Di Tolvo*, 131 N.J. Super. 72, 328 A.2d 625 (App. Div. 1974); joint bank accounts, *Kyzyma v. Kyzyma*, 117 N.J. Super. 472, 285 A.2d 76 (Ch. Div. 1971). *But cf.* *McCarty v. McCarty*, 453 U.S. 219 (1971), where the Supreme Court of the United States held that federal retirement pay was not subject to state law.

Assembly Bill 1896 would exempt property acquired by intestate succession from equitable distribution and Assembly Bill 2176 would provide that pension fund payments would not be considered property subject to equitable distribution. *See* A. 1896, 200th N.J. Legis., 1st Sess. (1982); A. 2176, 200th N.J. Legis., 1st Sess. (1982).

⁶³ *Mahoney*, 91 N.J. at 496, 453 A.2d at 531.

⁶⁴ *E.g.*, *Wisner v. Wisner*, 129 Ariz. 333, 631 P.2d 115 (Ct. App. 1981); *In re Marriage of Graham*, 194 Colo. 429, 574 P.2d 75 (1978); *DeLa Rosa v. DeLa Rosa*, 309 N.W.2d 755 (Minn. 1981); *Hubbard v. Hubbard*, 603 P.2d 747 (Okla. 1979); *In re Marriage of Lundberg*, 107 Wis. 2d 1, 318 N.W.2d 918 (1982).

⁶⁵ *E.g.*, *Wisner v. Wisner*, 129 Ariz. 333, 631 P.2d 115 (Ct. App. 1981); *In re Marriage of Graham*, 194 Colo. 429, 574 P.2d 75 (1978); *Frausto v. Frausto*, 611 S.W.2d 656 (Tex. Civ. App. 1980); *In re Marriage of Lundberg*, 107 Wis. 2d 1, 318 N.W.2d 918 (1982).

⁶⁶ *E.g.*, *DeLa Rosa v. DeLa Rosa*, 309 N.W.2d 755 (Minn. 1981); *Hubbard v. Hubbard*, 603 P.2d 747 (Okla. 1979).

property, but of whether the future earning potential that is attached to the degree is property.⁶⁷

Illustrative of the total rejection of special means of compensation is *In re Marriage of Graham*.⁶⁸ In that case the Supreme Court of Colorado rejected the contention that a husband's M.B.A. degree was property subject to division despite the fact that the defendant's wife contributed seventy percent of the couple's total income to the household while her husband attended graduate school.⁶⁹ The court in *Graham* pointed out the differences between an educational degree and more conventional notions of property: An educational degree cannot be sold or transferred in any way, it is extinguished upon the death of its holder, and is merely a memorialization of the "cumulative product of many years of previous education, combined with diligence and hard work."⁷⁰ The court further justified its position by observing that an advanced degree is an "intellectual achievement" not attainable through merely monetary means.⁷¹

Significantly, the *Graham* court bolstered its holding by stating that spouses who support their partners possess various remedies derived from the marital relationship.⁷² In a marriage where one spouse has contributed to the other's education and marital assets have been accumulated, the trial court can take this into account in its ultimate division of the property.⁷³ Conversely, a lack of accumulated assets may also be considered by the court in making an alimony award.⁷⁴

Justice Carrigan registered a strong dissent in *Graham*, arguing that it was "a matter of economic reality" that the husband's increased earning capacity was the most significant asset of the marriage.⁷⁵ He asserted that equitable principles should prevail over "traditional narrow concepts of property."⁷⁶ The dissent suggested that a spouse's income-earning potential should be subject to division as part of a prop-

⁶⁷ E.g., *Aufmuth v. Aufmuth*, 152 Cal. Rptr. 668 (Ct. App. 1979); *Stern v. Stern*, 66 N.J. 540, 331 A.2d 257 (1975).

⁶⁸ 194 Colo. 429, 574 P.2d 75 (1978).

⁶⁹ *Id.* at 432-34, 574 P.2d at 77-78.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 433, 574 P.2d at 78.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 434, 574 P.2d at 78 (Carrigan, J., dissenting).

⁷⁶ *Id.* Justice Carrigan noted that the wife in *Graham* made an investment in her husband's education. He also acknowledged that *Graham* represented the familiar situation where the wife supported her husband while he continued his education, only to be divorced by her husband after he received his degree. The dissent concluded that "equity demands that courts seek extraordinary remedies to prevent extraordinary injustice." *Id.*

erty settlement, and analogized the situation to one in which a widow is entitled to recover for the loss of anticipated future earnings when her husband has been wrongfully killed.⁷⁷

Arizona, a community property state, has upheld the *Graham* court's rejection of an educational degree as a form of property. The Arizona Supreme Court examined the nature of a professional degree in *Wisner v. Wisner*.⁷⁸ An ex-wife appealed a decision by the trial court which had held that her ex-husband's medical license, board certificate, and the value of his education were not part of the couple's community property.⁷⁹ Mrs. Wisner argued that she was entitled to one-half the value of those items or, alternatively, that she should be reimbursed for her contribution toward their acquisition under a theory of unjust enrichment.⁸⁰

The *Wisner* court agreed with the *Graham* majority and held that education, as an intangible, was not properly characterized as property and therefore was not subject to a division.⁸¹ The court stated, however, that education and the accompanying possibility of increased earnings are still important considerations in determining an equitable property split, maintenance payments, or child support.⁸² The *Wisner* court also rejected any claim of unjust enrichment, stating that such a claim is inapplicable to a marital relationship because marriage, unlike a business agreement, is not an "arm's length transaction."⁸³ The court noted, however, that spouses retain the right to make a contract specifying their respective rights and duties and in the absence of such an agreement, it should be presumed that the decision that one spouse

⁷⁷ *Id.* at 435, 574 P.2d at 79 (Carrigan, J., dissenting). The dissent suggested that the wife in *Graham*, and all spouses in similar cases, should perhaps be allowed to recover in a suit based on implied debt, quasi-contract, unjust enrichment, or some other legal theory. *Id.*

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

⁷⁹ *Id.* at 335, 631 P.2d at 117.

⁸⁰ *Id.* at 339, 631 P.2d at 121.

⁸¹ *Id.* at 340, 631 P.2d at 122.

