

Reimbursement of Educational Expenses at Divorce in the USA

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1. Introduction

A complicated legal problem arises at divorce, when one spouse has financed the education of the other spouse, then the marriage ends *before* the supporting spouse can be either rewarded by an increased standard of living during the marriage or compensated by an increased share of the marital property at divorce. Since the mid-1980s, there is a consensus in courts in the USA that such a supporting spouse should be reimbursed at divorce for her/his actual contributions to the supported spouse's enhanced earning potential. A trickle of reported judicial opinions on this topic began around 1975. There were at least four reported opinions/year during the years 1979-1992, with peaks of about 15 reported opinions/year during 1982 and 1984. The first two significant cases involving reimbursement of a supported spouse's educational expenses were a 1979 decision from the Oklahoma Supreme Court¹ and a 1982 decision from the New Jersey Supreme Court.²

I list the cases in chronological order in this essay, so the reader can easily follow the historical development of a national phenomenon. If I were writing a legal brief, then I would use the conventional citation order given in the *Bluebook*.

In the mid-1990s, litigating a claim of this kind in a trial court involved approximately US\$ 100,000 in attorney's fees and expert witness fees (e.g., to establish the value of the supported spouse's future earnings) for one party. Each appeal might cost an additional US\$ 20,000 in legal fees for each party. Such litigation is too expensive for most people with this type of case. The supporting spouse in a typical case of this type is about 25 to 30 years of age and has either a high school diploma or a bachelor's degree as her highest educational credential, which does not give her an income that can pay for such expensive divorce litigation. The supported spouse in a typical case of this type has a meager income as an apprentice professional (e.g., resident in a hospital, clerk to a judge) and he also owes banks for payments of some educational loans, so the supported spouse has insignificant income from which a court could order the supported spouse to pay the supporting spouse's attorney's fees (e.g., as *alimony pendente lite*). Furthermore, it would be improper for an attorney and client to agree to any contingency fee in a divorce case (e.g., it is improper for the attorney to accept 1/3 of the reimbursement of educational expenses as payment for the attorney's services).³ Given these significant financial obstacles, it is remarkable that there have been more than 120 reported appellate cases involving reimbursement

¹ *Hubbard v. Hubbard*, 603 P.2d 747 (Okla. 1979).

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

³ See, e.g., *Meyers v. Handlon*, 479 N.E.2d 106 (Ind.App. 1985); American Bar Association, *Model Rules of Professional Conduct*, Rule 1.5(d)(1). In contrast to divorce cases, contingency fee agreements are common in personal injury cases, such as products liability or medical malpractice.

of educational expenses at divorce.

disclaimers

Readers who are not attorneys are cautioned that some legal principles mentioned in this essay may *not* be accepted by judges in your particular state. Furthermore, an old reported case from an appellate court in your state may no longer be valid law in your state, as the law changes with time.

This essay is intended only to present general information about an interesting topic in law and is *not* legal advice for your specific problem. See my disclaimer at

<http://www.rbs2.com/disclaim.htm> .

If you are a spouse who needs advice about the subject of this essay, I urge that you contact an attorney who is *both* licensed to practice in your state *and* who has substantial experience in divorce law. For hints on how to find an attorney in the USA, see my webpage at

<http://www.rbs2.com/findatty.htm> .

nomenclature

The *supporting* spouse pays for [part of] the education of the *supported* spouse during the marriage. Using the words “supporting” and “supported” allows one to write in a gender-neutral way. However, some sentences would become turgid if one uses only the words supported and supporting, so I have sometimes used the pronouns *he/she* as a substitute for supported spouse, and *she/he* as a substitute for supporting spouse. Reading cases in this area of law shows that the supported spouse is nearly always male.

I use the term *marital property* in this essay as a synonym for what some statutes and some judges have called *marital assets*. In this sense, *property* includes not only tangible items (e.g., land, buildings, automobiles, etc.), but also intangible items (e.g., the value of bank accounts, mutual funds, stocks, and bonds).

When the supporting spouse is awarded reimbursement of educational expenses at divorce, but the marital property is too small to permit reimbursement at divorce by awarding an extra share of the marital property to the supporting spouse, courts sometimes order the supported spouse to reimburse these educational expenses from the future income earned by the supported spouse. This reimbursement from future income was initially called *reimbursement alimony*,⁴ because the payments were made in a way similar to traditional alimony. But that term is a misnomer,⁵ because:

⁴ *Mahoney v. Mahoney*, 453 A.2d 527, 534 (N.J. 1982).

⁵ *Reiss v. Reiss*, 478 A.2d 441, 444-45 (N.J.Super.Ch. 1984), *Reiss v. Reiss*, 490 A.2d 378, 379 (N.J.Super.Ch. 1984), *aff'd*, 500 A.2d 24 (N.J.Super.A.D. 1985).

1. *alimony* is a monthly payment for current living expenses, *not* reimbursement for past contributions.
2. *alimony* ceases on either remarriage or death of the recipient, while the reimbursement of educational expenses is repayment of a debt that should continue after the supporting spouse remarries or dies.
3. *alimony* is deductible on the federal income tax of the payor and is income to the recipient — the supporting spouse already paid income tax on this amount once during the marriage and should not need to pay income tax again when the amount is reimbursed.
4. *alimony* is not dischargeable in bankruptcy, but distributions of marital property might be dischargeable in bankruptcy.

A more appropriate name used by many recent courts is *equitable reimbursement*.⁶

2. Overview of Issues

Because there are a number of different issues and legal theories that occur in many cases, it makes sense to critically review these items by topic, *before* discussing individual cases in chronological order.

Legal theories

There are several different legal theories that have used to justify ordering reimbursement of educational expenses by the supported spouse.

As explained in detail below, beginning at page 9, an academic degree or a license to practice a profession is purely personal property that is owned solely by the supported spouse who earned that degree or license. During the marriage, *marital* property (i.e., income earned by the supporting spouse) was used to pay for part of the education that leads to such *personal* property. It would be *unjust enrichment* to allow the supported spouse to walk away at divorce without compensating the supporting spouse for her/his financial contributions to the supported spouse's academic degree that gave the supported spouse an enhanced earning potential.

Alternatively, the financial contributions from the supporting spouse could be interpreted as substitutes for loans from a bank, and therefore ought to be repaid like such loans, under a quasi-contract theory. Quasi-contracts are fictitious contracts created by a judge (i.e., implied-at-law) to prevent unjust enrichment. In my opinion, this is the best reason to order reimbursement of educational expenses.

⁶ *Bold v. Bold*, 542 A.2d 1374, 1378 (Pa.Super. 1988), *vacated and remanded*, 574 A.2d 552, 557, n. 7 (Pa. 1990) (“Whether the award is called equitable reimbursement or reimbursement alimony, the considerations determining the existence, the amount and the duration of the award are the same. Ultimately, the only criterion for fashioning the award under either analysis is fairness.”); *Zullo v. Zullo*, 613 A.2d 544, 546 (Pa. 1992); and many subsequent cases.

During the marriage, the supporting spouse probably agreed to pay for part of the supported spouse's education, in return for a higher standard of living in the future, as a result of the supported spouse's enhanced earning potential. Divorce was a supervening event that frustrated the purpose of the original agreement to pay for part of the supported spouse's education. The supported spouse received the education at less cost (e.g., fewer loans) than if he/she were *unmarried*, but the supporting spouse received nothing in return. From the perspective of conventional contract law, the supported spouse received the benefit of the bargain, while the supporting spouse received nothing. Conventional contract law would reimburse the supporting spouse for her/his contributions to the supported spouse's educational expenses.

Each of these legal theories is a path to the same result. Unjust enrichment, quasi-contract, restitution, etc. are just different labels for the same equitable remedy in these cases.

Only degrees that lead to increased income

Cases in appellate courts are clear that *only* academic degrees that lead to enhanced earning potential can be the subject of equitable distribution. If an investment banker with a large salary takes a sabbatical of a few years, and earns a doctoral degree in history, fine arts, archeology, etc., then there is no increase in earning potential.⁷ In such cases, there is little prospect of equitable reimbursement for educational expenses at divorce, because the education was *not* undertaken with the intent of increasing the supported spouse's income.⁸ This reasoning seems to be tied to the legal theory of unjust enrichment: without an increased earning potential, there is no enrichment, just or unjust.

On the other hand, when the supported spouse goes from a bachelor's degree in biology to an M.D. degree, there has been perhaps a five-fold increase in earning potential. Because of this significant increase in earning potential, it would be unjust enrichment to allow the supported spouse to walk away from the marriage without some form of compensation to the supporting spouse who paid for at least part of the education.

⁷ *Hoak v. Hoak*, 370 S.E.2d 473, 479 (W.Va. 1988) (“... reimbursement alimony would be inappropriate where the professional degree was not sought with the expectation of achieving a higher standard of living for the family. When, for example, a homemaker of many years returns to school for a teaching certificate, or when a successful executive takes a sabbatical to pursue a doctorate in philosophy or literature, the supporting spouse should not ordinarily be reimbursed for contributions to the other's education.”).

⁸ *Hanebutt v. Hanebutt*, 64 P.3d 560, 562, ¶ 11 (Okla.Civ.App. 2002) (Professor at university who had earned only a Master's degree then earned a law degree, in order to continue being a professor. Because there was no expectation of an increase in earning potential, the appellate court said that reimbursing the supporting spouse for her contributions to his law degree would be inappropriate.)

