NOTES

NELSON V. NELSON: A PROPOSAL FOR EQUITABLE DISTRIBUTION OF THE PROFESSIONAL DEGREE

I. INTRODUCTION: THE STATUS OF THE PROFESSIONAL DEGREE IN MARITAL DISSOLUTION IN ALASKA

Is a professional degree or license, earned by one party during a marriage, to be considered marital property subject to division upon marital dissolution? The Supreme Court of Alaska has joined the growing number of jurisdictions that have addressed this question, holding in *Nelson v. Nelson*[1] that a professional degree or license is *not* marital property. Under this holding, the spouse in Alaska who contributes to her[2] husband's professional education, and thus his earning potential, cannot be directly compensated for her investment. The contributing spouse must rely on the court's discretion in granting alimony,[3] if the court finds such an award both "just and necessary,"[4] or in considering her contributions when distributing the general marital property.[5]

On *Nelson*'s facts, the court's refusal to recognize the professional degree as property did not prevent an equitable result, but in other factual situations the holding threatens to have that effect unless it is modified. The court compensated the wife in *Nelson* by awarding her

1. 736 P.2d 1145 (Alaska 1987).

2. The contributing spouse is assumed to be the wife, because in the vast majority of cases on record this is the situation. Exceptions include Lyons v. Lyons, 403 Mass. 1003, 526 N.E.2d 1063 (1988); McGowan v. McGowan, 142 A.D.2d 355, 535 N.Y.S.2d 990 (1988); Freyer v. Freyer, 138 Misc. 2d 158, 524 N.Y.S.2d 147 (1987); Cronin v. Cronin, 131 Misc. 2d 879, 502 N.Y.S.2d 368 (1986).

3. The terms "alimony" and "maintenance" are used interchangeably in this article.

4. ALASKA STAT. § 25.24.160(a) (Supp. 1988). The statute provides in pertinent part:

> In a judgment in an action for divorce . . . the court may provide . . . (2) for the recovery by one party from the other of an amount of money for maintenance, in gross or in installments, as may be just and necessary without regard to which of the parties is in fault. . . .

5. *Nelson,* 736 P.2d at 1147.

half of the substantial assets the couple had accumulated during their seventeen-year marriage, pointing out that in the case of a long marriage the wife "receives a return which may exceed the amount of her contributions to [her husband's] education," and that the wife can receive a "return of her investment" by sharing in the accumulated marital property.[6] The *Nelson* court was thus able to compensate the wife without dealing with the ramifications of the professional-degree-as-property issue.[7]

The court, however, expressly reserved the question of whether a remedy exists to compensate the contributing spouse in the more common situation of a brief marriage during which one spouse has worked to enable the other to study full-time, with the result that the couple has not acquired any substantial assets that can be divided upon divorce.[8] In such a case, the wife's situation upon dissolution is made more inequitable by the possibility that, because she is obviously self-supporting, the court will not find an award of maintenance "necessary." Moreover, since in Alaska marital dissolutions are accomplished without regard to fault,[9] the contributing spouse who may be the more innocent of the parties can no longer make financial claims on the basis of fault.[10] Thus, the contributing spouse may leave the marriage with nothing, while her husband takes with him the valuable asset of future earning potential as a professional.

Alaska's courts will eventually be called upon to address the manifest inequity in such a situation. The policy behind Alaska's statute is clear: the court is to make every effort to balance the equities between the parties.[11] To broadly assert, as the court did in *Nelson,* that a

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6. *Id.* at 1146 (quoting Lesman v. Lesman, 88 A.D.2d 153, 158, 452 N.Y.S.2d 935, 939 (1982)).

7. In cases of long-term marriages, courts in other jurisdictions have taken a facts-first approach similar to the approach used in *Nelson,* avoiding meaningful confrontation with the issue of how a remedy would be found in a different factual situation. *See* Wisner v. Wisner, 129 Ariz. 333, 631 P.2d 115 (Ct. App. 1981); *In re* Marriage of Aufmuth, 89 Cal. App. 3d 446, 152 Cal. Rptr. 668 (Ct. App. 1979), *overruled on other grounds, In re* Marriage of Lucas, 27 Cal. 3d 808, 614 P.2d 285, 166 Cal. Rptr. 853 (1979); Todd v. Todd, 272 Cal. App. 2d 786, 78 Cal. Rptr. 131 (Ct. App. 1969); Vaclav v. Vaclav, 96 Mich. App. 584, 293 N.W.2d 613 (1980); Diment v. Diment, 531 P.2d 1071 (Okla. Ct. App. 1974).

8. *Nelson,* 736 P.2d at 1147. In Rhodes v. Rhodes, 754 P.2d 1333 (Alaska 1988), the supreme court held that the fact that the work of one spouse has contributed to the earning potential of the other must be considered as a "relevant factor" in making an equitable division of property. 754 P.2d at 1335. In *Rhodes,* as in *Nelson,* there were marital assets that could be divided. The court still has made no provision for compensating the contributing spouse in an assetless marriage where the contributing spouse can be considered as self-supporting.

9. *See* ALASKA STAT. § 25.24.160(a) (Supp. 1988).

10. ALASKA STAT. § 25.24.160(2), (4) (Supp. 1988).

11. ALASKA STAT. § 25.24.160(a) (Supp. 1988). The statute provides:

professional degree is not property subject to equitable distribution, without making other provision for the contributing spouse where the degree is the family's only asset, is to permit one party to leave the marriage enriched at the expense of the other — a signal that further balancing needs to be done.

Ideally, the Alaska Supreme Court should effect this balancing by recognizing the professional degree as marital property and by valuing it according to a labor theory of value.[12] Alternative workable remedies exist, however, that do not necessitate designating the degree as property, and which are possible under Alaska law. These remedies include equitable relief by means of quasi-contract and in gross restitutionary maintenance awards. As long as *Nelson* controls, the courts should consider applying these remedies when the situation envisioned in, but not addressed by, *Nelson* arises.

II. *NELSON V. NELSON*

June and Clairborne Nelson were married for seventeen years prior to their divorce in 1985. June had worked full-time to enable Clairborne to finish the last two years of his bachelor's degree in business accounting. While he was in school, Clairborne also worked part-time and received tuition aid because of his earlier military service. After graduation, Clairborne went to work for ARCO and June cared for their three children. She worked outside the home from time to time as well, most recently as a part-time pilot for a local airline.[13] The couple had accumulated assets valued by the trial court at $196,343. June petitioned the court to declare her husband's degree a "human capital asset" and thus part of the marital property, and to compensate her contribution to that degree by adding a portion of its value to her half of the property division.[14] The Alaska Supreme Court held that the lower court had not erred in dividing the marital assets equally,[15] or in failing to consider the degree as a marital asset.[16]

> In a judgment in an action for divorce . . . the court may provide (4) for the division between the parties of their property, whether joint or separate, acquired only during coverture, in the manner as may be just, and without regard to which of the parties is in fault; however, the court, in making the division, may invade the property of either spouse acquired before marriage when the *balancing of the equities between the parties requires it*; and to accomplish this end the judgment may require that one or both of the parties assign, deliver, or convey any of their real or personal property to the other party . . . .