⁸² *Id.* at 340-41, 631 P.2d at 122-23; accord *Graham*, 574 P.2d at 75.

⁸³ *Wisner*, 129 Ariz. at 341, 631 P.2d at 123. The *Wisner* court noted that:

[I]n the absence of such an agreement, we believe it is improper for a court to treat a marriage as an arm's length transaction by allowing a spouse to come into court after the fact and make legal arguments regarding unjust enrichment by reason of the other receiving further education during coverture. In the absence of a specific agreement, such legal arguments simply do not fit in the context of a marital relationship. In each marriage, for example, the couple decides on a certain division of labor, and while there is a value to what each spouse is doing, whether it be labor for monetary compensation or homemaking, that value is consumed by the community in the on-going relationship and forms no basis for a claim of unjust enrichment upon dissolution.

Id. (emphasis in original).

should continue his or her education was mutual and made with awareness of the sacrifices that would be needed to further that goal.⁸⁴

Other states have attempted to accommodate the interests of a spouse who has contributed substantial financial support to enable a marital partner to continue an education only to be handed divorce papers before any benefit can be derived from the increased earning potential.⁸⁵ In *In re Marriage of Lundberg*,⁸⁶ the Supreme Court of Wisconsin held that compensation for a person who supports his or her spouse while the spouse is pursuing an advanced degree can be obtained by expanding the traditional roles of property division and maintenance payments.⁸⁷ The court redefined maintenance "as a flexible tool available to the trial court to ensure a fair and equitable determination in each individual case," and rejected the traditional practice of providing such payments only when a spouse was incapable of self-support.⁸⁸ Although the *Lundberg* court did not authorize a specific formula to be used to provide reimbursement, it did state that "[a] trial court should examine all the relevant circumstances of a particular case and may employ maintenance, property division or a combination of the two in order to fairly compensate a spouse The goal in such cases is always to achieve a fundamentally fair and equitable result."⁸⁹

⁸⁴ *Id.*; see also *Frausto v. Frausto*, 611 S.W.2d 656 (Tex. Civ. App. 1980). In *Frausto*, the court held that "a professional education acquired during marriage is not a property right and is not divisible upon divorce." *Id.* at 659. The court also ruled that reimbursement for expenses paid by one spouse so that the other could continue his or her education was not available when expenses were paid from community funds. *Id.* at 660; cf. *Nail v. Nail*, 486 S.W.2d 761 (Tex. 1972) (good will of husband's medical practice was not community property subject to division).

⁸⁵ E.g., *In re Marriage of Horstmann*, 263 N.W.2d 885 (Iowa 1978); *Hubbard v. Hubbard*, 603 P.2d 747 (Okla. 1979); *In re Marriage of Lundberg*, 107 Wis. 2d 1, 318 N.W.2d 918 (1982).

⁸⁶ 107 Wis. 2d 1, 318 N.W.2d 918 (1982). In this case the wife supported the household while her husband attended medical school. *Id.* at 3, 318 N.W.2d at 919.

⁸⁷ *Id.* at 10, 318 N.W.2d at 922. The court noted that "[i]n a sense, [the husband's] medical degree is the most significant asset of the marriage. It is only fair that Judy be compensated for her costs and foregone opportunities resulting from her support of David while he was in school." *Id.* at 14, 318 N.W.2d at 924.

⁸⁸ *Id.* at 12, 318 N.W.2d at 923.

⁸⁹ *Id.* at 15, 318 N.W.2d at 924. The *Lundberg* court found it significant that Wisconsin law listed several factors to be taken into account by the trial court in compensating a spouse upon a divorce. *Id.* at 12-14, 318 N.W.2d at 923-24. The court noted that one factor to consider in making a property division under the statute was "[t]he contribution by one party to the education, training or increased earning power of the other." *Id.* at 11, 318 N.W.2d at 923 (citing Wis. STAT. ANN. § 247.255 (5) (West Cum. Supp. 1978) (recodified as Wis. STAT. ANN. § 767.255 (5) (West 1981)). Since this only delivered an equitable result when there was sufficient marital property held by the couple, the Wisconsin court utilized maintenance as a means to do equity in the situation where a wife supported her husband while he attended school without a significant accumulation of marital property. *Id.*

Another approach to this issue was taken in *Hubbard v. Hubbard*.⁹⁰ In that case, the Oklahoma Supreme Court held that a wife has the right to be compensated for the amount of her investment in her husband's education and training.⁹¹ The court relied on principles of "equity and natural justice" in order to prevent unjust enrichment by the husband,⁹² basing its ruling on the dissenting opinion in *Graham* which had suggested the use of a quasi-contract theory as the method of recovery.⁹³ The court noted that the wife in *Hubbard* made financial and other sacrifices in anticipation of future rewards based on her husband's earning potential as a physician.⁹⁴ The court saw no reason for the husband to retain, in effect, the only asset of the marriage, his education, without some benefit inuring to the wife.⁹⁵ Nevertheless, the *Hubbard* court limited the wife's recovery to contributions she had made to her husband's direct support, education, and professional training expenses, plus interest and inflation adjustments.⁹⁶ Thus, the Oklahoma court refused to grant the wife any award based on her husband's future earnings.⁹⁷

While some courts have looked at the issue of whether a professional degree is subject to equitable distribution, other courts have characterized a professional degree as an embodiment of future earning capacity and have examined whether the future earning capacity

The *Lundberg* court also noted that Wisconsin law listed factors in determining maintenance payments including the educational level of each individual as well as:

The earning capacity of the party seeking maintenance including educational background, training, employment skills, work experience, length of absence from the job market, custodial responsibilities for children and the time and expense necessary to acquire sufficient education or training to enable the party to find employment.

Id. at 12 n.2, 318 N.W.2d at 923 n.2. In recognizing the various factors listed by the legislature for determining proper compensation, the court determined that it was the legislative intent not to limit maintenance to cases where a spouse is incapable of self-support. *Id.* at 12-13, 318 N.W.2d at 923.

⁹⁰ 603 P.2d 747 (Okla. 1979).

⁹¹ *Id.* at 750.

⁹² *Id.*

⁹³ *Id.* at 751.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 752.