Only marriages that end soon after the education

If the supported spouse used the education for many years during the marriage to practice a profession, an extra amount of marital property can be distributed at divorce to the supporting spouse to compensate the supporting spouse's financial contribution to the education of the supported spouse. Alternatively, the supporting spouse may have been already "rewarded" by an increased standard of living during many years of marriage after the supported spouse earned his/her academic degree. See, for example:

- *Inman v. Inman*, 578 S.W.2d 266, 268 (Ky.App. 1979)(dicta: "... different considerations may apply when a sizeable marital estate is built up over the course of a long marriage. In such instances, it might be inequitable to award to a spouse who contributed to the other spouse's earning capacity years prior a "property" interest in the other's professional degree. In addition to considerable property which is in substantial part the fruit of the increased earning capacity. Such a division of property could amount to awarding an interest far out of proportion to any reasonable apportionment of interest in the degree."),
rev'd on other grounds, 648 S.W.2d 847 (Ky. 1982);
- *Wisner v. Wisner*, 631 P.2d 115, 123 (Ariz.App. 1981)("Obviously, also, an important factor to consider in the overall picture is the extent to which the non-license or degree holder has already or otherwise benefited financially during coverture from his or her spouse's earning capacity. The rather common situation in which one spouse puts the other through professional school, followed closely by a dissolution upon the completion of schooling, is perhaps the clearest picture of the injustice which may evolve. In that situation, the spouse who has devoted much of the product of several years of labor to an 'investment' in future family prosperity is barred from any return on his or her investment, while the other spouse has received a windfall of increased earning capacity. However, the acquisition of a considerable estate obviously solves this problem. Such is the situation here. Wife shared in the fruits of husband's education for many years during their marriage, and ultimately realized a value therefrom by a substantial award to her of the community assets, plus spousal maintenance as set forth above.");
- *Mahoney v. Mahoney*, 453 A.2d 527, 535-36 (N.J. 1982)("... where the parties to a divorce have accumulated substantial assets during a lengthy marriage, courts should compensate for any unfairness to one party who sacrificed for the other's education, not by reimbursement alimony but by an equitable distribution of the assets to reflect the parties' different circumstances and earning capacities. If the degree-holding spouse has already put his professional education to use, the degree's value in enhanced earning potential will have been realized in the form of property, such as a partnership interest or other asset, that is subject to equitable distribution.");
- *Watling v. Watling*, 339 N.W.2d 505, 507 (Mich.App. 1983)("... plaintiff has already been compensated to a large extent for her own contribution toward defendant's degree in dentistry. For 19 of the 20 years the parties were married, plaintiff shared in the benefits of his degree. Thus, plaintiff's contribution to defendant's degree has become quite attenuated.");
- *Washburn v. Washburn*, 677 P.2d 152, 159 (Wash. 1984)("We point out that where a marriage endures for some time after the professional degree is obtained, the supporting

spouse may already have benefited financially from the student spouse's increased earning capacity to an extent that would make extra compensation inappropriate. For example, he or she may have enjoyed a high standard of living for several years. Or perhaps the professional degree made possible the accumulation of substantial community assets which may be equitably divided. However, our attention today is centered on the more difficult case of the marriage that is dissolved before the supporting spouse has realized a return on his or her investment in family prosperity.”);

- *Martin v. Martin*, 358 N.W.2d 793, 799 (S.Dak. 1984)(“As a number of courts have pointed out, however, such reimbursement is not appropriate where the contributing spouse has benefited from the increased earning capacity resulting from the professional training that he or she had helped to finance.”);
- *Nelson v. Nelson*, 736 P.2d 1145 (Alaska 1987);
- *Petersen v. Petersen*, 737 P.2d 237, 242, n. 4 (UtahApp. 1987)(“In cases like the instant one, life patterns have largely been set, the earning potential of both parties can be predicted with some reliability, and the contributions and sacrifices of the one spouse in enabling the other to attain a degree have been compensated by many years of the comfortable lifestyle which the degree permitted. Traditional alimony analysis works nicely to assure equity in such cases.
In another kind of recurring case, typified by *Graham*, where divorce occurs shortly after the degree is obtained, traditional alimony analysis would often work hardship because, while both spouses have modest incomes at the time of divorce, the one is on the threshold of a significant increase in earnings. Moreover, the spouse who sacrificed so the other could attain a degree is precluded from enjoying the anticipated dividends the degree will ordinarily provide. Nonetheless, such a spouse is typically not remote in time from his or her previous education and is otherwise better able to adjust and to acquire comparable skills, given the opportunity and the funding. In such cases, alimony analysis must become more creative to achieve fairness, and an award of "rehabilitative" or "reimbursement" alimony, not terminable upon remarriage, may be appropriate.” [citations omitted]);
- *Sweeney v. Sweeney*, 534 A.2d 1290, 1292 (Maine 1987)(“ During the latter years of the marriage, Mrs. Sweeney has received the benefits of Dr. Sweeney's medical license through her enjoyment of his increased earning capacity during their marriage. In addition, it can be assumed that much of the marital property which Mrs. Sweeney will eventually realize, was acquired due to Dr. Sweeney's enhanced earning capacity. In this case, therefore, we conclude that any form of reimbursement alimony would be inappropriate”);
- *Gardner v. Gardner*, 748 P.2d 1076, 1081 (Utah 1988)(a 30-year marriage);
- *Hoak v. Hoak*, 370 S.E.2d 473, 479 (W.Va. 1988)(“As mentioned above, the supporting spouse in a marriage of many years should be compensated in the division of marital property.”);
- *Lambert v. Lambert*, 376 S.E.2d 331, 333 (W.Va. 1988)(“Reimbursement alimony is usually appropriate when the benefits of the professional degree for the supporting spouse are not evinced in the distribution of marital property because the parties, as in *Hoak*, have divorced shortly after the student spouse has completed his professional education. At this stage, the couple has not begun to reap the economic benefits of the degree that would otherwise appear as increased marital property, which, in turn, would be equitably

distributed.”)[*Lambert* makes a clear distinction between the total amount of marital property and the amount of marital property that was earned by the supported spouse after his/her graduation.];

- *Bold v. Bold*, 574 A.2d 552, 556, n. 5 (Pa. 1990)(“Among other matters of fairness, a court considering a claim for equitable reimbursement will have to consider the length of time the parties were married after the supported spouse began to enjoy the financial benefits of his or her increased earning capacity and the use to which these increased earnings were put. If the supported spouse contributed his or her increased earnings to the marriage and sufficient time has passed such that the supporting spouse has enjoyed these financial benefits commensurate with his or her contribution to the education or training that made them possible, equitable reimbursement would be inappropriate.”);
- *Postema v. Postema*, 471 N.W.2d 912, 920 (Mich.App. 1991)(“Where, for instance, the parties remain married for a substantial period of time after an advanced degree is obtained, fairness suggests that the value of an equitable claim would not be as great, inasmuch as the nonstudent spouse will already have been rewarded, in part, for efforts contributed by virtue of having already shared, in part, in the fruits of the degree. See *Watling, supra*, [339 N.W.2d 505, 507].”);
- *Jackson v. Jackson*, 995 P.2d 1109, 1112, ¶¶ 13-14 (Okla. 1999)(“... the Jacksons divorced more than fifteen years after Dr. Jackson completed his medical training and commenced an active practice. During those years, Mrs. Jackson lived an affluent lifestyle supported by the significant income (often in excess \$230,000 annually) Dr. Jackson earned. She resided in a luxury house. She traveled throughout the world, volunteering for a Christian ministry in which she had a great interest. In short, Mrs. Jackson had ample opportunity to enjoy the fruits of her investment in Dr. Jackson's education and training.
... the Jacksons accumulated substantial marital property, of which Mrs. Jackson received essentially half. The trial court, in the manner in which it divided the marital property, provided Mrs. Jackson with another form of return on her past investment in Dr. Jackson's education and training.”).

The problem arises when the marriage ends and there is *inadequate* marital property to use to compensate the supporting spouse for her/his contributions to the supported spouse's education. Such a situation might arise because the marriage was of short duration *or* because the supported spouse's educational expenses depleted the marital savings.

Some judges have remarked that reimbursement is only appropriate in marriages of a short duration. Such a statement is *not* precisely correct. The important issue is not the length of the marriage, but the amount of marital property available at the time of the divorce from which the supporting spouse can be compensated for her/his contribution to the other spouse's education. In a typical case of this kind, the parties married when they were in undergraduate school (e.g., at age 21 years) and separated soon after the supported spouse completed his/her graduate education (e.g., at age 26 years), so the marriage is of short duration and there is little marital property at divorce, because the supported spouse's education consumed all of the marital income not spent on an apartment, food, clothing, and other necessities. But it is possible that the parties could marry at age 22 years, then the supported spouse graduates from medical school at age 42 years

after depleting the marital savings on his medical education, and then the marriage ends soon after his graduation. In the latter example, the marriage lasted twenty years (i.e., *not* short duration), but there is inadequate marital property that could be used to compensate the supporting spouse. In both of these examples, the supporting spouse will need to be compensated by payments from the future income of the supported spouse after divorce. Because such payments appear similar to alimony, they were called “reimbursement alimony” by some early courts, as explained above in this essay in the section on nomenclature.

Can an academic degree be marital property?

An easy remedy in these divorce cases would be to partition the academic degree or license to practice a profession, and award a fractional interest to the supporting spouse at divorce. However, it is absolutely clear that academic degrees or professional licenses are *not marital property*. Degrees and licenses are only personal property and they belong solely to whoever personally earned them. A landmark decision in 1978 by the Colorado Supreme Court explained:

An educational degree, such as an M.B.A., is simply not encompassed even by the broad views of the concept of “property.” It does not have an exchange value or any objective transferable value on an open market. It is personal to the holder. It terminates on death of the holder and is not inheritable. It cannot be assigned, sold, transferred, conveyed, or pledged. An advanced degree is a cumulative product of many years of previous education, combined with diligence and hard work. It may not be acquired by the mere expenditure of money. It is simply an intellectual achievement that may potentially assist in the future acquisition of property. In our view, it has none of the attributes of property in the usual sense of that term.

in re Marriage of Graham, 574 P.2d 75, 77 (Colo. 1978).

This paragraph in *Graham* not only makes good sense, but also has been quoted with approval in judicial opinions in many other states, for example:

- *In re Marriage of Horstmann*, 263 N.W.2d 885, 891 (Iowa 1978);
- *In re Marriage of Aufmuth*, 152 Cal.Rptr. 668, 678, n. 5 (Cal.App. 1979);
- *Hubbard v. Hubbard*, 603 P.2d 747, 750 (Okla. 1979);
- *DeWitt v. DeWitt*, 296 N.W.2d 761, 766 (Wis.App. 1980);
- *Wisner v. Wisner*, 631 P.2d 115, 121-22 (Ariz.App. 1981);
- *In re Marriage of Goldstein*, 423 N.E.2d 1201, 1204 (Ill.App. 1981)(paraphrased);
- *In re Marriage of Lundberg*, 318 N.W.2d 918, 921 (Wis. 1982);
- *Mahoney v. Mahoney*, 453 A.2d 527, 531 (N.J. 1982);
- *Woodworth v. Woodworth*, 337 N.W.2d 332, 334-35 (Mich.App. 1983);
- *Hughes v. Hughes*, 438 So.2d 146, 147 (Fla.App. 1983);
- *Grosskopf v. Grosskopf*, 677 P.2d 814, 822 (Wyo. 1984);
- *Wehrkamp v. Wehrkamp*, 357 N.W.2d 264, 265-66 (S.Dak. 1984);
- *Hodge v. Hodge*, 486 A.2d 951, 953 (Pa.Super. 1984), *aff'd*, 520 A.2d 15, 16-17 (Pa. 1986);
- *Lehmicke v. Lehmicke*, 489 A.2d 782, 784 (Pa.Super. 1985);
- *Archer v. Archer*, 493 A.2d 1074, 1076, 1080 (Md. 1985);
- *Stevens v. Stevens*, 492 N.E.2d 131, 133 (Ohio 1986);

- *Nelson v. Nelson*, 736 P.2d 1145, 1146-47 (Alaska 1987);
- *Petersen v. Petersen*, 737 P.2d 237, 240 (Utah App. 1987);
- *Gardner v. Gardner*, 748 P.2d 1076, 1080 (Utah 1988);
- *Hoak v. Hoak*, 370 S.E.2d 473, 475-76 (W.Va. 1988);
- *Lowery v. Lowery*, 413 S.E.2d 731, 732 (Ga. 1992)(paraphrased);
- *Becker v. Perkins-Becker*, 669 A.2d 524, 531 (R.I. 1996);
- *Matter of Marriage of Denton*, 930 P.2d 239, 243, n. 1 (Or.App. 1996)(quoted one sentence);
- *In re Marriage of Lee*, 938 P.2d 650, 655-56 (Mont. 1997)(paraphrased);
- *Simmons v. Simmons*, 708 A.2d 949, 955 (Conn. 1998);
- *Guy v. Guy*, 736 So.2d 1042, 1044, ¶ 9 (Miss. 1999).