Id. (emphasis added).

12. *See infra* note 58 and accompanying text.
13. *Nelson,* 736 P.2d at 1146.
14. *Id.* at 1145-46.
15. *Id.* at 1147.
16. *Id.* at 1146.

The court acknowledged that other jurisdictions have recognized that one spouse has "a compensable property interest in the enhanced earning potential arising out of the other spouse's degree."[17] The court, however, distinguished *Nelson* on the basis of the facts typically present in such cases and absent in *Nelson*: the relatively brief marriage during which no immediately available assets exist because one spouse has worked to enable the other to obtain a professional education. The court pointed out that Clairborne's degree was not a specialized postgraduate degree, that he had contributed as well by working and receiving tuition aid, and that the length of the Nelsons' marriage had allowed June to realize her expectations by participating in the fruits of her husband's enhanced earning potential.[18] On these facts, the court found that an equal division of the general marital assets by the trial court was not inequitable.[19] Moreover, the court declared that a professional degree is not marital property subject to division under any circumstances.[20]

III. THE CONCEPT OF THE DEGREE AS PROPERTY

A. *In re Marriage of Graham:* The Property Anomaly

By holding that a professional degree is not marital property subject to division, the *Nelson* court espoused the view expressed by a majority of jurisdictions,[21] most of which follow the reasoning of the

17. *Id.* at 1146 (citing *In re* Marriage of Horstmann, 263 N.W.2d 885, 891 (Iowa 1978); Woodworth v. Woodworth, 126 Mich. App. 258, 259, 337 N.W.2d 332, 334 (1983)). Other cases which recognize a property interest in the professional degree, the minority position at the present time, include Reen v. Reen, 8 Fam. L. Rptr. 2193 (Mass. Probate & Fam. Ct. Hampden Div. Dec. 23, 1981); Daniels v. Daniels, 165 Mich. App. 726, 731, 418 N.W.2d 924, 927 (1988); Wilkins v. Wilkins, 149 Mich. App. 779, 791, 386 N.W.2d 677, 682 (1986); Thomas v. Thomas, 131 Mich. App. 830, 831, 346 N.W.2d 595, 596, *overruled on other grounds,* 419 Mich. 942, 355 N.W.2d 617 (1984); Vaclav v. Vaclav, 96 Mich. App. 584, 592, 293 N.W.2d 613, 617 (1980); McGowan v. McGowan, 142 A.D.2d 355, 357, 535 N.Y.S.2d 990, 991 (1988); O'Brien v. O'Brien, 66 N.Y.2d 576, 580-81, 498 N.Y.S.2d 743, 746, 489 N.E.2d 712, 715 (1985) (medical license is marital property); Daniels v. Daniels, 20 Ohio Op. 458, 459, 185 N.E.2d 773, 775 (1961) (medical license found analogous to a franchise and constitutes property that court may consider in determining alimony award).

18. *Nelson,* 736 P.2d at 1147.

19. *Id.*

20. *Id.* at 1146.

21. Jones v. Jones, 454 So. 2d 1006, 1009 (Ala. Ct. Civ. App. 1984); Pyeatte v. Pyeatte, 135 Ariz. 346, 351, 661 P.2d 196, 201 (Ct. App. 1982); Meinholz v. Meinholz, 283 Ark. 509, 512, 678 S.W.2d 348, 349 (1984); *In re* Marriage of Aufmuth, 89 Cal. App. 3d 446, 461, 152 Cal. Rptr. 668, 677 (Ct. App.), *overruled on other grounds, In re* Marriage of Lucas, 27 Cal. 3d 808, 614 P.2d 285, 166 Cal. Rptr. 853 (1979); *In re* Marriage of Graham, 194 Colo. 429, 432, 574 P.2d 75, 77 (1978); Wright v. Wright, 469 A.2d 803, 806 (Del. Fam. Ct. 1983); Hughes v. Hughes, 438 So. 2d 146, 150 (Fla. Dist. Ct. App. 1983); *In re* Marriage of Weinstein, 128 Ill. App.

leading case, *In re Marriage of Graham.*[22] *Nelson* cited with approval the *Graham* court's rationale for refusing to classify a professional degree as marital property:

> An educational degree, such as an M.B.A., is simply not encompassed even by the broad views of the concept of "property." It does not have an exchange value or any objective transferable value on an open market. It is personal to the holder. It terminates on death of the holder and is not inheritable. It cannot be assigned, sold, transferred, conveyed, or pledged. An advanced degree is a cumulative product of many years of previous education, combined with diligence and hard work. It may not be acquired by the mere

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3d 234, 244, 470 N.E.2d 551, 559 (1984); *In re* Marriage of McManama, 386 N.E.2d 953, 955 (Ind. Ct. App. 1979), *vacated on other grounds,* 399 N.E.2d 371 (1980); *In re* Marriage of Francis, 442 N.W.2d 59, 62 (Iowa 1989); *In re* Marriage of Wagner, 435 N.W.2d 372, 375 (Iowa 1988); McGowan v. McGowan, 663 S.W.2d 219, 223 (Ky. Ct. App. 1983); Archer v. Archer, 303 Md. 347, 358, 493 A.2d 1074, 1080 (1985); Drapek v. Drapek, 399 Mass. 240, 244, 503 N.E.2d 946, 949 (1987); Moss v. Moss, 80 Mich. App. 693, 695, 264 N.W.2d 97, 98 (1978); DeLa Rosa v. DeLa Rosa, 309 N.W.2d 755, 758 (Minn. 1981); Lowrey v. Lowrey, 633 S.W.2d 157, 160 (Mo. Ct. App. 1982); Ruben v. Ruben, 123 N.H. 358, 361, 461 A.2d 733, 735 (1983); Lynn v. Lynn, 91 N.J. 510, 517, 453 A.2d 539, 542 (1982); Muckelroy v. Muckelroy, 84 N.M. 14, 15, 498 P.2d 1357, 1358 (1972); Lesman v. Lesman, 88 A.D.2d 153, 158, 452 N.Y.S.2d 935, 939 (1982); Geer v. Geer, 84 N.C. App. 471, 478, 353 S.E.2d 427, 431 (1987); Nastrom v. Nastrom, 262 N.W.2d 487, 493 (N.D. 1978); Stevens v. Stevens, 23 Ohio St. 3d 115, 117, 492 N.E.2d 131, 135 (1986); Adair v. Adair, 670 P.2d 1002, 1003 (Okla. Ct. App. 1983); Lehmicke v. Lehmicke, 339 Pa. Super. 559, 566, 489 A.2d 782, 786 (1985); Heath v. Heath, 295 S.C. 312, 314, 368 S.E.2d 222, 223 (Ct. App. 1988); Wehrkamp v. Wehrkamp, 357 N.W.2d 264, 266 (S.D. 1984); Frausto v. Frausto, 611 S.W.2d 656, 659 (Tex. Ct. Civ. App. 1980); Johnson v. Johnson, 771 P.2d 696, 697 (Utah 1989); Sorensen v. Sorensen, 769 P.2d 820, 826 (Utah 1989); Hoak v. Hoak, 370 S.E.2d 473, 477 (W.Va. 1988); *In re* Marriage of Lundberg, 107 Wis. 2d 1, 10, 318 N.W.2d 918, 922 (1982); Grosskopf v. Grosskopf, 677 P.2d 814, 822 (Wyo. 1984).