⁹⁷ *Id.* A similar outcome can be found in *DeLa Rosa v. DeLa Rosa*, 309 N.W.2d 755 (Minn. 1981). In this case the wife supported her husband while he attended college and medical school but the two separated before a medical degree was attained. *Id.* at 756-67. The Minnesota Supreme Court, through a restitutionary remedy, allowed the wife to recover her contributions to her spouse while he attended school. *Id.* at 759. The court based its award on the amount of money contributed by the wife to her husband's living expenses and educational costs, minus the wife's own living expenses. The court expressed this concept in a formula:

itself is subject to distribution.⁹⁸ The Supreme Court of Iowa in *In re Marriage of Horstmann*⁹⁹ concluded that a professional degree is not an asset distributable after a divorce but nevertheless held that the increased earning potential made possible by the educational degree did constitute an asset subject to distribution.¹⁰⁰ The *Horstmann* court authorized the trial court to consider the future earning capacities of both parties, including their education, skill, or talent, in making an equitable distribution of property and in determining the amount of alimony that should be awarded.¹⁰¹ Alternatively, if proper evidence concerning the value of future earning capacity could not be introduced, the Iowa court allowed the trial court to consider the cost of an individual's education as a proper factor in awarding distribution or alimony.¹⁰²

The Supreme Court of New Jersey has also examined the nature and disposition of future earnings within the context of New Jersey's equitable distribution statute. In *Stern v. Stern*,¹⁰³ a wife wanted her husband's future earning capacity considered as a separate item of pro-

Working spouse's financial contributions to joint living expenses and educational costs of student spouse

less

one half (Working spouse's financial contributions plus student spouse's financial contributions (including student spouse's earnings, loans, grants and other sources of income) less cost of education)

equals

equitable award to working spouse

Id. Thus, all the educational expenses and one-half of the living expenses were imputed to the student spouse. *Id.*

⁹⁸ See *infra* notes 99-109 and accompanying text.

⁹⁹ 263 N.W.2d 885 (Iowa 1978).

¹⁰⁰ *Id.* at 891. The *Horstmann* court examined the nature of a law degree and stated that while the law degree or the certificate of admission to practice law was not an asset itself, "it is the potential for increase in future earning capacity made possible by the law degree and certificate of admission conferred upon the husband with the aid of his wife's efforts which constitutes the asset for distribution by the court." *Id.* *But cf.* *Wilcox v. Wilcox*, 173 Ind. App. 661, 365 N.E.2d 792 (Ct. App. 1977), wherein an Indiana appellate court ruled that the future earnings of the husband were not property subject to division as part of a divorce settlement and refused to award maintenance in excess of the actual physical assets of a marriage because of the application of a statute which limited maintenance payments to spouses who were physically or mentally incapacitated. *Id.* at 664-65, 365 N.E.2d at 795.

¹⁰¹ *Horstmann*, 263 N.W.2d at 891.

¹⁰² *Id.* California, in contrast, has consistently held that education is not property subject to division even if the education has been obtained through community funds. *Todd v. Todd*, 272 Cal. App. 2d 786, 78 Cal. Rptr. 131 (Ct. App. 1969); *accord In re Marriage of Sullivan*, 134 Cal. App. 3d 484, 184 Cal. Rptr. 796 (Ct. App. 1982) (education acquired by one spouse, with financial and emotional support of other during marriage, is neither separate nor community property that is divisible as part of divorce settlement).

¹⁰³ 66 N.J. 340, 331 A.2d 257 (1975).

perty entitling her to an equitable share.¹⁰⁴ While *Stern*, unlike *Mahoney*, did not involve the characterization of a professional degree, it did concern the nature of future earnings, a question strikingly similar to that presented in *Mahoney*.¹⁰⁵

In *Stern*, the trial court awarded the defendant's former wife alimony, child support, and \$100,000 as an equitable distribution of the defendant's share of the marital assets, including an interest in a law partnership and the husband's future earning capacity.¹⁰⁶ On appeal, the defendant conceded that although a partnership in a law firm is property, earning capacity itself should not be considered a separate asset.¹⁰⁷ The New Jersey Supreme Court accepted the defendant's contention that "a person's earning capacity, even where its development has been aided and enhanced by the other spouse, . . . should not be recognized as a separate, particular item of property."¹⁰⁸ The court recognized, however, that earning capacity is an important factor in making decisions regarding both equitable distribution of the other assets and alimony.¹⁰⁹

The highest courts of various states have perpetuated the confusion reflected in the broad range of theories put forth in the above cases by reversing the decisions of trial or appellate courts which held that

¹⁰⁴ See *id.* at 344, 331 A.2d at 260.

¹⁰⁵ *Mahoney*, 91 N.J. at 497, 453 A.2d at 532.

¹⁰⁶ *Stern*, 66 N.J. at 344, 331 A.2d at 259-60. The trial court included the defendant-lawyer's future earning capacity as property. *Id.* The trial court stated that:

His [earning capacity] is an amorphous asset of this marriage in the absence of other assets. It consists of natural ability, undergraduate and postgraduate education, marriage to the daughter of a man of high standing and lucrative income in the area of his professional activity, entree' to his office and ultimate partnership, subsequent management of the firm, with advancement in the esteem of his professional peers.

Id. at 345, 331 A.2d at 260 (citing *Stern v. Stern*, 123 N.J. Super. 566, 568, 304 A.2d 204 (Ch. Div. 1973), *aff'd*, 128 N.J. Super. 198, 319 A.2d 733 (App. Div. 1974), *rev'd*, 66 N.J. 340, 331 A.2d 257 (1975)).

¹⁰⁷ *Stern*, 66 N.J. at 344, 331 A.2d at 260.

¹⁰⁸ *Id.* at 345, 331 A.2d at 260.