Graham was not the first case to hold that academic degrees or professional licenses are personal property, but it does appear to be the first case to give good reasons for that holding. A few earlier cases are:

- *Todd v. Todd*, 78 Cal.Rptr. 131, 134 (Cal.App. 1969) (“If a spouse's education preparing him for the practice of the law can be said to be 'community property,' a proposition which is extremely doubtful even though the education is acquired with community moneys, it manifestly is of such a character that a monetary value for division with the other spouse cannot be placed upon it.”);
- *Muckleroy v. Muckleroy*, 498 P.2d 1357, 1358 (N.M. 1972) (“The medical license may be used and enjoyed by the licensee as a means of earning a livelihood, but it is not community property because it cannot be the subject of joint ownership. We hold, therefore, that for purposes of the community property laws of the State of New Mexico, a medical license is not community property.”);
- *Stern v. Stern*, 331 A.2d 257, 260 (N.J. 1975) (“We agree with defendant's contention that a person's earning capacity, even where its development has been aided and enhanced by the other spouse, as is here the case, should not be recognized as a separate, particular item of property within the meaning of [New Jersey statute]. Potential earning capacity is doubtless a factor to be considered by a trial judge in determining what distribution will be ‘equitable’ and it is even more obviously relevant upon the issue of alimony. But it should not be deemed property as such within the meaning of the statute.”);
- *Wilcox v. Wilcox*, 365 N.E.2d 792, 795 (Ind.App. 1977) (“When determining what is to be divided there is nothing in the statute which lends itself to the interpretation that future income is "property" and therefore divisible. It appears that a vested present interest must exist for the item to come within the ambit of "marital assets". [footnote omitted] We cannot say that Gerald has a vested present interest in his future earnings and the legislature cannot be said to have considered it as such.”);

As a practical economic matter, it would overcompensate the supporting spouse at divorce to award her/him approximately half of the financial value of the academic degree or professional license of the supported spouse during the *entire career* of the supported spouse. The increased earnings of the supported spouse after graduation are the result of the supported spouse's knowledge, skill, diligence, and long hours of hard work, *all* of which are purely personal to the

supported spouse.⁹ One must clearly distinguish between the *cost* of an education (e.g., the educational expenses: tuition, required fees, books, and perhaps the living expenses) and the financial *value* of an education (i.e., the enhanced earning potential of the supported spouse). The supporting spouse pays part of the *cost* of the education, but that does not entitle her/him to an investment in the *value* of the supported spouse's career *after* divorce. Because the supporting spouse contributed part of the *cost* of the education, the supporting spouse should be reimbursed at divorce for her/his contribution to that cost. However, the financial value of the supported ex-spouse's education is his/her personal property.

In passing, let me observe that some judges have refused to award the supporting spouse a fractional interest in the financial value of the supported spouses education, because such a value is supposedly speculative. For example, an appellate judge in Wisconsin wrote:

Whether a professional education is and will be of future value to its recipient is a matter resting on factors which are at best difficult to anticipate or measure. A person qualified by education for a given profession may choose not to practice it, may fail at it, or may practice in a specialty, location or manner which generates less than the average income enjoyed by fellow professionals. The potential worth of the education may never be realized for these or many other reasons. An award based upon the prediction of the degree holder's success at the chosen field may bear no relationship to the reality he or she faces after the divorce. Unlike an award of alimony, which can be adjusted after divorce to reflect unanticipated changes in the parties' circumstances, a property division may not. The potential for inequity to the failed professional or one who changes careers is at once apparent; his or her spouse will have been awarded a share of something which never existed in any real sense. [two footnotes omitted]

DeWitt v. DeWitt, 296 N.W.2d 761, 768 (Wisc.App. 1980).

This holding in *DeWitt* has been quoted with approval in:

- *Mahoney v. Mahoney*, 453 A.2d 527, 532 (N.J. 1982);
- *Hughes v. Hughes*, 438 So.2d 146, 148 (Fla.App. 1983);
- *Wehrkamp v. Wehrkamp*, 357 N.W.2d 264, 266 (S.D. 1984);
- *Meyer v. Meyer*, 606 N.W.2d 184, 189, ¶ 19 (Wis.App. 1999),
rev'd on other grounds, 620 N.W.2d 382 (Wis. 2000).

These judges got the correct answer for the wrong reason. Such calculations of the present value of extrapolated future income are routinely used in tort litigation to determine the amount of plaintiff's loss. Such calculations by an economist are *not* speculative, as that word is used in law, although there are assumptions made in the process of the calculation. The correct reason for not awarding the supporting spouse part of the financial value of the supported spouse's academic degree or license to practice a profession is that the degree or license is purely personal property, *not* because its present financial value is "speculative".

⁹ As the professional's career develops, his/her increased earnings are attributable more to his/her personal experience than to his/her academic degree. *Hughes v. Hughes*, 438 So.2d 146, 148 (Fla.App. 1983); *Watling v. Watling*, 339 N.W.2d 505, 507 (Mich.App. 1983).

Additionally, traditional divorce law is very clear that the relevant number in determining alimony is not the actual income of a party, but their “earning capacity” or earning potential.¹⁰ For example, a husband with a large earning capacity can not escape alimony obligations by refusing to work, or by working for a trivially small salary; and a former wife with an adequate earning capacity can not receive alimony instead of working for her living. These are examples of how divorce law routinely uses the potential, rather than actual, earnings of a party.

Obviously, the supported spouse’s future (i.e., *after* divorce) earnings are *not* marital property, which is yet another reason not to award the supporting spouse a fraction of the financial value of the supported spouse’s education.

Finally, it is *improper* to treat a degree or license as investment property, which pays dividends for the life of those who might be assigned an interest in this “property”, because treating a *person* (or their career) as an investment property is almost as offensive as slavery.¹¹

minority view

Despite the simplicity and clarity of the reasoning in *Graham* in 1978, a few states have awarded the supporting spouse part of the academic degree or license to practice a profession. These cases, which are a minority view of the law in the USA, fall into two classes: (1) a legal fiction that allowed a court to fairly compensate the supporting spouse, and (2) quirky statutes about marital property in New York and Oregon.

In a typical case, there was no marital property to divide and the supporting spouse did not qualify for alimony, which seemed to prevent some judges from compensating the supporting spouse. In many of the early cases (e.g., *Graham*, discussed below beginning at page 33) the judges failed to solve the problem presented to them. However, in a few early cases, judges engaged in a legal fiction and awarded the supporting spouse part of the enhanced earning potential of the supported spouse, so that the judges could fairly compensate the supporting spouse.¹² If the

¹⁰ *Appleton v. Appleton*, 155 A.2d 394, 396 (Pa.Super. 1959); *Balaam v. Balaam*, 187 N.W.2d 867, 870-71 (Wis. 1971); *Schmidt v. Schmidt*, 429 A.2d 470, 473 (Conn. 1980); *Schuler v. Schuler*, 416 N.E.2d 197, 203 (Mass. 1981); *Pacella v. Pacella*, 492 A.2d 707, 712 (Pa.Super. 1985); etc.

¹¹ *Martinez v. Martinez*, 818 P.2d 538, 542 (Utah 1991) (“The time has long since passed when a person’s personal attributes and talents were thought to be subject to monetary valuation for commercial purposes. In short, we do not recognize a property interest in personal characteristics of another person such as intelligence, skill, judgment, and temperament, however characterized.”).

¹² *Daniels v. Daniels*, 185 N.E.2d 773 (Ohio App. 1961); *In re Marriage of Horstmann*, 263 N.W.2d 885 (Iowa 1978) (appears to confuse *cost* of education with financial *value* of education); *Inman v. Inman*, 578 S.W.2d 266, 268 (Ky.App. 1979), *rev’d*, 648 S.W.2d 847, 852 (Ky. 1982); *DeLa Rosa v. DeLa Rosa*, 309 N.W. 2d 755 (Minn. 1981).

degree or license to practice a profession were *really* marital property, then the supporting spouse would conventionally receive approximately half of the financial value of the supported spouse's enhanced earning potential. However, these courts awarded a tiny fraction of the financial value of the education, so that the amount of the award was equal to the supporting spouse's contribution to the cost of the supported spouse's education. Looking at the amount of the award, especially from our historical perspective, shows that these courts really engaged in a legal fiction that obtained the same result as the straightforward "reimbursement alimony" in *Mahoney*¹³ and later cases.

Because of a quirky statute, judges in New York State got the wrong result: they awarded the wife 40% of her husband's estimated lifetime earnings as a physician (i.e., a fraction of the financial value of his license to practice medicine) in *O'Brien*, 489 N.E.2d 712 (N.Y. 1985), awarded husband a fraction of the value of his wife's Master's degree in *McGowan*, 535 N.Y.S.2d 990 (1988), and awarded husband a fraction of his wife's license to practice medicine in *McSparron*, 662 N.E.2d 745 (N.Y. 1995). In both *McGowan* and *McSparron*, the husband obtained part of his wife's degree or license despite paying none of her tuition, although in *McSparron* the husband did pay his wife's (and their children's) living expenses when she was in medical school. There are many more reported cases involving this issue in New York State, but I ignore them because I consider them to be an aberration in American law.