22. 194 Colo. 429, 574 P.2d 75 (1978). The following states have specifically adopted the *Graham* language: Alaska, Arizona, California, Florida, Illinois, Iowa, Kentucky, Maryland, New Jersey, Ohio, Oklahoma, Pennsylvania, South Dakota, Utah, Wisconsin. *See* Nelson v. Nelson, 736 P.2d 1145, 1146-47 (Alaska 1987); Wisner v. Wisner, 129 Ariz. 333, 339-40, 631 P.2d 115, 121-22 (Ct. App. 1981); *In re* Marriage of Aufmuth, 89 Cal. App. 3d 446, 461 n.5, 152 Cal. Rptr. 668, 678 n.5 (Ct. App.), *overruled on other grounds, In re* Marriage of Lucas, 27 Cal. 3d 808, 614 P.2d 285, 166 Cal. Rptr. 853 (1979); Hughes v. Hughes, 438 So. 2d 146, 147 (Fla. Dist. Ct. App. 1983); *In re* Marriage of Goldstein, 97 Ill. App. 3d 1023, 1027, 423 N.E.2d 1201, 1203 (1981); *In re* Marriage of Horstmann, 263 N.W.2d 885, 891 (Iowa 1978); Inman v. Inman, 578 S.W.2d 266, 268 (Ky. Ct. App. 1979), *rev'd,* 648 S.W.2d 847 (1982) (The Kentucky Supreme Court adopted the *Graham* language which had been rejected by the lower court.); Archer v. Archer, 303 Md. 347, 351, 493 A.2d 1074, 1076 (1985); Mahoney v. Mahoney, 91 N.J. 488, 496, 453 A.2d 527, 531 (1982); Stevens v. Stevens, 23 Ohio St. 3d 115, 117-18, 492 N.E.2d 131, 133 (1986); Hubbard v. Hubbard, 603 P.2d 747, 750 (Okla. 1979); Hodge v. Hodge, 513 Pa. 264, 268, 520 A.2d 15, 17 (1986); Saint-Pierre v. Saint-Pierre, 357 N.W.2d 250, 259 (S.D. 1984); Gardner v. Gardner, 748 P.2d 1076, 1080 (Utah 1988); *In re* Marriage of Lundberg, 107 Wis. 2d 1, 8, 318 N.W.2d 918, 921 (1982).

> expenditure of money. It is simply an intellectual achievement that may potentially assist in the future acquisition of property. In our view, it has none of the attributes of property in the usual sense of that term.[23]

Graham involved a six-year marriage during which the wife supported her husband in his pursuit of a master's degree in business administration. As is common in such situations, the couple had accumulated no marital assets,[24] so Anne Graham could not be compensated by a property division as June Nelson was. The Colorado court, noting that Anne Graham had not sought maintenance, said that a trial court could consider one spouse's contribution to the education of the other in awarding maintenance.[25] As the dissent pointed out, however, Colorado's statute restricted the court's power to award maintenance in cases where the spouse seeking it is incapable of self-support.[26] The *Graham* court's refusal to recognize the professional degree as property, combined with statutory inflexibility as to the awarding of alimony, deprives the self-supporting contributing spouse of any compensation — a clearly inequitable resolution in such a situation.[27]

B. Historical Perspective on the Law of Property

The view of property espoused by the *Graham* court represents the once-dominant physicalist conception of property as articulated by William Blackstone in the eighteenth century.[28] Blackstone based his law of property on a taxonomy of things — things which could be perceived by the senses, and rights issuing out of those things.[29] Blackstone's concept recognized as property only things over which absolute dominion and control could be exercised.[30] A central aspect of this control was the alienability of property.

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23. *Graham,* 194 Colo. at 432, 574 P.2d at 77, *cited in Nelson,* 736 P.2d at 1146-47.

24. *Id.* at 431, 574 P.2d at 76.

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

26. *Id.* at 435, 574 P.2d at 78-79 (Carrigan, J., dissenting).

27. Recognizing the harshness of this potential result, the Colorado Supreme Court subsequently ruled that, in cases where there is insufficient marital property to divide, the maintenance statute's requirement of "reasonable need" must be interpreted broadly enough to encompass the working spouse's reasonable expectations after years of deferring the acquisition of marital property and postponing her own career goals in order to assist the other spouse through career training. *In re* Marriage of Olar, 747 P.2d 676, 681-82 (Colo. 1987).

28. 2 W. BLACKSTONE, COMMENTARIES (1765).

29. Vandevelde, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property,* 29 BUFFALO L. REV. 325, 331 (1980). This article offers an excellent summary of the development of new property concepts.

30. *Id.* at 331.

During the nineteenth century, as protection of intangible forms of wealth became increasingly important to litigants, courts began to define property in terms of the right to value, rather than the absolute right to a given thing. Various forms of nonphysical property were thus created, especially in equity jurisprudence, under which valuable interests had to be designated as property in order to qualify for equitable protection.[31] Among the personal rights recognized as property during this time was the goodwill of a business, which formerly had been recognized only as an incident of real property.[32] By the end of the century, property no longer denoted exclusively rights over things, but rights to any valuable interest as well.[33]

Accordingly, a modern concept of property developed which defines property as a set of legal relations between people with respect to valuable interests.[34] This view was adopted by the Restatement of Property in 1936. The Restatement definition begins: "The word 'property' is used in this Restatement to denote legal relations between persons with respect to a thing. The thing may be an object having physical existence or it may be *any kind of an intangible* such as a patent right or a chose in action."[35] The Restatement then describes the legal relations which constitute property in terms of four elements (rights, privileges, powers and immunities), with their correlatives (absence of rights, duties, liabilities and disabilities).[36] The property owner possesses a "bundle of rights,"[37] and ownership does not depend on having all of the available rights in the bundle, one of which is alienability. The property is no less valuable if it happens to be inalienable.[38]

This modern definition, which unlike Blackstone's is not self-limiting, could theoretically embrace all valuable interests. In practice, however, judicial selection of the interests which are to receive the

31. *Id.* at 334 (citing the rule in equity first stated in Gee v. Pritchard, 2 Swanst. 402, 36 Eng. Rep. 670 (1818)).

32. *See id.* at 335-36.

33. Among the other interests held to be property by courts during the late nineteenth and early twentieth centuries were the right to use news one has gathered, International News Serv. v. Associated Press, 248 U.S. 215, 237-38 (1918), and the right to a tax exemption on tribal land, Choate v. Trapp, 224 U.S. 665, 673 (1912).

34. See Reich, *The New Property,* 73 YALE L.J. 733 (1964), for a perceptive and thorough analysis of rights and status as the modern individual's wealth, or property.

35. RESTATEMENT OF PROPERTY ch. 1 introductory note (1936) (emphasis added).

36. *Id.* §§ 1-4.