¹⁰⁹ *Id.* The trial court in *Mahoney* distinguished *Stern*'s holding that a professional degree was property. *Mahoney v. Mahoney*, 175 N.J. Super. 443, 419 A.2d 1149 (Ch. Div. 1980), *rev'd*, 182 N.J. Super. 598, 442 A.2d 1062 (App. Div.), *aff'd*, 91 N.J. 488, 453 A.2d 527 (1982). The *Mahoney* trial court compared earning capacity with the "intrinsic value of an educational degree" and suggested that *Stern* did not adequately address the latter. *Id.* at 445, 419 A.2d at 1150. In *Stern*, the court suggested that goodwill, on the other hand, could be subject to equitable distribution. 66 N.J. at 345-47 n.5, 331 A.2d at 261 n.5. Recently, in *Dugen v. Dugen*, 92 N.J. 423, 457 A.2d 1 (1983), the New Jersey Supreme Court clearly enunciated the principle that goodwill is an asset subject to equitable distribution. *Id.* at 433, 457 A.2d at 6. It has been argued that if goodwill is recognized as intangible property, then a professional degree, or the future earnings it represents, should also be afforded the same treatment. See Weitzman, *The Economics of Divorce: Social Consequences of Property, Alimony and Child Support Awards*, 28 UCLA L. REV. 1181, 1211-12 (1981).

education or future earnings were marital assets.¹¹⁰ Against this backdrop of uncertainty and inconsistency, New Jersey examined the nature of a higher educational degree within the framework of its equitable distribution statute.

The *Mahoney* court acknowledged that there is no legislative history to serve as a guide in determining the meaning of the word "property" as it is used in New Jersey's equitable distribution statute, and that the statute itself offers no clear indication of whether professional degrees and licenses should be treated as property.¹¹¹ Justice Pashman, writing for a unanimous court,¹¹² noted that the New Jersey Supreme Court in the past had given an "expansive interpretation" to the word property.¹¹³ Nevertheless, Pashman wrote "[t]his Court . . . has never subjected to equitable distribution an asset whose future monetary value is as uncertain and unquantifiable as a professional degree or license."¹¹⁴

The court accepted the *Graham* court's characterization of the nature of a degree or professional license as an inalienable personal achievement of the holder which possesses an uncertain value¹¹⁵ and contrasted the degree with the relative definiteness of an unmatured pension which provides a specific amount of money at a specific date.¹¹⁶ Additionally, Justice Pashman observed that "[t]he value of a professional degree for purposes of property distribution [is] nothing more than the possibility of enhanced earnings that the particular academic credential will provide."¹¹⁷ In equating a professional degree with future

¹¹⁰ E.g., *Inman v. Inman*, 648 S.W.2d 847 (Ky. 1982); *Graham*, 194 Colo. at 429, 574 P.2d at 75. In New York, another state in which there is confusion over this issue, two trial courts handed down contradictory decisions within one day of each other. See Skoloff, *supra* note 1.

¹¹¹ *Mahoney*, 91 N.J. at 495, 453 A.2d at 531. In *Hill v. Hill*, 91 N.J. 506, 509-10, 453 A.2d 537, 538 (1982), one of the companion cases to *Mahoney*, the court reiterated its position that a reimbursement is only proper when one spouse has made financial contributions to the other with the expectation that both will acquire a significant monetary and tangible benefit. In *Lynn v. Lynn*, 91 N.J. 510, 517, 453 A.2d 539, 542 (1982), the second companion case to *Mahoney*, the New Jersey Supreme Court found that equitable distribution of the husband's medical degree was improper and therefore provided the wife "a generous but fair award of alimony."

¹¹² *Id.* at 506, 453 A.2d at 537. Similarly, *Lynn* and *Hill*, the two companion cases to *Mahoney* were written by Justice Pashman for a unanimous court.

¹¹³ *Mahoney*, 91 N.J. at 495, 453 A.2d at 531; see, e.g., *Kikkert v. Kikkert*, 88 N.J. 4, 438 A.2d 317 (1981) (private pensions); *Kruger v. Kruger*, 73 N.J. 464, 375 A.2d 659 (1977) (disability benefits); *Di Tolvo v. Di Tolvo*, 131 N.J. Super. 72, 328 A.2d 625 (App. Div. 1974) (personal injury claims); *Hughes v. Hughes*, 132 N.J. Super. 559, 334 A.2d 379 (Ch. Div. 1975) (worker's compensation claim). But see *Amato v. Amato*, 180 N.J. Super. 210, 434 A.2d 639 (App. Div. 1981) (appellate division reversed trial court's decision granting husband share of wife's potential medical malpractice award).

¹¹⁴ *Mahoney*, 91 N.J. at 496, 453 A.2d at 531.

¹¹⁵ *Id.* See discussion of *Graham* at *supra* notes 68-77 and accompanying text.

¹¹⁶ *Mahoney*, 91 N.J. at 496, 453 A.2d at 531.

¹¹⁷ *Id.* at 496-97, 453 A.2d at 532.

earning capacity, the court was obliged to rely on its analysis in *Stern* where an enhanced earning capacity, irrespective of a spouse's contribution thereto, was not recognized as property within New Jersey's equitable distribution law.¹¹⁸

The *Mahoney* court noted that New Jersey's equitable distribution statute requires only the division of property acquired during the marriage; any income earned after the marriage is exempt from the operation of the statute.¹¹⁹ Further, the court observed that even if enhanced earnings were to be held divisible, it would be nearly impossible to ascertain the correct valuation of a professional degree.¹²⁰ Justice Pashman found that valuation would not only entail the use of complex calculations, but would produce merely an estimate of an individual's future income.¹²¹ Even if a reasonable calculation could be made, a plethora of potential events could influence earning capacity.¹²² Additionally, Justice Pashman noted that an inequitable result would be achieved if a court erred in determining the worth of a license or degree since an equitable distribution award, unlike alimony, is permanent and thus not subject to modification should circumstances change.¹²³

The *Mahoney* court surveyed the decisions from other jurisdictions and concluded that a professional education should not be subject to equitable distribution even if found to be a marital asset.¹²⁴ The court accepted the appellate division's conclusion that the cost of a profes-

¹¹⁸ *Id.* at 497, 453 A.2d at 532.

¹¹⁹ *Id.*; *accord In re Marriage of Aufmuth*, 89 Cal. App. 3d 446, 152 Cal. Rptr. 668 (1979) (any division of earnings based on legal education would be distribution of post-dissolution property).

¹²⁰ *Mahoney*, 91 N.J. at 497, 453 A.2d at 532.