Oregon has a strange statute that makes enhanced earning capacity marital property if that capacity was acquired as a result of education during the marriage. In one case in Oregon, the attorney for the supporting spouse was unable to get the trial judge to award her approximately half of the present value of her husband's enhanced earning capacity as a physician.¹⁴ The attorney, who was also a member of the legislature, managed to get the marital property statute changed.¹⁵ While this change came too late for his client,¹⁶ the change has made it easier for subsequent supporting spouses in Oregon to be highly compensated for their contributions to the enhanced earning potential of the supported spouse.

¹³ *Mahoney v. Mahoney*, 453 A.2d 527, 536, n. 6 (N.J. 1982) ("It should be noted that alimony is not generally available for a self-supporting spouse under the laws of Minnesota, see *DeLa Rosa*, *supra*, 309 N.W.2d at 758, or Kentucky, see *Inman*, *supra*, 578 S.W.2d at 270, two states that have treated professional licenses as property. Those states are thus handicapped in their ability to do equity in situations where little or no marital property has been accumulated and the supporting spouse does not qualify for maintenance unless they treat professional licenses as property.").

¹⁴ *Matter of Marriage of Stuart*, 813 P.2d 49 (Or.App. 1991).

¹⁵ *Matter of Marriage of Denton*, 930 P.2d 239, 244-45 (Or.App. 1996).

¹⁶ *Matter of Marriage of Olsen*, 902 P.2d 1217, 1218-19 (Or.App. 1995).

Gender Bias

In the typical case, the wife works to finance the husband's education in either medical, law, or dental school. Soon after the husband graduates, he files for divorce. It appears that the husband exploited his wife's labor, to get his professional education at lower cost to him (i.e., fewer educational loans from banks), then he jettisons her like used chewing gum.¹⁷

Three appear to be only a few reported cases before 1999 in which the husband was the supporting spouse and the wife received the education:

- *Saint-Pierre v. Saint-Pierre*, 357 N.W.2d 250 (S.Dak. 1984);
- *Geer v. Geer*, 353 S.E.2d 427 (N.Car.App. 1987);
- *Holland v. Holland*, 539 So.2d 1011 (La.App. 1989);
- *Smith v. Smith*, 418 S.E.2d 314 (S.C.App. 1991);
- *Prenatt v. Stevens*, 598 N.E.2d 616 (Ind.App. 1992).

Then, beginning in 1999, for reasons that I do not understand, there is a burst of cases in which the husband was the supporting spouse:

- *Guy v. Guy*, 736 So.2d 1042 (Miss. 1999);
- *Walker v. Walker*, 618 N.W.2d 465 (Neb.App. 2000);
- *Wolpert v. Wolpert*, 2001 WL 1661581 (Conn.Super. 2001);
- *Root v. Root*, 65 P.3d 41 (Wyo. 2003).

In these *uncommon* cases in which the husband supported the wife's education, the husband must fight an uphill battle against the cultural presumption that it is the husband's duty to earn the money in the marriage and support his wife.

Traditionally, the law required the husband to support his wife, and the wife had a legal duty only to provide homemaking services. The husband's legal duty to support his wife was also expressed in many state statutes that allowed courts to order a husband to pay alimony to his ex-wife, but did *not* allow courts to order a wealthy woman to pay alimony to her ex-husband. This gender bias in alimony statutes was abolished in the USA only in the year 1979. *Orr v. Orr*, 440 U.S. 268 (U.S. 1979).

The way the cultural presumption plays in the mind of a conventional person is illustrated by the following two vignettes:

1. **husband is supporting spouse:** Some wives purchase mink coats, other wives spend money earned by their husband on her M.D. or Ph.D. degree. The husband should stop whining.

¹⁷ While this essay concentrates on economic and technical legal concepts, there can be no doubt that the emotions of having been exploited and then discarded are what really drives the supporting spouse into litigation.

2. **wife is supporting spouse:** The husband exploited his wife, in that the wife worked hard to support *both* of them, while the lazy husband lived an idyllic life as a student, free from any need to earn a living. Imagine a 90 pound woman picking up a 250 pound husband and carrying him, because he is too lazy to walk.

I do not suggest that either characterization is rational, I only suggest that these are conventional stereotypes about “proper” gender roles. My personal opinion about divorce law in the USA is that divorce courts generally give more favorable treatment to supporting spouses who are ex-wives than to supporting spouses who are ex-husbands.

In many states, the law specifically states that each spouse has an obligation to support the other spouse, so the legal duty of support is reciprocal, mutual, and independent of gender. Some states even have an equal rights amendment to the state constitution that prohibits gender discrimination in law. Nonetheless, until recently, most judges who heard divorce cases grew up when men were employed and women were housewives, so this *unstated* cultural presumption may have affected the outcome of cases in which the husband was the supporting spouse.

Reimburse living expenses too?

If the supported spouse had not been married during the education, then the supported spouse would need to use loans from banks to pay for *both* living expenses *and* educational expenses. Therefore, it is arguable that equitable reimbursement should reimburse *half* of the living expenses of both parties during the supported spouse's education, in addition to reimbursing *all* of the educational expenses (e.g., tuition and required fees, books, supplies, etc.) of the supported spouse that were paid from income earned by the supporting spouse. Indeed, some appellate courts have made or upheld such an order:

- *Hubbard v. Hubbard*, 603 P.2d 747, 752 (Okla. 1979)(“We therefore remand to the trial court with instructions to determine the amount of Ms. Hubbard's contributions to Dr. Hubbard's direct support and school and professional training expenses, plus reasonable interest and adjustments for inflation as and for property division alimony,”);
- *DeLa Rosa v. DeLa Rosa*, 309 N.W.2d 755, 759 (Minn. 1981)(“It is this Court's view that the award should have been limited to the monies expended by respondent for petitioner's living expenses and any contributions made toward petitioner's direct educational costs. To achieve this result, we subtract from [wife]'s earnings her own living expenses. This has the effect of imputing one-half of the living expenses and all the educational expenses to the student spouse.”);
- *Mahoney v. Mahoney*, 453 A.2d 527, 534 (N.J. 1982)(“... there will be circumstances where a supporting spouse should be reimbursed for the financial contributions he or she made to the spouse's successful professional training. Such reimbursement alimony should cover *all* financial contributions towards the former spouse's education, 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.”);

- *Pyeatte v. Pyeatte*, 661 P.2d 196, 207 (Ariz.App. 1982)(“The award to appellee should be limited to the financial contribution by appellee for appellant's living expenses and direct educational expenses. See *DeLa Rosa v. DeLa Rosa*, 309 N.W.2d 755.”);
- *Reiss v. Reiss*, 478 A.2d 441, 445-46 (N.J.Super.Ch. 1984)(awarding wife reimbursement of half of her gross earnings while her husband was in medical school), *aff'd*, 500 A.2d 24 (N.J.Super.A.D. 1985);
- *Lehmicke v. Lehmicke*, 489 A.2d 782, 787 (Pa.Super. 1985)(following *Mahoney*);
- *Hoak v. Hoak*, 370 S.E.2d 473, 478 (W.Va. 1988)(following *Mahoney*);
- *Guy v. Guy*, 736 So.2d 1042, 1046, ¶ 16 (Miss. 1999)(“Audra's argument that the \$ 35,000 consisted of housing, food, and clothing expenses in addition to books and tuition is irrelevant. We recognize that it takes more than books and tuition money to attend school and obtain a higher education. Housing, clothing, and food must also be paid for in order to attend a university.”).

The trial court in *Reiss* explained at length why reimbursement of living expenses, including entertainment, was reasonable:

In an unalloyed sense the cost of obtaining a professional degree should cover only tuition, books and college fees. However, few would deny that the true cost of an education should also include expenses for food, shelter, clothing, medical expenses, toiletry items and the like. But should it also include expenses for entertainment and leisure, such as movies, ballets, vacation trips, an occasional dinner out or a few nights at the local pub? Here we enter murky waters aware of the potentiality for excess if we allow reimbursement of such expenses.

Yet, few who have studied diligently, whether in high school or college, would dispute the desirability, if not the necessity, for some entertainment and leisure as a respite from the rigors of perpetual study to freshen the mind and “remove the cobwebs.” Just as man does not live by bread alone, one does not become educated through studies alone. An educated person is the product of varied influences in uneven amounts which must all coalesce to obtain the desired end. Surely in this enlightened era a mature and rational assessment must conclude that some entertainment and leisure are reasonable and necessary to procure a professional degree. No evidence was offered by the husband that their expenses in Spain [where Husband attended medical school] were excessive or unnecessary. Under these circumstances, it must be assumed that these parties were lived on a tight budget and very little was wasted on extravagant or unnecessary items.

Reiss v. Reiss, 478 A.2d 441, 445-46 (N.J.Super.Ch. 1984).

However, the modern trend in divorce cases in some states seems to limit equitable reimbursement *only* to tuition, books, school supplies, and other expenses directly related to education.¹⁸ Courts justify such a limitation by saying that each spouse has a legal obligation to pay for living expenses, and such an obligation is *not* reimbursable at divorce.

¹⁸ I do not provide citations to these cases here, because I do not want to contribute free legal research to supported spouses who are trying to avoid reimbursing the supporting spouse for living expenses.

In my opinion, recent courts have been too quick to reject reimbursement of living expenses. Granted, spouses owe each other a duty of support: either by earning money in a job or by being a homemaker. But the supported spouse *neither* earned money *nor* was a homemaker. Being a medical student or law student, involves studying 60 to 80 hours/week, and there is no significant time for activities that financially benefit the marriage (e.g., accumulation of marital property). By becoming a *full-time* student, the supported spouse *neglected* his/her duty to contribute to the accumulation of marital property. Therefore, I believe it is reasonable to have the supported spouse reimburse half of the parties' living expenses, for the time that the supported spouse was a full-time student.

Instead of reimbursing living expenses, the Washington Supreme Court suggested that the supporting spouse be reimbursed for half of the income that the supported spouse would have earned if he/she had not been a student in a university:

... we direct the trial court to consider the following factors, among others, in determining the proper amount of compensation for the supporting spouse:

- (1) The amount of community funds expended for direct educational costs, including tuition, fees, books, and supplies. We do not include living expenses incurred by the student spouse as a factor because those expenses would have existed regardless of whether the student spouse pursued a professional education.
- (2) The amount which the community would have earned had the efforts of the student spouse not been directed towards his or her studies. By including this factor, we do not imply that parties to a marriage have a general duty to the community to realize their full economic potential. However, when the parties to a marriage make the joint decision that one spouse should obtain a professional degree or license, the community sacrifices not only the funds spent for direct educational or training costs, but also the earnings of the student spouse, if he or she would otherwise have been working. These sacrifices were made in the expectation that the community would receive financial benefit in the form of increased future earnings. When this expectation is frustrated by dissolution of the marriage, it would be inconsistent to permit the trial court to compensate the supporting spouse for the funds spent, but not the funds forgone.
- (3)

Factors (1) and (2) reflect funds sacrificed by the community in order to obtain the education or training; accordingly, the supporting spouse should be awarded no more than his or her one-half interest therein. The trial court may take the effect of inflation during the educational years into account.