37. J. DUKEMINIER & J. KRIER, PROPERTY 158 (2d ed. 1988).

38. An example of property that cannot be transferred by the owner is an inalienable life estate of which the owner is life tenant. *See* 3 L. SIMES & A. SMITH, THE LAW OF FUTURE INTERESTS § 1157 (2d ed. 1956).

protection of the property laws is based on public policy considerations. Public policy thus serves as the limiting principle that determines what valuable interests are denominated as property. Community property and equitable distribution statutes reflect public policy favoring recognition and protection of all valuable interests acquired by spouses during marriage. The modern definition of property permits recognition that, in many young families, a professional degree or license, with its enhanced earning potential, is the major marital asset.[39] A narrow view of marital property ignores the public policy expressed by the social and legislative history of the equitable dissolution statutes.[40] Ideally, the implications of the legislated policy of equitable distribution should be as important to courts as precedent in designating what is to constitute marital property.[41]

C. Alimony versus Property Award

Why have courts such as the Colorado Supreme Court in *Graham* avoided the accepted concept of property, reverting instead to a narrow, anachronistic definition that ill accords with equitable distribution policy, in order to support their conclusion that the professional degree is not marital property? The answer may lie partly in the conservative nature of the judiciary in general; claims that a professional degree should be considered as marital property are relatively new,[42] and, except for New York's Equitable Marriage Distribution Law,[43] no state statutes specify that professional degrees must be considered

39. Krauskopf, *Recompense for Financing Spouse's Education: Legal Protection for the Marital Investor in Human Capital,* 28 U. KAN. L. REV. 379, 411 (1980).

40. *See generally* I. ELLMAN, P. KURTZ & A. STANTON, FAMILY LAW, 291-300 (1986). *See also* Gailor & McGill, *The Equitable Distribution of Professional Degrees upon Divorce in North Carolina,* 10 CAMPBELL L. REV. 69, 80 (1987).

41. The public policy that both parties to a marital dissolution are to receive an equitable share of the assets accumulated during marriage underlies the property division statutes of the 42 equitable distribution jurisdictions (including the District of Columbia) and the nine community property states, which are Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington and Wisconsin.

42. The earliest claim found is Colvert v. Colvert, 568 P.2d 623 (Okla.), *overruled,* Hubbard v. Hubbard, 603 P.2d 747, 752 (Okla. 1977).

43. N.Y. DOM. REL. LAW § 236 (McKinney 1980-81). Under this statute, New York courts have found that marital property encompasses not only professional degrees and licenses, but also the skills of an artisan, actor, professional athlete or any person whose expertise has enabled him to become an exceptional wage earner. *See* Golub v. Golub, 139 Misc. 2d 440, 444, 527 N.Y.S.2d 946, 949 (Sup. Ct. 1988) (increase during marriage in value of wife's career as model and actress was marital property, in view of husband's contributions to increase). *See also* McAlpine v. McAlpine, 143 Misc. 2d 30, 31-33, 539 N.Y.S.2d 680, 681-82 (Sup. Ct. 1989) (husband's award of fellowship in Society of Actuaries was marital asset, but since wife had not contributed to its attainment she could not share in any enhanced earning capacity).

as marital property.[44] Thus, courts can choose to interpret such statutes narrowly to find that the legislature did not intend professional degrees to be included as marital property subject to equitable division.[45]

The primary reason for these courts' conservatism, however, appears to be their unwillingness to undertake the valuation problems a professional degree represents, especially to grapple with the issue of future earning potential.[46] Yet, recognizing the inequities in allowing a contributing spouse who is capable of self-support to go totally without compensation, courts in the *Graham* line have allowed the husband's future earning potential to be considered in awarding alimony, while still denying that the degree itself is a divisible marital asset.[47] One appellate court has even held that the lower court's erroneous award of a property settlement representing a valuation of the husband's degree could be sustained if it were recharacterized as a provision for additional alimony.[48] In these jurisdictions, alimony becomes the back door by which the contributing spouse can be compensated with some future earnings, without designating the degree or earning potential as property.

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44. Some statutes do require the courts to consider, in awarding maintenance or property, "the contribution by one party to the education, training, or increased earning power of the other." WIS. STAT. ANN. §§ 767.26(9), 767.255(5) (West 1981). Statutes with similar provisions include CAL. CIV. CODE § 4801(a)(1)(B)(2) (West Supp. 1989); DEL. CODE ANN. tit. 13, § 1512(c)(6) (Supp. 1988); FLA. STAT. ANN. § 61.075 (1)(d), (e) (West Supp. 1989); GA. CODE ANN. § 19-6-5(a)(6) (1982); IND. CODE ANN. § 31-1-11.5-11(d) (Burns 1987 & Supp. 1989); IOWA CODE ANN. § 598.21(1)(e) (West 1989); N.J. STAT. ANN. § 2A:34-23.1(h) (West Supp. 1989) (award of alimony); N.C. GEN. STAT. § 50-20(c)(7) (1987); OR. REV. STAT. ANN. § 107.105(1)(d) (1983); 23 PA. CONS. STAT. ANN. § 501(b)(6) (Purdon Supp. 1989); TENN. CODE ANN. § 36-5-101(d)(9) (1984 & Supp. 1988). *See* Haugan v. Haugan, 117 Wis. 2d 200, 207-12, 343 N.W.2d 796, 804 (1984) (even though wife was not in need, she could be awarded maintenance to compensate her for contribution to husband's education). A few statutes do not mention the contribution of one spouse to the education of the other, but do require consideration of a spouse's "interruption of [a] personal career or educational opportunities." *See, e.g.,* NEB. REV. STAT. § 42-365 (1988); N.J. STAT. ANN. § 2A:34-23(b)(8) (West Supp. 1989) (equitable distribution of property).

45. *See* Hodge v. Hodge, 337 Pa. Super. 151, 155-57, 486 A.2d 951, 952-54 (Super. Ct. 1984), *aff'd,* 513 Pa. 264, 520 A.2d 15 (1986).

46. *See infra* Section IV.A.

47. *See* Archer v. Archer, 303 Md. 347, 493 A.2d 1074 (1985); Drapek v. Drapek, 399 Mass. 240, 244-47, 503 N.E.2d 946, 949-50 (1987); Rayburn v. Rayburn, 738 P.2d 238, 240 (Utah Ct. App. 1987).

48. Petersen v. Petersen, 737 P.2d 237, 242 (Utah Ct. App. 1987).

While this solution may appear on its face to be equitable, the use of alimony rather than a property settlement has important disadvantages for the contributing spouse.[49] Alimony is taxable income which is terminable upon the remarriage of the recipient or the death of either party. Alimony is conventionally not paid in a lump sum but over a period of years, posing the risks to the recipient of collection problems and possible modification or termination by the court.[50] Alimony awards interfere with the important goal of finality of litigation, causing unnecessary expenditure of judicial resources. The protracted nature of alimony payments also means that the recipient cannot use the money as flexibly as she could a lump sum property award, toward financing her own education or starting a business, for example. Most importantly, alimony is not a matter of right; its propriety and amount are discretionary with the court in all jurisdictions, based by statutory mandate on the court's concept of need or necessity in the particular case.[51] The contributing spouse is thus completely at the mercy of the court and her ex-spouse over a period of years.[52]

In contrast, a fair division of property is generally seen by courts as equitably necessary, not discretionary.[53] A property award is final and not terminable on the recipient's death or remarriage.[54] Such an award does not constitute taxable income. Moreover, the award is generally nonmodifiable, so that once the property settlement agreement is reached the parties need not return to court.[55]

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49. H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 650 (2d ed. 1988).