¹²¹ *Id.* The equation becomes even more complicated when one considers that the calculated increased earnings would have to be reduced by the amount the spouse would have earned if employed during the time he or she was attending school. *Id.* (citing *Mahoney v. Mahoney*, 182 N.J. Super. 598, 609, 442 A.2d 1062 (App. Div.), *aff'd*, 91 N.J. 488, 453 A.2d 527 (1982)). This adjustment is based on the proposition that an individual who was motivated to pursue a professional education would channel that drive to other income earning occupations. *Id.*

¹²² *Id.* Some of these uncertainties include the fact that an educated individual may decide to abandon his profession, may be unsuccessful within it, "or may practice in a specialty, location or manner which generates less than the average income enjoyed by fellow professionals." *Id.* at 498, 453 A.2d at 532 (citing *DeWitt v. DeWitt*, 98 Wis. 2d 44, 296 N.W.2d 761, 768 (Ct. App. 1980)).

¹²³ *Id.* The court noted that most courts examining the nature of professional degrees failed to subject them to equitable distribution upon dissolution of a marriage. Nevertheless, the court also observed that jurisdictions have allowed a wife to recover the amount of financial contribution she made in supporting the household while the husband furthered his education. *Id.*, 453 A.2d at 533; *see, e.g., DeLa Rosa v. DeLa Rosa*, 309 N.W.2d 755 (Minn. 1981); *Hubbard v. Hubbard*, 603 P.2d 747 (Okla. 1979); *In re Marriage of Horstmann*, 263 N.W.2d 885 (Iowa 1978).

¹²⁴ *Mahoney*, 91 N.J. at 499, 453 A.2d at 533.

sional degree does not accurately reflect its true worth and, therefore, does not account for the nonmonetary contributions made by the degree holder in its acquisition.¹²⁵ Additionally, Justice Pashman noted that any decision which accepted the cost basis of valuing a degree was theoretically based not on a property rationale but on the equitable principle that a spouse who supported his or her partner should be reimbursed for payments to the household since the expected future benefits to the familial unit were never realized.¹²⁶ Justice Pashman acknowledged, however, the necessity of some form of recovery in certain situations.¹²⁷ He recognized that the trial court in this case had, in effect, based its award to the wife on a reimbursement theory rather than on an equitable distribution theory.¹²⁸

Despite the fact that the Supreme Court of New Jersey accepted the concept of reimbursement in certain situations, reimbursement was not supported as an overall policy.¹²⁹ The court clearly enunciated its opinion that “[m]arriage is not a business arrangement in which the parties keep track of debits and credits,” but rather is like a joint venture or partnership where each party shares in the fortune of the other.¹³⁰ Nevertheless, Justice Pashman held that “[w]here a partner to marriage takes the benefits of his spouse’s support in obtaining a profes-

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.* at 500, 453 A.2d at 533. The court also partially based its recognition of the concept of reimbursement alimony on the remedial parts of N.J. STAT. ANN. § 2A:34-23 (West Cum. Supp. 1983-1984) which provide that a fundamental function of alimony is to support and maintain the standard of living of the dependent spouse. *Mahoney*, 91 N.J. at 501-02, 453 A.2d at 534. The *Mahoney* court compared the use of reimbursement alimony, in this context, with its previous application of “rehabilitative alimony.” *Id.* at 502, 453 A.2d at 534; *see also Lepis*, 83 N.J. at 155 n.9, 416 A.2d at 53 n.9.

Justice Pashman also observed that New Jersey’s alimony statute provided for alimony as a flexible remedy to be adapted to each individual case and he determined that the alimony statute’s requirement of an award that is “fit, reasonable and just” allows the court a great deal of discretion. *Mahoney*, 91 N.J. at 502, 453 A.2d at 534. Consequently, Pashman concluded that “[n]othing in the statute precludes the court from considering marital conduct—such as one spouse contributing to the career of the other with the expectation of material benefit—in fashioning alimony awards.” *Id.*

¹²⁸ *Mahoney*, 91 N.J. at 499, 453 A.2d at 533. Justice Pashman noted that, in actuality, the trial court did not attempt to place a specific value upon the M.B.A. degree but rather allowed the wife “ ‘a reasonable sum as a credit . . . on behalf of the maintenance of the household and the support of the plaintiff during the educational period’ ” despite the fact that the trial court couched its award within property distribution terminology. *Id.* (citing *Mahoney v. Mahoney*, 175 N.J. Super. 443, 447, 419 A.2d 1149, 1151, *rev’d*, 182 N.J. Super. 598, 442 A.2d 1062 (*App. Div.*), *aff’d*, 91 N.J. 488, 453 A.2d 527 (1982)).

¹²⁹ *Id.* at 500, 453 A.2d at 533.

¹³⁰ *Id.*; *see Jersey Shore Medical Center—Fitkin Hospital v. Estate of Baum*, 84 N.J. 137, 141, 417 A.2d 1003, 1005 (1980) (concept of marriage is similar to that of partnership); *Rothman*, 501 65 N.J. at 219, 229, 320 A.2d at 496 (marriage “is a shared enterprise, a joint undertaking, that in many ways is akin to a partnership”).

sional degree or license with the understanding that future benefits will accrue and inure to both of them, and the marriage is then terminated without the supported spouse giving anything in return, an unfairness has occurred that calls for a remedy."¹³¹

The *Mahoney* court noted that the wife had made monetary contributions towards her husband's education in anticipation of a future return based upon the advanced degree.¹³² Consequently, Justice Pashman decided that it would be "patently unfair" for the noncontributing spouse to leave the marriage, not only with the degree, but also with the increased earning potential represented by the degree, without having incurred any future obligation to the spouse who helped make it possible.¹³³ To heighten the perceived inequity of the situation, the court also pointed out other less tangible contributions and sacrifices made by one spouse in a marriage where the other spouse is still in school.¹³⁴ Since factors such as marital support and standard of living are significant in the consideration of an alimony award, the Supreme Court of New Jersey introduced the concept of reimbursement alimony in order to redress the inequities involved when one spouse experiences a reduction of support, a lower standard of living, or "[h]as been deprived of a better standard of living in the future."¹³⁵ The *Mahoney* court also advocated the use of reimbursement alimony as a flexible tool to compensate a person who contributed to the support of his or her student spouse in spite of additional awards of permanent alimony or equitable distribution of marital property.¹³⁶ The court provided that reimbursement should be made for all support costs including "household expenses, educational costs, school travel expenses and any other contributions used by the supported spouse in obtaining his or her degree or license."¹³⁷

The *Mahoney* court made clear, however, that reimbursement alimony did not necessarily entitle every individual who helped to support a spouse during the quest for an advanced degree to such a remedy.¹³⁸ Significantly, the court limited the use of reimbursement, stating

¹³¹ *Mahoney*, 91 N.J. at 500, 453 A.2d at 533.