Washburn v. Washburn, 677 P.2d 152, 159 (Wash. 1984).

This remedy truly honors the principle that both spouses have a duty to support the other. Washington is a community-property state, which may make it more difficult to apply this holding to the majority of states in the USA. In my opinion, this holding in *Washburn* speaks to the duty of spouses to support each other, and not the fraction of the marital property that each spouse should receive at divorce (i.e., each receives half vs. each receives an equitable distribution).

There is another way to justify this holding in *Washburn*. The supported spouse's failure to be a full-time employee caused the supporting spouse to suffer a diminished standard of living,

which was part of the cost of the supported spouse's education. If the marriage had continued for many years after the supported spouse's graduation, then the supporting spouse would have been rewarded for her/his suffering during the supported spouse's education by a higher standard of living afterward.¹⁹ However, divorce interrupted this reward of the supporting spouse.

In a terse paragraph apparently written without knowledge of the *Washburn* decision, and published only 12 days after *Washburn*, the Supreme Court of Wisconsin said:

We can, however, suggest several approaches for the trial court to consider in reaching its decision as to a maintenance award, property division, or both for the supporting spouse.

....

A second approach is looking at opportunity costs. The trial court may in determining the award to the supporting spouse consider the income the family sacrificed because the student spouse attended school rather than accepting employment. In this case the wife introduced evidence that the husband's increased earnings during the seven-year marriage had he not pursued medical education and training would have been \$45,700 after taxes, or \$69,800 indexed for inflation.

Haugan v. Haugan, 343 N.W.2d 796, 802-03 (Wis. 1984).

There is no further opinion in the Westlaw database on the *Washburn* or *Haugan* cases, so we do not know what the trial judges did on remand.

In rare cases, the supported and supporting spouses may have lived in separate cities, while the supporting spouse earned an income and the supported spouse attended medical school or law school.²⁰ In such cases, reimbursing living expenses of the supported spouse is further justified, because the only reason that the spouses lived in separate cities (with the extra cost of maintaining *two* apartments) was the education of the supported spouse.

Most judges in divorce courts would be reluctant to order the supported spouse to reimburse living expenses during the marriage to the supporting spouse, because one of the fundamental laws of marriage is that spouses *owe* a legal duty to support each other during the marriage, so such support is conventionally seen as ordinary and appropriate, and *not* to be reimbursed at divorce. The key to obtaining reimbursement of educational expenses is to convince the judge that the supported spouse was a *full-time* student who worked 60 to 80 hours/week and – most importantly – the supported spouse *neglected* his/her responsibilities to contribute to the acquisition of marital property and the supported spouse *neglected* to support his/her spouse. Such marriages were *not* a conventional partnership where *both* spouses worked toward a common good. The cases discussed in this essay involve marriages that were an exploitation: the supporting spouse *worked* to support both spouses (and pay at least part of the supported spouse's educational expenses), while the supported spouse spent essentially all of his/her time earning his/her personal

¹⁹ See remarks above, beginning at page 6.

²⁰ Many states have only one law school or only one medical school, which may not be near where the supporting spouse has an established job.

property (i.e., an academic degree or license to practice a profession), and then the marriage ended before there was *any* significant financial benefit to the supporting spouse.

In the analogous area of a divorced parent's legal obligation to pay the undergraduate college expenses of an adult child, many courts have held that "educational expenses" include room and board. For example:

- *Baril v. Figge*, 305 N.W.2d 351 (Minn. 1981)("school costs" included room and board and other living expenses, but did not include clothing, transportation, or entertainment);
- *Scott v. Scott*, 401 So.2d 92, 96 (Ala.Civ.App. 1981) ("necessary and reasonable education expenses" includes books, fees, tuition, room and board.);
- *In re Marriage of Pauley*, 432 N.E.2d 661, 665 (Ill.App. 1982)("Therefore, educational expenses are to include more than just tuition and book fees. The mother is entitled to reasonable living expenses for Mike who was living on campus and");
- *In re Marriage of Frink*, 409 N.W.2d 477, 481, n. 5 (Iowa App. 1987)("We think that the children's educational expenses include tuition, books, laboratory costs, and room and board because these items are incident to the post-secondary education itself.");
- *Dupuis v. Click*, 604 A.2d 576, 577 (N.H. 1992)("the Superior Court (Dunn, J.) ruled that 'college expenses' meant the 'costs of room, board, tuition, books, activity fees, registration fees, costs of laundry (upon furnishing bill receipts) and \$20.00 per week payable directly to such child while said child is actually in attendance at school and not employed.'");
- *In re Marriage of Hillebrand*, 630 N.E.2d 518, 521 (Ill.App. 1994) (citing Illinois statute from year 1992, 750 ILCS 5/513, stating: "... educational expenses may include, but shall not be limited to, room, board, dues, tuition, transportation, books, fees, registration and application costs, medical expenses including medical insurance, dental expenses, and living expenses during the school year and periods of recess,");
- *Douglas v. Hammett*, 507 S.E.2d 98, 101 (Va.App. 1998)("Under the plain meaning rule, we believe the term 'college expenses' includes tuition, room, board, books, fees, clothing, allowances and incidentals." [citations to 8 cases omitted]);
- *Meek v. Warren*, 726 So.2d 1292, 1294 (Miss.App. 1998)("educational expenses" includes "only tuition, room and board, and fees".);
- *Warner v. Warner*, 725 N.E.2d 975, 978 (Ind.App. 2000)("The trial court must determine what constitutes educational expenses, and the guidelines state that these will generally include tuition, books, lab fees, supplies, student activity fees, and the like. Room and board are also included when the student lives away from the custodial parent during the school year." [citations to Child Support Guidelines omitted]);
- *In re Marriage of Dolter*, 644 N.W.2d 370, 373 (Iowa App. 2002)("We now specifically hold that the term 'necessary postsecondary education expenses' means tuition, room, board, and books, including mandatory fee assessments for such things as laboratory, student health, and computer use.");
- *In the Matter of Gilmore*, 803 A.2d 601, 604 (N.H. 2002)(Costs of room and board in a dormitory operated by the college were included in "educational expenses", but costs of clothing and shoes, automobile expenses, etc. were *not* educational expenses.).

Also see:

- *Spicer v. Com., Dept. of Public Welfare*, 428 A.2d 1008, 1011 (Pa.Cmwlth. 1981)(State grants to needy college students "include living expenses within their definition of educational expenses".).

There is no legal duty for married parents to pay for their child's college education and divorced parents can be required to pay for their child's college education only if such support would not be a financial burden to the parent.²¹ The only reason that an adult child is not working and needs support from his/her parents (i.e., the adult child is *not* emancipated) is that the child is a full-time college student. Similarly, the only reason that the supported spouse is not working and contributing an income to the marriage is that the supported spouse is a full-time student, typically in a grueling academic program leading to a master's, doctoral, or law degree. In my opinion, at divorce, a supported spouse should reimburse not only the cost of tuition and books, but also either (a) the supported spouse's living expenses that were paid by the supporting spouse or (b) half of what the supported spouse could have earned in full-time employment if he/she had not been a student.

Is divorce an economic transaction?

It seems to be common that judges in divorce courts take a romantic view of marriage as something more than a business partnership, hence judges are reluctant (and often refuse) to apply a strict economic accounting at divorce. Some of the legal theories expressed in divorce cases involving reimbursement of educational expense include rules from conventional contract law, or from conventional equities law (e.g., unjust enrichment), which seems to be *unfamiliar* or *distasteful* to judges in divorce courts. For example, an appellate judge in the *Mahoney* case in New Jersey wrote:

The termination of the marriage represents, if nothing else, the disappointment of expectations, financial and nonfinancial, which were hoped to be achieved by and during the continuation of the relationship. It does not, however, in our view, represent a commercial investment loss. Recompense for the disappointed expectations resulting from the failure of the marital entity to survive cannot, therefore, be made to the spouses on a strictly commercial basis which, after the fact, seeks to assign monetary values to the contributions consensually made by each of the spouses during the marriage. Appropriate recompense, as it were, is afforded by an award of alimony where the parties' respective income situations warrant and by equitable distribution of the financial assets accumulated during the marriage. Indeed, the whole point of equitable distribution is based on the recognition of the value and worth of the nonfinancial contributions which spouses make which ultimately entitle each to a share of those assets. *See Rothman v. Rothman*, 65 N.J. 219, 229, 320 A.2d 496 (1974).

The question, then, is whether there should be a different rule and a different basic jurisprudence which would place on a strictly commercial basis the financial contributions made by one spouse during the marriage to the other spouse's education and training in order that contribution alone be commercially recompensed. Unless the spouses themselves have otherwise agreed, we think not, even if the marriage terminates before the expected "fruits" of the education and training are borne.

²¹ Ronald B. Standler, *Legal Duty of Parent in USA to Pay for Child's College Education*, http://www.rbs2.com/son_edu.pdf (Aug 2003).

The claim of special recompense is based on the notion that there are unique considerations involved when one spouse's financial contribution is made in order to enable the other to obtain a professional degree or license. In our view, that claim represents a kind of elitism which inappropriately depreciates the value of all the other types of contributions made to each other by other spouses pursuing different life styles and responding in their individual ways to their life experiences. Clearly, a wife who supports her husband while he pursues an educational or professional objective (or the husband who supports the wife, if that is the case) is at the same time receiving nonfinancial contributions from him. The supporting wife is, moreover, not sacrificing for the exclusive benefit of the husband. Her efforts are for them both, as are his, in following a self-determined, consensual and mutual plan they have agreed upon for their joint benefit. If the plan fails by reason of the termination of the marriage, we do not regard the supporting spouse's consequent loss of expectations by itself as any more compensable or demanding of solicitude than the loss of expectations of any other spouse who, in the hope and anticipation of the endurance of the relationship and its commitments, has invested a portion of his or her life, youth, energy and labor in a failed marriage.

Ultimately, we are in accord with the rationale of the Arizona court which, in *Wisner v. Wisner*, *supra*, rejected a wife's unjust enrichment claim on this reasoning:

[In conclusion, we would like to make some observations concerning wife's argument of "unjust enrichment." In our opinion, unjust enrichment, as a legal concept, is not properly applied in the setting of a marital relationship.]²² Marriage is by nature not an arm's length transaction between two parties. If 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. However, in 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 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.