50. *Id.* at 653.

51. *Id.* at 644. *See, e.g.,* ALASKA STAT. § 25.24.160 (Supp. 1988), and text *supra* at note 4. Given these disadvantages, the fact that alimony is not dischargeable if the payor goes bankrupt seems small consolation to the contributing spouse.

52. Even though fault has largely been eliminated as a ground for divorce, some courts still consider it a relevant factor in the alimony decision. *See, e.g.,* Chapman v. Chapman, 498 S.W.2d 134, 138 (Ky. 1973) (fault is not to be considered in determining whether a spouse is entitled to maintenance, but it may be considered in determining the amount to be awarded); Mahne v. Mahne, 147 N.J. Super. 326, 329, 371 A.2d 314, 315, *cert. denied,* 75 N.J. 22, 379 A.2d 253 (1977); Hegge v. Hegge, 236 N.W.2d 910, 916 (N.D. 1975). Some statutes also explicitly state that the court is to consider fault (often expressed as "the conduct of the parties") in awarding alimony. *See* FLA. STAT. ANN. § 61.08(1) (West Supp. 1980); GA. CODE ANN. § 19-6-1(b) (1982); MASS. ANN. LAWS ch. 208, § 34 (Law. Co-op. 1989); MO. REV. STAT. § 452.335(2)(9) (West Supp. 1989); N.C. GEN. STAT. § 50-16.2 (1988); 23 PA. CONS. STAT. ANN. § 501(b)(14) (Purdon Supp. 1989); W. VA. CODE § 48-2-15(i) (1986).

53. Moore, *Should a Professional Degree be Considered a Marital Asset Upon Divorce?,* 15 AKRON L. REV. 543, 551-52 (1982).

54. *Id.*

55. *See, e.g.,* Gailor & McGill, *supra* note 40, at 82-86; Note, Horstmann v. Horstmann: *Present Right to Practice a Profession as Marital Property,* 56 DENVER L.J. 677, 681-84 (1979).

The policy behind equitable distribution of marital assets is that marriage is an economic partnership, and that the couple's investments in the marital property should be divided as fairly as possible. Valuing the professional degree indirectly by means of an alimony award may seem to achieve an equitable resolution for the contributing spouse in some situations, but it poses unacceptable risks and disadvantages for the recipient, unless certain of the traditional attributes of alimony are altered. Both common judicial solutions to the problem — indirectly valuing the degree through alimony, or refusing to value the degree at all — can severely disadvantage the contributing spouse and thus frustrate the policy on which equitable distribution is founded.

IV. Possible Solutions for Balancing the Equities

A. Valuing the Degree Using a Labor Theory

The problem of how to assign a value to the professional degree or license appears to be the primary concern of courts which, like the Alaska Supreme Court, have denied the degree or license status as marital property. At the root of this concern lies the perceived necessity of finding a way to value the degree-holding spouse's future earning capacity in order to arrive at a full economic valuation of the degree. It is a well-settled principle of economics that the present value of an income-producing entity consists of its future earning capacity.[56] Valuing a future earning stream, however, while economically desirable, presents two serious problems in the marital dissolution context.

The first problem is that prospective valuation is necessarily speculative. Although abundant statistics exist to provide data for the formulas used to calculate future earning potential attributable to a professional degree,[57] not all degree holders can earn the average statistical value; and it is not possible to consider fully all the variables that can affect actual future value. Such variables include not only

56. Garfield, *Wrongful Death: Principles Governing Valuation of Economic Law,* 1967 Ins. L.J. 654, 655.

57. A typical calculation is described in Fitzpatrick & Doucette, *Can the Economic Value of an Education Really Be Measured? A Guide for Marital Property Dissolution,* 21 J. Fam. L. 511, 516-20 (1982). More generally, to determine future earning potential, one must:

1. determine earning capacity after the education has been acquired, to be compared with the earning capacity if the education has not been obtained;
2. subtract out-of-pocket costs and opportunity costs — lost earnings — of the added education, costs which would be incurred anyway;
3. discount future income to present value, selecting a discount rate which factors in elements of risk such as premature death or disability.

Krauskopf, *supra* note 39, at 382-84.

premature death or disability, but unforeseeable changes in market opportunities, or changes of career or profession.[58] It is true that courts have long engaged in just such speculation in allowing calculations of future earning potential as damages in wrongful death and personal injury actions, and several commentators cite this precedent as justification for valuing the professional degree's future earning potential.[59] These advocates overlook the fact that in tort, it is the finding of fault that justifies the imposition of damages. With the growing trend toward no-fault divorce, this important policy justification is increasingly inapplicable in marital dissolution law.

The second difficulty is that valuing of the degree in terms of statistically average future earnings could seriously infringe on the student spouse's personal freedom to pursue his career as he wishes, or even to change careers entirely. A graduate of a nationally ranked law school has the option to work in a large law firm in a major city at a high entering salary, yet he may wish to practice public interest law or work for a government agency, or he may have captured a prestigious, but low-paying judicial clerkship. If he chooses any of the less remunerative positions, his earnings will be below the statistical average for his profession. Must he be required to live in a different city, give up a clerkship, or stay in a profession for which he may soon discover he is unsuited, in order to realize the income level projected at the time of the marital dissolution?

Any of these alternatives would represent an unsupportable encroachment on the personal freedom of a spouse who, at least in the eyes of the law, if not in fact, has committed no fault. Placing such a lien on the student spouse's future cannot be justified, even on the grounds that only by so doing can the contributing spouse be fully compensated. Some means of valuation must be employed that establishes a more just balance between these competing interests.

The valuation method that comes the closest to achieving this balance is the labor theory of value, as proposed by Professor Linda

58. Mullenix, *The Valuation of an Educational Degree at Divorce,* 16 LOY. L.A. L. REV. 227, 268 (1983).

59. *See* Gailor & McGill, *supra* note 40, at 97; Moore, *supra* note 53, at 547; Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards,* 28 UCLA L. REV. 1181, 1219 (1981); Krauskopf, *supra* note 39, at 388-89; Case Comment, *Divorce After Professional School: Education and Future Earning Potential May Be Marital Property: In re* Marriage of Horstmann, 44 MO. L. REV. 329, 333-36 (1979); Comment, *Professional Education as a Divisible Asset in Marriage Dissolutions,* 64 IOWA L. REV. 705 (1979); Case Comment, *Graduate Degree Rejected as Marital Property Subject to Division upon Divorce: In re* Marriage of Graham, 11 CONN. L. REV. 62, 71 (1978); Comment, *The Interest of the Community in a Professional Education,* 10 CAL. W.L. REV. 590, 605-06 (1974).