¹³² *Id.*

¹³³ *Id.*, 453 A.2d at 533-34.

¹³⁴ *Id.* at 500-01, 453 A.2d at 534. The court recognized that not only had the contributing wife supported the household financially, but she undoubtedly had endured a lowered standard of living since she had neglected her own financial opportunities while consenting to her husband's desire to further his education. Additionally, her husband would otherwise be employed if not in school, thereby further benefitting the couple's standard of living. *Id.*

¹³⁵ *Id.* at 501, 453 A.2d at 534 (emphasis added).

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.* at 502-03, 453 A.2d at 535.

that “[o]nly monetary contributions made with the mutual and shared expectation that both parties to the marriage will derive increased income and mutual benefits should be the basis for such an award.”¹³⁹ The court specifically rejected the use of reimbursement alimony in situations in which traditional alimony and equitable distribution adequately protected the rights of each party in a divorce action.¹⁴⁰

The *Mahoney* court posed several situations in order to demonstrate the various options available to spouses faced with a divorce action. The court suggested that rehabilitative alimony might be a favorable alternative to reimbursement alimony in a situation where the wife gave up the opportunity to further her education for the sake of her husband’s career plans.¹⁴¹ Thus, Justice Pashman noted that in this situation either a lump sum or short term periodic payments could be used to allow the wife to continue her own education or to take other actions to establish her self-sufficiency.¹⁴² Conversely, he found that where a wife was already self-sufficient or was precluded for some reason from rejoining the work force, rehabilitative alimony would be inappropriate.¹⁴³ Similarly, reimbursement alimony would be inappropriate, according to the court, in the case of a marriage of long duration in which a large amount of marital property had been acquired, since any inequity between the parties could be overcome through an equitable distribution of the marital assets.¹⁴⁴ The *Mahoney* court concluded that a spouse’s increased earning capacity, made possible by an advanced degree, could be considered a factor in making a fair division of such property.¹⁴⁵

According to Justice Pashman, a spouse could also be compensated through an award of permanent alimony based upon the other spouse’s enhanced earning potential.¹⁴⁶ He reasoned that since the equitable distribution statute states that alimony awards must take into consideration the supporting spouse’s ability to pay, earning potential remains

¹³⁹ *Id.* The court noted that “[t]hose spouses supported through professional school should recognize that they may be called upon to reimburse the supporting spouses for the financial contributions they received in pursuit of their professional training. And they cannot deny the basic fairness of this result.” *Id.*

¹⁴⁰ *Id.* at 503, 453 A.2d at 535. The court suggested that reimbursement alimony would not be appropriate since “it is unlikely that a financially successful executive’s spouse, who, after many years of homemaking, returns to school, would upon divorce be required to reimburse her husband for his contributions to her degree.” *Id.*

¹⁴¹ *Id.* at 504, 453 A.2d at 535.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*, 453 A.2d at 535-36.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 504-05, 453 A.2d at 536.

an important factor to consider in determining an award.¹⁴⁷ The *Mahoney* court found that alimony could be used not only to prevent a spouse from becoming a burden on the public, but also to allow a spouse to partake in the assets accumulated during a marriage.¹⁴⁸ The court concluded that alimony might in fact be a preferable remedial option since it could be adjusted should the increased earning power of an individual turn out to be greater than anticipated.¹⁴⁹

Justice Pashman further observed that, in the Mahoneys' case, the wife supported her husband while he pursued an M.B.A. degree with the expectation that future material benefits would inure to both of them.¹⁵⁰ Therefore, the case was remanded to the trial court to fashion an award based upon the criteria set forth in the decision.¹⁵¹

The true significance of the *Mahoney* decision is that the New Jersey Supreme Court has provided trial courts with a great deal of discretion in fashioning an appropriate award for a former spouse. As the *Mahoney* court observed, all too often one spouse has made great sacrifices so that the other spouse can further his or her education only to be served with divorce papers when the degree holder is on the verge of a lucrative new career.¹⁵² In many instances, this apparent inequity is redressed through an appropriate property distribution or alimony award.¹⁵³ In other situations, however, no remedy is readily available because of the lack of marital assets in the case of a property division or the lack of need in the case of an alimony award.¹⁵⁴ The Supreme Court of New Jersey addressed this inequitable happenstance by utilizing a flexible approach toward alimony payments.¹⁵⁵ In addition to traditional and rehabilitative alimony the New Jersey Supreme Court, through *Mahoney*, has augmented a trial court's options in dealing with divorce situations by authorizing reimbursement alimony.¹⁵⁶

The *Mahoney* court's recognition of reimbursement alimony is auspicious. When other practical considerations are examined, the pre-

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 505, 453 A.2d at 536.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 506, 453 A.2d at 536.

¹⁵¹ *Id.*

¹⁵² Research has not discovered a case in which the principle issue was a husband's demand for some compensation for supporting his wife while she pursued an advanced degree. Nevertheless, in New Jersey either spouse could seek reimbursement alimony in appropriate circumstances since the alimony statute is gender neutral. N.J. STAT. ANN. § 2A:34-23 (West Cum. Supp. 1983-1984).

¹⁵³ *Mahoney*, 91 N.J. at 504, 453 A.2d at 535-36.