We believe if the decision is made that one or both spouses shall receive further education, courts should assume, in the absence of contrary proof, that the decision was mutual and took into account what sacrifices the community needed to make in the furtherance of that decision. In this case, wife's testimony clearly illustrated that the decision as to husband's further training was mutual, consensual and made with full understanding of the sacrifices that necessarily accompanied the decision. There is nothing to support a claim of unjust enrichment. We therefore hold that the items in question are not property, and that the court did not abuse its discretion in denying further compensation to the wife.

[*Wisner v. Wisner*, 631 P.2d 115, 123 (Ariz.App. 1981).]

²² The text in brackets is part of *Wisner* that was not quoted in *Mahoney*.

For these reasons, we conclude that the wife here is not entitled to reimbursement for the contributions she made to her husband's support during the 16 months in which he earned his M.B.A. degree.

Mahoney v. Mahoney, 442 A.2d 1062, 1071-71 (N.J.Super.A.D. 1982).

This opinion in *Mahoney* was later reversed by the New Jersey Supreme Court,²³ I cite it here only to show a common judicial attitude, not as a correct statement of law. The court in *Wisner* remarked:

If 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. However, in the absence of such an agreement

and *Mahoney* continues this theme by remarking “unless the spouses themselves have otherwise agreed”. These remarks seem to hint at the possibility of the parties making a written pre-nuptial agreement (or a written post-nuptial agreement) to give their marriage an unconventional, but legally acceptable, basis. From my reading of cases involving pre-nuptial and post-nuptial contracts,²⁴ I conclude that these judicial suggestions were illusory in the early 1980s — such an unconventional contract would likely *not* be enforced at divorce.

In *Wisner*, the wife made no financial contribution to her husband's education, but she sought reimbursement for her services as a homemaker. The facts in *Wisner* are therefore *unlike* the facts in *Mahoney* and the other cases in this essay. A later case by the same court that decided *Wisner* stated:

... we reject the view that the economic element necessarily inherent in the marital institution (and particularly apparent in its dissolution) requires us to treat marriage as a strictly financial undertaking upon the dissolution of which each party will be fully compensated for the investment of his various contributions. When the parties have been married for a number of years, the courts cannot and will not strike a balance regarding the contributions of each to the marriage and then translate that into a monetary award. To do so would diminish the individual personalities of the husband and wife to economic entities and reduce the institution of marriage to that of a closely held corporation.

Pyeatte v. Pyeatte, 661 P.2d 196, 207 (Ariz.App. 1982)(awarding supporting spouse restitution).

The West Virginia Supreme Court said:

We note that reimbursement between former spouses as a general rule is neither desirable nor practical. Marriage is not a business arrangement, and this Court would be loathe to promote any more tallying of respective debits and credits than already occurs in the average household.

Hoak v. Hoak, 370 S.E.2d 473, 478 (W.Va. 1988).

With that initial caution, the West Virginia Supreme Court then followed *Mahoney* and allowed reimbursement of educational and living expenses related to the supporting spouse's education that

²³ *Mahoney v. Mahoney*, 453 A.2d 527 (N.J. 1982).

²⁴ Ronald B. Standler, *Pre-Nuptial and Post-Nuptial Contract Law in the USA*, <http://www.rbs2.com/dcontract.pdf> (Aug 2003).

led to his/her enhanced earning potential. This text from *Hoak* was quoted in *Simmons v. Simmons*, 708 A.2d 949, 956 (Conn. 1998), which added: “Reducing the relationship, even when it has broken down, to such base terms serves only to degrade and undermine that relationship and the parties.” The judges in the *Wisner*, *Pyeatte*, *Hoak* and *Simmons* cases clearly consider business law as filthy and not applicable to a marriage that had ended in divorce.

In my opinion, a very reasonable view of how a judge should consider the division of marital property at divorce was in a dissenting opinion by a justice of the Pennsylvania Supreme Court in 1986:

Marriage is more than a mere economic partnership, yet, when a marriage fails, it is beneficial for society to subject the marital relationship to a strict economic accounting. In this way, we are best able to “insure a fair and just determination and settlement of [the spouses’] property rights.” 23 Penn. Statutes § 102(a)(6). With this principle in mind, we must analyze marriage as a joint economic venture. A spouse lends money without a credit check or loan agreement, secure in the knowledge that repayment will be made. A supporting spouse expects that any contribution made to the student spouse’s education or career potential is an investment in the future – a future in which every family member will benefit. No prudent business partner would expend time, effort and money without the promise of a return on his or her investment. Similarly, a spouse may defer realization of personal career goals or make economic contributions and sacrifices in order that his or her “partner” will attain a level of proficiency, evidenced by a degree or license, that will make possible the future rewards to both of the enhanced earnings of one.

Hodge v. Hodge, 520 A.2d 15, 25 (Pa. 1986)(Larsen, J., dissenting).

A dissenting opinion is *not* law. Furthermore, this quotation should *not* be cited in legal briefs, because, eight years after writing this dissent, Larsen was impeached and removed from the bench by the Pennsylvania legislature.²⁵ While Rolf Larsen is now disgraced, I still believe the above quotation rises above the political correctness and romantic view of marriage that pervades divorce courts in the USA.

Marriage may be more than an economic partnership, but after the love dies and the parties are in divorce court, all that remains for the judge is an economic problem about distributing marital property, awarding alimony, etc. In a marriage in which the supporting spouse earned 95% of the income, and the supported spouse was a full-time student (i.e., the supported spouse neglected his/her duty to contribute to the acquisition of marital property), I believe it would be equitable to award the supporting spouse 95% of the remaining marital property at divorce, plus to order the supported spouse to reimburse *all* educational expenses that were paid from money earned by the supporting spouse, and perhaps also order the supported spouse to reimburse half of the living expenses during the marriage (for reasons given above, beginning at page 15). In practice, it is extraordinary to find a judge in a divorce court that orders a division of marital property that gives one spouse more than 65% of the marital property.

²⁵ *In re Larsen*, 717 A.2d 39 (Pa.Ct.Jud.Disc. 1998); *Larsen v. Senate of Com. of Pa.*, 152 F.3d 240 (3rd Cir. 1998), *cert. den.*, 525 U.S. 1145 (U.S. 1999).

3. Statutes

The basic principles for the division of marital property at divorce will be stated in a state statute, which is the starting point for the judge in divorce court. Among the states in the northeastern USA, most of the reported cases involving reimbursement of educational expenses arose in either New Jersey or Pennsylvania. The Pennsylvania statute on equitable division of marital property was copied in 1980 from the New Jersey statute, so those two states have essentially identical statutory law on equitable distribution of marital property.

Pennsylvania statute

The 1984 version of the Pennsylvania statute read:

In a proceeding for divorce or annulment, the court shall, upon request of either party, equitably divide, distribute or assign the marital property between the parties without regard to marital misconduct in such proportions as the court deems just after considering all relevant factors including:

- (1) The length of the marriage.
- (2) Any prior marriage of either party.
- (3) The age, health, station, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties.
- (4) The contribution by one party to the education, training, or increased earning power of the other party.
- (5) The opportunity of each party for future acquisitions of capital assets and income.
- (6) The sources of income of both parties, including but not limited to medical, retirement, insurance or other benefits.
- (7) The contribution or dissipation of each party in the acquisition, preservation, depreciation or appreciation of the marital property, including the contribution of a party as homemaker.
- (8) The value of the property set apart to each party.
- (9) The standard of living of the parties established during the marriage.
- (10) The economic circumstances of each party at the time the division of property is to become effective.

23 Pa.Stat. § 401(d), quoted from *Semasek v. Semasek*, 479 A.2d 1047, 1051-52 (Pa.Super. 1984).

For the topic of this essay, the most important words are in subsection (4) that mentions “The contribution by one party to the education, training, or increased earning power of the other party.”²⁶ This is the statutory basis for ordering the supported spouse to reimburse the supporting

²⁶ In passing, I note that the same or similar words appear in Wisconsin Statutes 767.26 (enacted 1977), Iowa Statute § 598.21, New Jersey Statute 2A:34-23.1, and Rhode Island Statute 15-5-16.1.

spouse for contributions to the education that increased the earning potential of the supported spouse. Note that, according to a literal reading of this statute, it is *not* necessary that the education increase the earning potential of the supported spouse, however many courts have added such an interpretation,²⁷ perhaps to make reimbursement of educational expenses be justified under the equitable doctrine of *unjust enrichment*. Because an academic degree is personal property, use of marital property to finance the acquisition of such personal property *might* properly be reimbursable at divorce, in agreement with the plain meaning of the Pennsylvania statute, regardless of the effect of that degree on the supported spouse's earning potential.

Notice the words "without regard to marital misconduct" in the third line of this statute. The plain meaning of these words is that allegations of physical or mental abuse of one spouse by the other spouse, adultery, etc. are *irrelevant* to the division of marital property at divorce. Despite the plain meaning of these words, judges sometimes ignore this statute and, not only admit this clearly *inadmissible* evidence, but also consider "misconduct" in dividing marital property.

erroneous 50/50 presumption in Pennsylvania

Worse, judges often ignore the statute altogether, and begin with a fictitious presumption that each spouse should take *half* of the marital property at divorce. This error by judges, in effect, rejects the clear intention of the legislature to have an *equitable* division of marital property, and begins to create a *community property* regime, in which each spouse receives exactly half of the marital property. I mention this error by trial judges, because their fictional presumption may discourage judges from awarding between 70% and 95% of the marital property to the supporting spouse, even if statutory principles and evidence in the case supports such an *unequal* distribution of marital property at divorce. In 1994, while doing legal research for a divorce case in Pennsylvania, I found a long²⁸ list of appellate cases in Pennsylvania in which trial judges were criticized for ignoring the statute, by creating a fictional presumption that each party at divorce should receive half of the marital property. One early appellate case declared that trial judges in Pennsylvania divorce courts must *equitably divide* the marital property, according to the list of factors in the statute, and *not* presume that each party gets half:

But an equitable division often will not be even; the essence of the concept of an equitable division is that "after considering all relevant factors," the court may "deem[] just" a division that awards one of the parties more than half, perhaps the lion's share, of the property. *Platek v. Platek*, 454 A.2d 1059, 1063 (Pa.Super. 1982), quoted with approval in: *Semasek v. Semasek*, 479 A.2d 1047, 1052 (Pa.Super. 1984), *rev'd on other grounds*, 502 A.2d 109 (Pa. 1985); *Sergi v. Sergi*, 506 A.2d 928, 934 (Pa.Super. 1986);

²⁷ See discussion at page 5, above.