Mullenix.[60] This method is founded on the classic economic theory that the value of any commodity can be expressed in terms of the labor input required to produce it. The labor theory of value was dominant before the advent of modern industrialized society brought to the fore market-oriented theories of value, and it is still a valid means of assessing the value of a nonmarketable asset that has been produced by the application of a single factor of production.[61]

According to the labor theory, the measure of the value of the degree as a marital asset is the amount of labor time it took the student spouse to acquire it. Upon divorce, the student spouse owes the marriage the value of this asset, or the time which was spent on its acquisition, rather than on contributions to the family that the student spouse could have otherwise made. This value is determined by awarding the contributing spouse fifty percent of the student spouse's actual post-degree income for the same period of time it took him to acquire the degree. Thus, the contributing spouse who supported the student spouse during a three-year law degree is entitled to fifty percent of the student spouse's income for the three years following the divorce. A court employing this method never has to set an actual monetary value on the degree, so that the need for often conflicting expert valuations is avoided.[62]

The labor theory of value allows the contributing spouse to be compensated with an amount that exceeds mere restitution, because it is the cost of the degree to the student spouse, and not the wife's contributions, that is being valued. The contributing spouse is fully compensated for her investment in labor expended, even if she does not receive as much money as she would have if the degree were valued in terms of future earnings. The period of payment is confined to the first few years of the student spouse's professional career, when his earning power reflects primarily the degree's value rather than the value of experience and skill acquired over time. Moreover, limitation of the period of payment to a few years minimizes the restrictions on the student spouse's pursuit of his career that would be imposed by an award of a portion of the student spouse's future earnings spanning most if not all of his productive lifetime.

Valuing the degree in terms of labor also provides a means of reimbursing the contributing spouse's opportunity costs without engaging in speculation as to the monetary value of opportunities foregone. The primary opportunity costs incurred by the contributing

60. Mullenix, *supra* note 58, at 274-83. *See also* Haugan v. Haugan, 117 Wis. 2d 200, 214-15, 343 N.W.2d 796, 803 (1984).

61. Mullenix, *supra* note 58, at 274-77.

62. *Id.* at 278-79.

spouse are time spent and salary and educational opportunities sacrificed. Receiving fifty percent of the degree-holding spouse's income for the same period of time foregone by the contributing spouse allows her the same kind of benefit she had provided — a sum of money large enough to enable the pursuit of a full-time educational program, or to fund other opportunities of her choice.

Upon declaring that a professional degree or license is marital property subject to equitable distribution, the Alaska Supreme Court should adopt the labor theory of valuation as the preferred method for trial courts to use in valuing the degree or license. This method provides a fair return on the contributing spouse's monetary and opportunity cost investment without placing untenable restrictions on the student spouse's future, and, in addition, it is simple to calculate and to implement. Trial courts should, however, maintain the discretion to adjust the percent of the labor award downward from fifty percent if the equities of the individual case, supported by adequate evidence, require. An example of such a case would be one in which the student spouse was declared ineligible for a scholarship, or was required to borrow money from an outside source at a higher interest rate, because his wife was contributing to the family income.

B. Restitution in Quasi-Contract

If the Alaska Supreme Court chooses to remain among the majority of jurisdictions that do not recognize the professional degree as marital property, alternative means remain for balancing the equities between the contributing spouse and student spouse. A court is not restricted by the terms of the equitable distribution and maintenance statutes, but may resort to its inherent power to grant equitable relief by finding that a quasi-contract, or contract implied in law, existed between the husband and wife.[63] The court can thus apply principles of restitution to prevent the unjust enrichment of the student spouse independently of maintenance determinations and without having to designate the degree as marital property.

To grant this remedy, the court must find that one party has received a benefit at the expense of the other, and that it would be unjust for the recipient to retain the benefit without compensating the other party. As long as the conferring of the benefit was neither officious nor gratuitous, its retention is considered unjust.[64] The Restatement

63. *See, e.g.*, Krauskopf, *supra* note 39, at 389-91.

64. *See* Mahoney v. Mahoney, 91 N.J. 488, 500, 453 A.2d 527, 533 (1982) ("Where a partner to marriage takes the benefits of his spouse's support in obtaining a professional 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

of Restitution recognizes that a benefit is unjustly retained when services are performed with the recipient's knowledge because the performer reasonably believes that he will also benefit from the services.[65]

A number of courts have applied the principle of unjust enrichment in the context of marital investment in the education of a spouse,[66] but a few courts have refused to do so, acting on the presumption that services performed within the marital relationship are gratuitous.[67] This presumption derives from the traditional common law marital contract, whereby certain mutually beneficial services were to be performed gratuitously by the husband and wife. The common law contract, however, never imposed on either spouse, especially the wife,[68] the duty of supporting the other during the acquisition of an education. Since by so doing the contributing spouse has performed a service and rendered a benefit not encompassed by the traditional contract, and for which the contract provides no offsetting benefit, she should not be presumed to have provided this service gratuitously.[69] Instead, the court should look to the contributing spouse's reasonable expectations of the benefit she would in turn receive for performing the service.[70] Although the contributing spouse cannot share in the eventual earnings realized from the degree, as she had

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spouse giving anything in return, an unfairness has occurred that calls for a remedy.").

65. RESTATEMENT OF RESTITUTION § 40(b) (1937).

66. *See* Pyeatte v. Pyeatte, 135 Ariz. 346, 661 P.2d 196 (Ct. App. 1982); Woodworth v. Woodworth, 126 Mich. App. 258, 337 N.W.2d 332 (1983); DeLa Rosa v. DeLa Rosa, 309 N.W.2d 755 (Minn. 1981); *In re* Marriage of Cropp, 5 Fam. L. Rptr. (BNA) 2957 (D. Minn. 1979); Mahoney v. Mahoney, 91 N.J. 488, 453 A.2d 527 (1982); Adair v. Adair, 670 P.2d 1002 (Okla. Ct. App. 1983). *See also* Hubbard v. Hubbard, 603 P.2d 747, 749-52 (Okla. 1979) (Oklahoma Supreme Court creates hybrid form of alimony called "cash award in lieu of property settlement," limited to cases where only major marital asset is educational degree).

67. Wisner v. Wisner, 129 Ariz. 333, 341, 631 P.2d 115, 123 (Ct. App. 1981), *limited to facts of case*, Pyeatte v. Pyeatte, 135 Ariz. 346, 354, 661 P.2d 196, 202 (Ct. App. 1982); Lesman v. Lesman, 88 A.D.2d 153, 158-59, 452 N.Y.S.2d 935, 939 (1982).

68. *See* Church v. Church, 96 N.M. 388, 395-96, 630 P.2d 1243, 1250-57 (Ct. App. 1981) (wife's claims of providing financial support and educational funds for husband's medical education state a basis for relief because wife had no duty to support (applying Virginia law)).

69. *See* Krauskopf, *supra* note 39, at 394. *See also* Woodworth v. Woodworth, 126 Mich. App. 258, 268, 337 N.W.2d 332, 337 (1983) ("Clearly . . . the degree was a family investment, rather than a gift or benefit to the degree holder alone. Treating the degree as such a gift would unjustly enrich the degree holder to the extent that the degree's value exceeds its cost.").