¹⁵⁴ *Id.* at 501, 453 A.2d at 534.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

science of the *Mahoney* court's recognition of reimbursement alimony becomes clear. An equitable distribution award is permanent, since there exists no statutory¹⁵⁷ or judicial¹⁵⁸ remedy to adjust the award. On the other hand, alimony can generally be modified should the circumstances of the parties change.¹⁵⁹ Nevertheless, an important question in this regard is left unanswered by the *Mahoney* court's refusal to "determine the degree of finality or permanency that should be accorded an award of reimbursement alimony as compared to conventional alimony."¹⁶⁰ The court left to future cases the decision "whether and under what circumstances such awards may be modified or adjusted."¹⁶¹ While the *Mahoney* decision can be faulted for sidestepping this important issue, it is significant that Justice Pashman left open the possibility of revision of a reimbursement alimony award.¹⁶² Since flexibility is the hallmark of reimbursement alimony, future courts should preserve that principle and allow such awards to be modified as the circumstances of the parties change.¹⁶³

While reimbursement alimony is used primarily to restore the more tangible contributions of the supporting spouse such as household expenses and educational costs, arguably, the *Mahoney* decision does not prevent compensation for less tangible contributions. The court, in dicta, recognized that when a wife provides support for her husband while he pursues his education, she, in effect, experiences a lower standard

¹⁵⁷ N.J. STAT. ANN. § 2A:34-23 (West Cum. Supp. 1983-1984).

¹⁵⁸ See Erickson, *supra* note 29, at 981.

¹⁵⁹ N.J. STAT. ANN. § 2A:34-23; see also Krauskopf, *Recompense For Financing Spouse's Education: Legal Protection For the Marital Investor in Human Capital*, 28 KAN. L. REV. 379 (1980). Professor Krauskopf, examining the relative merits of compensating a supporting spouse through either an alimony award or through property distribution, concluded the alimony award to be more advantageous since the full expectations of the parties can be considered. *Id.* at 416. Thus, where a wife can show that she expected to share in the increased future earnings of her husband she can obtain a portion of that value. If the requisite expectation is not proved then the wife is only entitled to restitution for her outlays in financing her spouse's education. *Id.* at 401. Conversely, a finding that a degree is property subject to distribution would create a more rigid division in community property states where the value of such property is divided equally. *Id.* at 415.

¹⁶⁰ *Mahoney*, 91 N.J. at 503 n.5, 453 A.2d at 535 n.5.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ The Supreme Court of New Jersey should allow a modification when it appears, subsequent to the judgment, that the circumstances of the parties have greatly changed. For example, where the supporting spouse enjoys a tremendous windfall such as winning a lottery or gaining an inheritance and clearly does not even need restitutionary alimony the award can be modified downward. Conversely, should the payor of reimbursement alimony suffer illness or severe financial reverses which make it clear that he will be strained to fulfill the terms of the judgment then also reimbursement alimony can be reduced. In addition, where an initial award is reduced because of illness or financial strain to the educated spouse and that spouse regains his health or ability to pay the award could be enlarged to the full amount compensable.

of living than she would otherwise have known not only because of her financial sacrifices but also because her husband has postponed his own employment and financial contributions to the household in order to pursue a new career.¹⁶⁴ Thus, to more fully restore the supporting spouse, reimbursement alimony should in the future recognize this additional factor to some degree.

Another consideration of practical importance which may bode well for the reimbursement approach is that under current federal law, a property award can be discharged in bankruptcy while an alimony award is not dischargeable.¹⁶⁵ Since the federal bankruptcy courts are not compelled to accept a state's characterization of an award as dispositive, it remains to be seen whether a reimbursement alimony award will be considered as alimony or as a property distribution under federal law.¹⁶⁶ The manner in which this question is resolved will bear significantly upon other jurisdictions considering the relative merits of creating an award based upon reimbursement alimony or fashioning one through some other manner. If reimbursement alimony is subsequently held to be modifiable and not dischargeable in bankruptcy, other jurisdictions will find it more equitable and protective of a spouse's interest to base compensation to a supporting spouse on alimony rather than on property distribution principles.

A determination that a spouse holds an interest based upon either the value of the professional degree or the value of the degree holder's future earnings would require a proper valuation of such an asset. Any formula purporting to do so would be highly speculative and complex.¹⁶⁷ As the court in *Mahoney* observed, "[v]aluing a professional degree in the hands of any particular individual at the start of his or her career would involve a gamut of calculations that reduces to little more than guesswork."¹⁶⁸ On the other hand, a calculation for reimbursement purposes based upon the educational and support costs minus any contributions made by the supported spouse is relatively easy to formulate.¹⁶⁹

The argument has been advanced, however, that methods valuing future earning capacity can be formulated since calculations determining future earnings are utilized in worker's compensation, personal injury, and wrongful death litigation.¹⁷⁰ Such an analysis apparently

¹⁶⁴ *Mahoney*, 91 N.J. at 500-01, 453 A.2d at 534.

¹⁶⁵ 11 U.S.C. § 523(a)(5) (1982).

¹⁶⁶ Patrick & Meyer, *An Overview of the Bankruptcy Reform Act of 1978*, 1 BANKR. 1, 32 (1980).

¹⁶⁷ *Mahoney*, 91 N.J. at 497, 453 A.2d at 532.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 501, 453 A.2d at 534.

¹⁷⁰ Weitzman, *supra* note 109, at 1219.

disregards two important factors. First, it ignores the differences between the perceived wrongs in a tort action and those in a failed marriage.¹⁷¹ Additionally, an entitlement to a spouse's future earnings would deflate the status of a marriage to that of a business arrangement.¹⁷² As the Arizona Supreme Court noted in *Wisner*, prospective spouses have the opportunity to formalize their respective duties and expectations in a contract¹⁷³ provided the agreement does not contravene public policy.¹⁷⁴

It has been argued that a mate who has supported a spouse in pursuit of an educational degree has in fact invested in human capital and is entitled to a return of this investment.¹⁷⁵ Nevertheless, treatment of an educational degree or license as property distributable upon divorce often would create an oppressive obligation for the degree holder.¹⁷⁶ In effect, such a holding would give the supporting spouse a vested interest in an ex-spouse's future earnings despite the fact that contributions to the education were disproportionate in value to the earnings anticipated over a lifetime.¹⁷⁷ The *Mahoney* court, by granting a reimbursement, created a restitutionary type of remedy without over-compensating the spouse who supported the household while the other spouse attended school.¹⁷⁸ A decision recognizing a professional degree as marital property would have the additional deleterious effect of stifling the incentive of the rewarded spouse to pursue his or her career

¹⁷¹ New Jersey has passed a no-fault divorce law. N.J. STAT. ANN. § 2A:34-2 (d) (West Cum. Supp. 1983-1984) (allows divorce where there is separation of 18 or more consecutive months and where there is no reasonable prospect of reconciliation). In contrast, a wrongful death action is premised upon the fact that an individual, through some fault of his own, caused the death of another. See N.J. STAT. ANN. § 2A:31-1 (West 1952).