²⁸ There is no doubt that such a presumption of an equal division occurs routinely, but the size of most marital estates is too small for the cheated party to justify spending a few tens of thousands of dollars in attorney's fees on an appeal.

Marinello v. Marinello, 512 A.2d 635, 638 (Pa.Super. 1986);
Ganong v. Ganong, 513 A.2d 1024, 1029 (Pa.Super. 1986);
Anthony v. Anthony, 514 A.2d 91, 92, n. 2 (Pa.Super. 1986).

Three years after *Platek*, an appellate court in Pennsylvania warned, in dicta, judges in divorce trial courts:

We find no abuse of discretion by the court in its distribution of the marital property. We are concerned, however, of the growing tendency to establish a presumption in favor of a 50-50 ratio for distribution. The master's report (p. 5) cites to *Prescott v. Prescott*, 21 Pa.D. & C.3d 590 (1981) and *Paul W. v. Margaret W.*, 130 Pitts.L.J. 6 (Alleg.Co. 1981) in support of this practice. See also 24 Standard Pa.Practice 2d 126:393. The appellant in his brief also refers to this presumption.

This court in *Ruth v. Ruth*, 316 Pa.Super. 282, 462 A.2d 1351 (1983) rejected the adoption of presumptions to be applied in deciding issues involving property rights. Rather, the guidelines established in the Divorce Code are to be the sole criteria upon which an equitable distribution is to be made. Adoption of a presumption places a burden upon the party seeking to influence the court to deviate from the presumed 50/50 distribution. This burden should not exist.

In addition, adoption of a presumption detracts from the court's consideration of the statutory guidelines by establishing a "normal" result which the court should reach after evaluation of the factors in 23 P.S. § 401(d)(1)-(10)

The ten factors in § 401 stand alone, without presumptions, as the bases upon which the court is to fashion an equitable distribution. Weight is to be accorded the various factors as the court finds appropriate and the property to be distributed in such proportions as the court deems just. The court is not restricted by needing to overcome a presumption in favor of equal distribution. It is free to award the property in any proportion justifiable by its application of the relevant factors. Such decision will then be reviewable for an abuse of discretion. Since the court did not follow the master's recommendation of a 50/50 split, it did not adopt the erroneous theory of presumption of equal division and was not in error.

Morschhauser v. Morschhauser, 516 A.2d 10, 15-16 (Pa.Super. 1986).

This holding is cited with approval in:

Fratangelo v. Fratangelo, 520 A.2d 1195, 1199 (Pa.Super. 1987);
Uhler v. Uhler, 594 A.2d 688, 692 (Pa.Super. 1991).

After *Platek* and *Morschhauser*, judges in Pennsylvania's divorce trial courts had *still* not learned to follow the statute, so these trial judges were rebuked strongly by the appellate court:

The opinion and reasoning of the trial court in this case illustrates the fallacy of using as a starting point a fifty-fifty division of the marital property, which in this case is the marital residence. In a rather summary fashion, the trial court disregarded, as irrelevant and diversionary, most of the testimony having to do with the factors required to be considered by the Divorce Code, 23 P.S. § 401(d). [footnote quoting the statute omitted] If the court had followed the mandate of the Code and considered, reviewed and applied those factors prior to determining whom to favor and equitable distribution of the marital property, it is inconceivable that the division of the marital home would have been sixty-forty. By applying a presumption that marital property is to be divided fifty-fifty (stated as a starting point), with whatever adjustments to that division which might be occasioned by considering § 401(d) factors, the court felt no compulsion to evaluate and apply those factors to the total value of the

property but could conveniently discuss some of them in generalities and make a division without serious application, which is patently unfair. In particular, the court's failure to take into full account the husband's dereliction and the wife's contribution pursuant to section 401(d)(7) is a glaring departure from the mandate of the Code.

This is the first instance where this Court has taken the opportunity to review what has quickly become the widespread practice of using a fifty-fifty distribution of marital property as the starting point in marital distribution. By utilizing a semantic inversion, "starting point" without consideration of its de facto nature and effect, the legislative provisions have been subverted.

Ruth v. Ruth, 316 Pa.Super. 282, 462 A.2d 1351, [1353] (1983) correctly stated the law that there may be no guidelines established beyond those of the Divorce Code of 1980 in equitable distribution of marital property. There the court said:

[A]t oral argument in this case, a suggestion was made by counsel for the parties that this Court adopt "guidelines" or establish "presumptions" to be applied in deciding issues involving property rights under the Code. In view of the legislative guidelines which are set out forthwith, we see no need for this Court to enumerate additional criteria. Rather, we will carefully scrutinize each of the guidelines in determining whether or not the lower court has abused its discretion. This will assure that our review of proceedings under the New Divorce Code be appropriately assiduous.

.... *Ganong v. Ganong*, 353 Pa.Super. 483, 513 A.2d 1024 (1986) recognized that a fifty-fifty starting point may not be used as a presumption (is not an end in itself) but that 401(d) factors must be applied. To the extent that the fifty-fifty starting point, without more, or with nominal consideration of the 401(d) factors is applied, it is for evidentiary purposes an unacceptable presumption. The far better procedure is to avoid any reference to the fifty-fifty starting point and to go directly to the factors contained in the legislative guidelines pursuant to section 401(d). The reasons for avoiding such a starting point is already evident in that the fifty-fifty starting point is acquiring the weight of a presumption as demonstrated by the position taken by some lawyers, judges and writers.

....

.... While the court in *Paul W. [v. Margaret W.]*, 130 P.L.J. 6 (Ct.Common Pleas, Allegheny County 1981) confesses an inability to evaluate the factors of 401(d) before fixing distribution and, therefore, must fall back upon a starting point of fifty-fifty distribution, this simply ignores the legislative mandate and adopts the *easiest* solution which, in keeping with human nature, will be the *only* solution. Once the fifty-fifty starting point is universal, lip service will be paid to equitable distribution and we will, in fact, if not in word, be distributing property in the manner of community property regimes and, in most respects, as done in partition, or as was the manner of proceeding prior to the 1980 Divorce Code. The Pennsylvania Supreme Court has declared community property laws unconstitutional; therefore, any distribution that is effected on the basis of similar considerations would be likewise unsupportable. To the extent that there is *an automatic bestowal* of the separate property of one spouse upon the other, as is the law in community property states, it is unconstitutional as a deprivation of property in violation of due process. See *Willcox v. Penn Mutual Life Insurance Co.*, 357 Pa. 581, 55 A.2d 521 (1947); *Everson v. Everson*, 494 Pa. 348, 431 A.2d 889 (1981); *Bacchetta v. Bacchetta*, 498 Pa. 227, 445 A.2d 1194 (1982).

Fratangelo v. Fratangelo, 520 A.2d 1195, 1198-1200 (Pa.Super. 1987).

This holding in *Fratangelo* was cited with approval in:
Aletto v. Aletto, 537 A.2d 1383, 1387 (Pa.Super. 1988);
Powell v. Powell, 577 A.2d 576, 579 (Pa.Super. 1990);
Williamson v. Williamson, 586 A.2d 967, 970 (Pa.Super. 1991);
Anderson v. Anderson, 822 A.2d 824, 828 (Pa.Super. 2003).

In my opinion, experienced divorce litigators sometimes confuse the way trial judges in divorce courts *actually* operate with the way that these judges *should* operate. For that reason, I have written at some length about this long series of refusals of trial court judges in Pennsylvania to follow the statute about equitable division of marital property. Such a gross series of errors by judges in trial courts is frightening to litigants who expect judges to follow the law.

Massachusetts statute

When I looked in July 2003 at the corresponding statute for Massachusetts, where I practice law, I found a much different statute than the above-quoted statute in Pennsylvania:

.... In addition to or in lieu of a judgment to pay alimony, the court may assign to either husband or wife all or any part of the estate of the other, including but not limited to, all vested and nonvested benefits, rights and funds accrued during the marriage
In determining the amount of alimony, if any, to be paid, or in fixing the nature and value of the property, if any, to be so assigned, the court, after hearing the witnesses, if any, of each party, shall consider:

- the length of the marriage,
- the conduct of the parties during the marriage,
- the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties and
- the opportunity of each for future acquisition of capital assets and income.

In fixing the nature and value of the property to be so assigned, the court shall also consider the present and future needs of the dependent children of the marriage. The court may also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates and the contribution of each of the parties as a homemaker to the family unit.

Massachusetts General Laws, Chapt. 208, § 34 (1990). [I added bullets and formatting to make the long sentence easier to read.].

The differences between the New Jersey/Pennsylvania statutes and the Massachusetts statute clearly shows the variability of divorce law amongst the different states.

Despite the fact that Massachusetts has more medical schools and more law schools than most states,²⁹ in August 2003, I could find only one reported case in Massachusetts on

²⁹ Massachusetts has four medical school and nine law schools.

reimbursement of educational expenses at divorce: *Drapek v. Drapek*, 503 N.E.2d 946 (Mass. 1987). In *Drapek* the husband attended medical school and was a resident during the eight-year marriage, while the wife earned more than half of the marital income. *Drapek* contains several holdings that are relevant here:

- “... the present value of future earned income is not subject to equitable assignment under G.L. c. 208, § 34.” *Drapek* at 949.
- “Since assigning a present value to a professional degree would involve evaluating the earning potential created by that degree, we also decline to include the professional degree or license as a marital asset subject to division under G.L. c. 208, § 34.” *Ibid.*
- “General Laws c. 208, § 34, *requires* consideration of vocational skill, the conduct of the parties, employability, and the opportunity of each party for future acquisition of capital assets and income. The statute allows consideration of the contribution of the parties to the ‘acquisition, preservation or appreciation in value of their respective estates’ and of ‘the contribution of each of the parties as a homemaker to the family unit.’ Thus, the trial judge was not in error in considering Celia's financial contributions to Mark's attainment of his medical degree, and her homemaking services. The judge could consider these factors, with relation to not only the assignment of the estates of the parties, but also the award of alimony. Similarly, there was no error in the judge's assigning a monetary value to Celia's homemaking services based on expert testimony.” *Drapek* at 950.
- However, the trial court could *not* award the supporting spouse “one-half of the income Mark would have received if he had not attended medical school and her lost income due to the separation.” *Ibid.*

4. Reported Appellate Cases

The first thing to know about divorce law in the USA is that it is entirely state law. Each state has its own statutes and common law.³⁰ Law that is valid for one state may not be accepted in another state. Normally, in a divorce case, an attorney only searches for cases from within the state where the divorce litigation was filed. However, reported appellate cases involving reimbursement of educational expenses in a divorce proceeding are *uncommon*: most states have only a few such reported cases, and some states have no reported cases. Therefore, litigators may need to do a nationwide search of cases with an issue about reimbursement of educational expenses at divorce. While attorneys may cite reported appellate cases from other states to attempt to persuade a local judge to give favorable treatment to the litigator's client with an *uncommon* legal issue, it is important to note that cases from other states are *not* precedent that is binding, hence the result is *uncertain*.