70. DeLa Rosa v. DeLa Rosa, 309 N.W.2d 755, 758 (Minn. 1981) (court awarded extra-statutory equitable remedy on basis that wife had a "reasonable expectation" that she would be rewarded for her efforts in putting husband through medical school by a higher standard of living when he began practicing medicine).

anticipated, she can at least be restored financially to the position she would have been in if she had not made possible the earning of the degree.[71]

Unlike valuing future earning capacity, the remedy in restitution is retrospective rather than prospective. The objective is to compensate the contributing spouse by restoring to her the quantified present value of her contributions, rather than to grant her a share of the student spouse's income not yet earned.[72] The restitution remedy does not involve the kind of speculation inherent in valuing future earnings; it is based on actual past expenditures, concerning which the contributing spouse has the burden of proof. Courts vary as to their definition of what constitutes compensable educational costs. Some limit

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71. The traditional common law marital contract appears to be undergoing redefinition as societal changes are creating new obligations and expectations in marital and even non-marital relationships. For example, there is growing judicial recognition of individual contracts by which the parties order their own relationships in alternative ways. Many jurisdictions, including Alaska, are holding valid antenuptial and marital contracts which provide for distribution of property in the event of divorce. *See* Brooks v. Brooks, 733 P.2d 1044, 1048-51 (Alaska 1987) (discussing the changes in social perception of marriage and divorce, and its effects on the law's recognition of prenuptial agreements). Formerly, courts tended to find antenuptial contracts invalid as against the public policy of discouraging divorce, and such contracts are still deemed to violate public policy when their terms threaten to "promote and encourage dissolution." *In re* Marriage of Dawley, 17 Cal. 3d 342, 358, 551 P.2d 323, 333, 131 Cal. Rptr. 3, 13 (1976). *See also* RESTATEMENT (SECOND) OF CONTRACTS § 190(2) (1981). Now, however, antenuptial contracts are more often viewed as realistic attempts to provide for a possible contingency in a manner that tends to conserve both marital and judicial resources. *See, e.g., Dawley*, 17 Cal. 3d at 358, 551 P.2d at 333-34, 131 Cal. Rptr. at 13-14.

A growing number of courts are also making both contract and equitable remedies available to unmarried couples ending their relationships. Not only do the courts in several states recognize express contracts between such partners, but a number of jurisdictions will look for an implied contract as did the California Supreme Court in Marvin v. Marvin, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976) (court granted division of property accumulated in a non-marital relationship by finding an oral implied-in-fact agreement). *See, e.g.*, Hudson v. DeLonjay, 732 S.W.2d 922 (Mo. 1987); Kozlowski v. Kozlowski, 80 N.J. 378, 403 A.2d 902 (1979) (implied contracts of cohabiting couples recognized); Moroni v. Moroni, 50 N.Y.2d 481, 429 N.Y.S.2d 592 (1980), *modified on other grounds,* 85 A.D.2d 768, 445 N.Y.S.2d 605 (1981); Latham v. Latham, 274 Or. 421, 547 P.2d 144 (1976) (recognizing express contracts between cohabiting partners); Watts v. Watts, 137 Wis. 2d 506, 405 N.W.2d 303 (1987). If unmarried couples are accorded the benefit of these remedies, it would seem only just to treat married couples in the same manner.

72. *But see In re* Marriage of Francis, 442 N.W.2d 59 (Iowa 1989). The Iowa Supreme Court affirmed an alimony award, styled as "reimbursement," that was calculated on the basis of the husband's future earning potential. The court said, "In keeping with the standard established in *Horstmann,* . . . courts in Iowa are not confined to reimbursing supporting spouses solely for the expense of the advanced degree itself." *Id.* at 66.

recovery to direct educational costs,[73] some include living expenses,[74] and others recognize any other related contributions.[75] Whatever costs are considered compensable, the amount awarded should include adjustment for inflation and reasonable interest, so that the award is restitutionary and not merely reimbursement.[76]

In addition, restitution avoids placing undue limitations on the freedom of the degree-holding spouse to pursue his desired career path. Although he must pay the restitutionary award out of his earnings, the schedule of payments can be fixed at a level his income will accommodate, in the manner of conventional loan payments. The student spouse is, in fact, repaying an implied loan from the contributing spouse. Moreover, as in a loan, the payments will eventually terminate when the full amount of the award has been paid.

C. Restitution Through In Gross Maintenance

The majority of courts confronted with the problem of a professional degree in marital dissolution have declared that a professional degree or license is not a marital asset, but that a spouse's contributions to its achievement by the other spouse may be considered in the determination of alimony or maintenance, as well as in property division if there is any property to divide.[77] For a number of reasons,

73. DeLa Rosa v. DeLa Rosa, 389 N.W.2d 755, 759 (Minn. 1981).

74. Pyeatte v. Pyeatte, 135 Ariz. 346, 357, 661 P.2d 196, 207 (Ct. App. 1982).

75. *In re* Marriage of Horstmann, 263 N.W.2d 885, 891 (Iowa 1978) (Although the Iowa Supreme Court held that the potential for increase in future earning capacity made possible by the husband's law degree was a marital asset available for distribution, the award to the wife approved by the court was purely restitutionary in nature.); Mahoney v. Mahoney, 91 N.J. 488, 501, 453 A.2d 527, 534 (1982); Lehmicke v. Lehmicke, 339 Pa. Super. 559, 567-68, 489 A.2d 782, 786-87 (1985).

76. If the student spouse had had to secure this money from an outside source in the form of a loan, he would have to repay both principal and interest; equity requires that the contributing spouse be repaid in the same manner. *See* Hubbard v. Hubbard, 603 P.2d 747, 752 (Minn. 1981). *But see* DeLa Rosa v. DeLa Rosa, 309 N.W.2d 755 (Minn. 1981) (wife got money ten years later, with no adjustment for time lapse); Geer v. Geer, 84 N.C. App. 471, 353 S.E.2d 427 (1987); Lehmicke v. Lehmicke, 339 Pa. Super. 559, 489 A.2d 782 (1985).

77. Wisner v. Wisner, 129 Ariz. 333, 340-41, 631 P.2d 115, 122-23 (Ct. App. 1981); *In re* Marriage of Olar, 747 P.2d 676, 680 (Colo. 1987); *In re* Marriage of McManama, 272 Ind. 483, 486, 399 N.E.2d 371, 373 (1980); *In re* Marriage of Francis, 442 N.W.2d 59, 64 (Iowa 1989); *In re* Marriage of Wagner, 435 N.W.2d 372, 375-76 (Iowa Ct. App. 1988); Wilkins v. Wilkins, 149 Mich. App. 779, 788-92, 386 N.W.2d 677, 681-83 (1986); Olah v. Olah, 135 Mich. App. 404, 410, 354 N.W.2d 359, 361 (1984); *In re* Marriage of Cropp, 5 Fam. L. Rptr. (BNA) 2957 (D. Minn. 1979); Mahoney v. Mahoney, 182 N. J. Super. 598, 615, 442 A.2d 1062, 1071-72, *rev'd on other grounds,* 91 N.J. 488, 453 A.2d 527 (1982); Nastrom v. Nastrom, 262 N.W.2d 487, 493 (N.D. 1978); Adair v. Adair, 670 P.2d 1002, 1003 (Okla. Ct. App. 1983); Washburn v. Washburn, 101 Wash. 2d 168, 178-82, 677 P.2d 152, 157-59 (1984); Lambert v. Lambert, 376 S.E.2d 331, 332-33 (W. Va. 1988); Haugan v. Haugan, 117

however, conventional alimony is an unsatisfactory means of compensating the contributing spouse.[78] If the Alaska courts wish to employ this remedy, several characteristics of conventional alimony must be altered to provide the contributing spouse the benefits she would have if there were property to divide.