¹⁷² See *supra* note 130 and accompanying text.

¹⁷³ *Wisner*, 129 Ariz. at 341, 631 P.2d at 123. The *Wisner* court refused to treat a marriage as an "arm's length transaction" without the existence of a prenuptial agreement but noted that "[i]f two individuals wish to define their marriage as such, they may of course do so and memorialize it in a contract that spells out the specific rights and duties of each." *Id.*

¹⁷⁴ See, e.g., *Lepis*, 83 N.J. at 139, 416 A.2d at 45 (support agreement to be judicially enforced must be fair and equitable).

¹⁷⁵ See Krauskopf, *supra* note 159, at 379.

¹⁷⁶ *DeWitt v. DeWitt*, 98 Wis. 2d 44, 58, 296 N.W.2d 761, 768 (Ct. App. 1980).

¹⁷⁷ *Id.* at 58-59, 296 N.W.2d at 768.

¹⁷⁸ See D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 4.1 (1973). Generally, restitution, or "restoration" of the plaintiff's property or money, is awarded when the defendant has "gained a benefit that it would be unjust for him to keep, though he gained it honestly." *Id.* at 224. Arguably, it may be even more unfair for a person who has incurred numerous sacrifices, emotional as well as financial, in advancing a marital partner's education to be denied a share in expected future benefits based upon the investment. Nevertheless, the concept of reimbursement alimony effectively serves to compensate the supporting spouse not only for the amount contributed to a partner's educational expenses, but also for the value of the living expenses provided.

ambitions, thus thwarting the public policy of maintaining independent and self-fulfilled citizens.¹⁷⁹

Despite the basic fairness of the result in *Mahoney*, the decision is bound to be criticized in some quarters for not going far enough in protecting a spouse who supported his or her marriage partner in the attainment of an advanced degree. This criticism may develop because the *Mahoney* court did not recognize reimbursement alimony as a matter of right.¹⁸⁰ The court, instead, specifically foreclosed the use of reimbursement alimony for an individual who financially supported his spouse in the pursuit of an advanced degree when there is no expectation of future benefits by the supporting spouse.¹⁸¹

While this latter result may seem inequitable since an expenditure of resources has nonetheless been made, this situation is more accurately characterized as either a fundamental outgrowth of the marital relationship or as a gift.¹⁸² Any decision allowing reimbursement without the requisite expectation of future benefits would render the marital union more akin to a business relationship, a result which the court sought to prevent.¹⁸³ As long as the court does not require an unreasonable amount of proof to demonstrate the requisite expectation and as long as traditional alimony and equitable distribution avenues remain open, there is little danger that an unjust hardship will result.¹⁸⁴

Moreover, the *Mahoney* approach is superior when compared to those of other jurisdictions. While at first glance the *Horstmann* view may be more appealing in that it appears to provide a supporting spouse

¹⁷⁹ Through the use of rehabilitative alimony the courts have made it clear that a beneficial public policy is effectuated when a spouse is given the means to continue his or her education and to become self-supporting. See *supra* notes 37-41 and accompanying text.

¹⁸⁰ *Mahoney*, 91 N.J. at 504, 453 A.2d at 536; see Erickson, *supra* note 29, at 972-73. Professor Erickson has suggested that the reimbursement be accomplished as a matter of right, without regard to the expectation that future benefits will be derived, through the passage of a uniform law that would give the supporting spouse a reimbursement for all of the educational and household expenses that he or she has provided the spouse in school. *Id.* She contends that the uniform statute is necessary because state courts and legislatures have failed to provide an equitable solution for this situation. *Id.* at 948. Professor Erickson's proposed statute would be incorporated into the Uniform Marriage and Divorce Act (U.M.D.A.) and would reimburse the supporting spouse for his/her contribution to the other spouse's school expenses including tuition, fees, books and other supplies, living expenses, research, tutorial and clerical assistance, housework and maintenance of the home and family in excess of the contributing spouse's equitable share plus other reasonable expenses and contributions. *Id.* at 972-73. The statute also would provide for an offset if both parties attended school in order to compensate the spouse who contributed the greater share and also recognized that a spouse can waive his or her rights under the statute by signing a written agreement. *Id.*

¹⁸¹ *Mahoney*, 91 N.J. at 502-03, 453 A.2d at 535.

¹⁸² See Krauskopf, *supra* note 159, at 386, 394.

¹⁸³ See *supra* note 130 and accompanying text.

¹⁸⁴ See *supra* note 139 and accompanying text.

with a share in his or her mate's future earnings, it has not resolved the problems of valuation and the potential for placing an oppressive obligation upon the supported spouse.¹⁸⁵ The solution presented in *Graham* is inadequate because it fails to address the specific situation where traditional alimony and property distribution remedies are inapplicable, thus resulting in an injustice to the supporting spouse.¹⁸⁶ Likewise, the strict restitution approach utilized in *Hubbard* is not always adequate¹⁸⁷ as pure restitution is a rigid concept more akin to the settling of a debt.¹⁸⁸ *Mahoney*, on the other hand, allows the courts to use a restitutionary-type remedy when appropriate but also provides greater flexibility in that the principles of matrimonial law, such as the right of modification, remain intact.

By allowing some measure of compensation for a spouse who has sacrificed in order to provide broader educational opportunities for a mate, the New Jersey Supreme Court has struck a reasonable "middle ground" between affording no compensation and the finding of a property right. The *Mahoney* decision may thus serve as a sound model for those jurisdictions that are facing the problem of characterizing a professional degree in order to properly compensate a divorcing spouse who has worked to put his or her partner through school.

James V. Santulli

¹⁸⁵ See *supra* notes 101-02 and accompanying text.

¹⁸⁶ See *supra* notes 72-74 and accompanying text.

¹⁸⁷ See *supra* note 96 and accompanying text.

¹⁸⁸ See generally D. DOBBS, *supra* note 178, at 233, § 4.2.