Any maintenance award which functions as restitution to a contributing spouse should be a lump sum, or in gross, award. This award may be made payable in installments, but should be made nonterminable upon remarriage.[79] By holding that contributions to the welfare of a spouse may be considered in determining maintenance, courts have recognized that the obligation to make the contributing spouse whole is a function of alimony as valid as the more traditional function of providing support.[80] Once this compensatory function is acknowledged, the necessity of making the alimony award nonterminable is apparent.[81] Making the award in gross allows the kind of finality present in a property settlement; although the award is of necessity usually made payable in installments, it is not open-ended like conventional alimony and the payments generally terminate within a shorter period of time.

Nothing in Alaska's statute appears to prevent the adoption of in gross maintenance in Alaska.[82] The Alaska Supreme Court's interpretation of the statute also indicates a flexible approach toward the

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Wis. 2d 200, 207-21, 343 N.W.2d 796, 800-06 (1984); *In re* Marriage of Lundberg, 107 Wis. 2d 1, 10-12, 318 N.W.2d 918, 922-23 (1982).

78. *See supra* Section III.C.

79. *See In re* Marriage of Francis, 442 N.W.2d 59, 64 (Iowa 1989). Courts which have employed such a remedy include Greer v. Greer, 32 Colo. App. 196, 198-99, 510 P.2d 905, 906-07 (1973); Moss v. Moss, 80 Mich. App. 693, 694-95, 264 N.W.2d 97, 98-99 (1978); Hubbard v. Hubbard, 603 P.2d 747, 751-52 (Okla. 1979); Diment v. Diment, 531 P.2d 1071, 1074 (Okla. Ct. App. 1974); Washburn v. Washburn, 101 Wash. 2d 168, 183, 677 P.2d 152, 160 (1984); *In re* Marriage of Lundberg, 107 Wis. 2d 1, 14-15, 318 N.W.2d 918, 924 (1982).

80. *See In re* Marriage of Lundberg, 107 Wis. 2d 1, 12, 318 N.W.2d 918, 923 (1982) ("[M]aintenance payments are no longer limited to situations where the spouse is incapable of self-support. Instead, we view maintenance as a flexible tool . . . to ensure a fair and equitable determination in each individual case."). *See also* Greer v. Greer, 32 Colo. App. 196, 199, 510 P.2d 905, 907 (1973) ("Although referred to as 'alimony,' the lump sum awarded in the present case . . . must be considered as a substitute for, or in lieu of, the wife's rights in the husband's property as distinguished from her rights of future support envisioned by the ordinary award of alimony.").

81. Krauskopf, *supra* note 39, at 406.

82. ALASKA STAT. § 25.24.160 (Supp. 1988). "In a judgment in an action for divorce . . . the court may provide . . . (3) for the recovery by one party from the other of an amount of money for maintenance, *in gross* or in installments, as may be just and necessary without regard to which of the parties is in fault . . . ." (emphasis added). *See also* Faro v. Faro, 579 P.2d 1377, 1380 (Alaska 1978) (trial court is vested with broad discretion in making alimony determination).

granting of maintenance that would support such an award. In *Nelson,* the supreme court restated its longstanding preference for securing the financial needs of divorcing spouses by means of property division rather than alimony.[83] The court stated, however, that where there is no substantial property to divide, alimony may be awarded if it is found "just and necessary."[84] The supreme court has supported a broad reading of the statute, stating that the spouse seeking maintenance is not necessarily ineligible for maintenance because she can support herself; she may be eligible if she is "unable to secure employment appropriate to her skills and interests."[85] The concept of "appropriate employment," rather than any kind of employment for the contributing spouse, reflects an interpretation of the statutory requirement of necessity that is broad enough to permit rehabilitative alimony for the education of a supporting spouse,[86] and to allow a contributing spouse to receive alimony even if she is self-supporting.[87]

The court thus appears to regard the requirement of necessity as one of reasonable necessity in the light of the applicant's situation and reasonable expectations. Given its progressive concept of the function of alimony, it seems likely that the supreme court would uphold an award of in gross nonterminable maintenance in a situation of the type reserved in *Nelson.*

V. CONCLUSION

The time will come when an Alaska court will be confronted with a marital dissolution in which one spouse, during a short-term marriage with no significant assets, made possible the acquisition of a professional degree by the other spouse. The Alaska Supreme Court, which in *Nelson v. Nelson* refused to recognize a professional degree as marital property, has not provided the lower courts with guidance as to how to carry out the policy behind Alaska's equitable distribution statute in such a situation.

Without acknowledging that the degree is property and, thus, without disturbing *Nelson,* a trial court can provide restitutionary

83. *Nelson,* 736 P.2d 1145, 1147 (Alaska 1987). *See also* Bussell v. Bussell, 623 P.2d 1221, 1224 (Alaska 1981); Malone v. Malone, 587 P.2d 1167, 1168 (Alaska 1978); Messina v. Messina, 583 P.2d 804, 805 (Alaska 1978).

84. *Nelson,* 736 P.2d at 1147 (quoting ALASKA STAT. § 25.24.160 (3)).

85. Messina v. Messina, 583 P.2d 804, 805 (Alaska 1978) (citing UNIF. MARRIAGE & DIVORCE ACT § 308, 9A U.L.A. 347 (1973)).

86. Bussell v. Bussell, 623 P.2d 1221, 1224 (Alaska 1981) (award of rehabilitative alimony upheld as not clearly unjust when of limited duration and for a specified purpose).

87. Colorado, since *Graham,* has joined Alaska in holding that the contributing spouse's "appropriate employment" is one of the factors to be considered in determining maintenance. *In re* Marriage of Olar, 747 P.2d 676, 681 (Colo. 1987).

compensation for the contributing spouse by either of two means: employing a theory of unjust enrichment in quasi-contract, or granting a lump-sum maintenance award that is nonterminable and nonmodifiable. Ultimately, however, the supreme court should acknowledge that a professional degree is the kind of valuable interest encompassed by the modern concept of property. Such recognition need not lead inevitably to a speculative valuation based on the degree-holding spouse's future earning potential, nor should it be prevented by the fact that the degree itself is not alienable. By adopting the nonspeculative labor theory of value, the court can avoid valuing the degree in monetary terms entirely. The labor theory, which values the degree according to the time invested by the contributing spouse toward its achievement by the student spouse, compensates the contributing spouse in the fairest manner possible without unduly restricting the future freedom of the student spouse.

Celia Grasty Jones