I made a nationwide search in the Lexis online database in 1994 and an independent nationwide search in the Westlaw online database in July 2003. While I have been doing online searches of reported cases since 1991 and I am an experienced searcher, searching for cases on this topic is frustratingly difficult, because judges in different states use different words to refer to

³⁰ *Common law* is judge-made law that is expressed in reported decisions of appellate courts. A *reported* decision is one that is published in the official state reports and is intended to be precedent in future cases.

similar concepts. Therefore, I have done several broad searches, then waded through hundreds of irrelevant cases, in order to find the cases that I downloaded to my case file. My case file on this topic currently (on 3 Sep 2003) includes 122 different cases, some of which have between two and five reported opinions. It would take too much of my *unpaid* time to write a critical review of *all* of these cases, and the resulting document would be tediously lengthy for readers. Therefore, I have selected a few of the most significant, early cases nationwide, along with a few seldom-cited cases of historical interest, to discuss below.

It is important to understand that many of the cases discussed below are really a tentative experiment with evolving, new law. After many stumbles and unjust decisions, courts have finally recognized that the proper remedy is to order the supported spouse to reimburse the supporting spouse for the expenses of an education that increases the supported spouse's earning potential. However, courts continue to wrestle with some details in how this reimbursement is to be calculated and ordered.

I list the following cases in chronological order, so the reader can easily follow the historical development of a national phenomenon.

Stuart 1949

Stuart v. Stuart, 89 N.Y.S.2d 639 (N.Y.Sup. 1949).

In making a deliberate search for early cases, I found *Stuart*. The parties were married in 1915 and divorced in 1933. During the marriage, the wife's income as a saleswoman and hairdresser paid for some of the husband's undergraduate educational expenses plus his expenses while he was a student at Tufts Dental School. The divorce occurred six years after the husband began his practice of dentistry. Eleven years after the divorce, the ex-husband presented his ex-wife with a general release to sign, in which she accepted payment of a mere \$ 750 as adequate reimbursement for her contributions to his education and establishing his practice of dentistry. One year after signing the release, the wife was disabled by a medical problem and was no longer able to work. She filed for alimony four years after being disabled. She then alleged that she had given her husband \$ 4835 of her earnings to use for his education and establishing his professional practice. The trial judge wrote:

In view of the amount which plaintiff has unquestionably poured into the family coffer and contributed to the defendant's professional set-up, and the fact that the bank account and car were in her name, it appears to me that the meager \$750 which she received at that time supports her claim that this was a settlement for moneys advanced. Even if we were to hold that the Instrument executed by Mrs. Stuart was intended as a general release of all future marital obligations, it was certainly an improvident one and should not be upheld.

....

I am convinced that out of her successful private business she contributed substantially, not only in laying the foundations of his practice which has become lucrative in latter years, but also in aiding him escape the mesh of his philanderings. Despite his promiscuous

propensities, this woman, then operating her own business, asked no tribute from him in way of alimony at the time she procured the divorce. Moreover, this case reveals a unique situation in that, aside from frequent squabbles, their relations remained somewhat friendly, even to the extent of his taking care of her dental requirements.

Stuart at 642.

The trial judge in 1949 ordered the husband to pay alimony in the amount of \$ 50/week, although the parties had then been divorced for 16 years without any alimony. There is no further opinion in Westlaw on this case.

Two Cases in Nebraska, 1953 and 1973

Prosser v. Prosser, 57 N.W.2d 173 (Nebr. 1953).

The parties were married in 1946 and the husband attended college for three years and graduated with honors in 1949. During the time the husband was in college, the wife earned 77% of the marital income. The parties separated approximately three years after husband's graduation, but the court's opinion gives neither the date of separation nor the duration of the marriage. At the time of the trial, the husband was earning more than twice the income of wife, owing to husband's college education.

The trial judge awarded wife a total of \$ 500 in alimony. The Nebraska Supreme Court increased the alimony to \$ 6500 and said:

The conclusion to be drawn from the facts in the case is plain. The [wife] had a good position at the time of the marriage. The [husband] had no position or property. The parties decided that the best way to success was for the [husband] to obtain a college education. This was successfully undertaken. [Wife] worked and made the contributions hereinbefore set forth. The [husband's] earning capacity was small until he finished college and secured a position and then a partnership in an accounting firm. It is clear that [wife] made a large investment in [husband's] future, with the thought no doubt that it was of joint interest to the future of both. But as the [husband's] success mounted and he began to assume a higher station in the community, his interest in the [wife] cooled and he sought the society of another. That this is true stands undisputed in this record. The evidence also shows that this [wife] was without the semblance of fault and that the divorce was due solely to the conduct of the [husband]. The latter appears to have treated the marriage as one of convenience and, when his schooling was completed and his success apparently assured, he was willing to cast her aside and bestow his affections upon one who made no contribution whatever to the success that he now enjoys. We point out that this wife had a right to expect that in the years to come she would share in the benefits derived from the training and ability of the [husband], which she literally helped to bring about. The partnership was earning [husband] an annual income of \$7,000 or more at the time of trial, an income towards which this [wife] made a very substantial contribution. An allowance of alimony to the wife in the amount of \$500 is, under such circumstances, wholly inadequate. It compels the wife to return to her former job to earn a livelihood, while the [husband] reaps the benefits which she aided so materially in bringing about. Equitable principles require that the alimony awarded be materially increased.

....

Alimony is awarded for the maintenance of the wife when the conditions exist that the statute requires. It is not an assignment of a portion of the husband's estate and it may, in fact, exceed the value of the husband's personal and real property. [citation omitted] It should not be allowed as a matter of sympathy to the wife or as a penalty imposed for the misconduct of the husband. It is a provision for maintenance to which she is entitled because of her former marital status out of which it grows. In determining the amount of alimony to be awarded in the present case the relative or comparative fault of the parties is a material element. The age of the parties and the duration of the marriage have evidential value. The social standing, comforts, and luxuries of life which the wife probably would have enjoyed are to be weighed in fixing the amount. The earnings of the husband and his ability to earn are particularly important in this case when viewed in the light of the contributions made thereto by the wife. We cannot overlook the fact that [husband] has seen fit to treat the marriage as a matter of convenience to be cast aside when the material fruits have been realized. Justice and equity require that we, too, treat the situation from the same viewpoint when we are called upon to adjust the differences brought about by the dissolution of the marriage relation through the fault of the [husband] alone. After considering all the facts as set forth in this record and the principles applicable thereto, we think that justice and right require that [wife] be awarded alimony in the sum of \$6,500 in lieu of the \$500 allowed by the trial court, payable \$100 per month commencing March 1, 1953.

57 N.W.2d at 175-76 (changed "plaintiff" to "wife"; "defendant" to "husband").

The Nebraska Supreme Court did not explain how they arrived at the numerical value of the alimony award, however \$6500 is approximately the same as the total income of wife during the years that the husband was a college student. Modern judicial reasoning might award wife half of that amount, on the grounds that the other half was used for living expenses of the wife, which would be *inappropriate* to reimburse.

Twenty years later, the Nebraska Supreme Court decided another divorce case that involved educational expenses. *Magruder v. Magruder*, 209 N.W.2d 585 (Nebr. 1973). During this nine-year marriage, the husband completed the last year of his undergraduate college education and then earned an M.D. degree, while the wife earned a bachelor's and master's degree and became a teacher. The husband's living expenses during four years of medical school were entirely paid from income earned by his wife. The husband's tuition was paid from grants and income from livestock that he owned. Wife had no children. The Nebraska Supreme Court ordered the husband to pay his wife a total of \$ 101,666 in alimony over 122 months, unless wife died or remarried during that time. The Nebraska Supreme Court did not explain how it calculated the monthly alimony payment or the maximum duration of the alimony, but they did say:

In the case at hand, both parties are young, both are in good health, and both are or can be self-supporting. The marriage having been dissolved, it does not appear desirable to have their lives bound together by financial ties which may continue for their lifetimes if the [wife] does not remarry. On the other hand, the marriage did endure for about 9 years and during that time the [wife] made substantial contributions to the future economic well-being of the parties. The parties at the time of the separation had just reached the point where they would begin to reap some of the economic rewards of their efforts. The [wife] would have liked to have had the marriage continue. These considerations lead us to believe that the alimony to be awarded the [wife] should be substantial, but in the light of the ages of the parties and the

capacity of the [wife] to ultimately be self-supporting in a teaching or secretarial capacity, we think the award should be payable over a relatively shorter period of time than that made by the trial court. We determine, therefore, that the [wife] should receive monthly alimony for a shorter period of time, but the present value of the award should be an amount approximately equivalent to that made by the trial court. The alimony award is thus modified as follows: The [wife] shall receive monthly alimony in the amount of \$833.33 for a period of 10 years and 2 months, beginning with the filing of our mandate in the trial court, but such alimony shall terminate upon the death of either party or the remarriage of the [wife]. 209 N.W.2d at 588 (changed “defendant” to “wife” for clarity).

Graham 1978

In re Marriage of Graham, 555 P.2d 527 (Colo.App. 1976), *aff’d*, 574 P.2d 75 (Colo. 1978).

The parties were married in 1968. During the marriage the wife worked continuously as an airline stewardess and earned approximately 70% of the total marital income, while the husband attended a university for 3.5 years and earned both a B.Sc. in engineering physics and an M.B.A. degree. The parties filed for divorce in 1974, after a six-year marriage. At the time of the divorce trial, wife was earning \$ 600/month and husband was earning \$ 830/month. The parties had no children and had accumulated no financial assets.

The trial court found that husband’s academic degrees were marital property and awarded wife \$ 33134 as her share of his future earnings that an expert witness attributed to his degrees. The Colorado Court of Appeals held that academic degrees were not marital property, but – in a terse, one-sentence statement with no explanation – said the trial court could “consider” the degrees in arriving at an equitable division of marital property and in determining alimony. The Colorado Supreme Court, in a landmark ruling that was quoted above at page 9, held that academic degrees are *not* marital property. The four justices in the slim majority at the Colorado Supreme Court noted that there was no marital property to divide and the wife had not requested alimony³¹, therefore, there was no way for wife to be compensated for her contribution to her husband’s education.

The majority opinion of the Colorado Supreme Court is an example of a court so concerned with rigid legal technicalities that it could not create an equitable remedy to prevent the unjust enrichment of husband. The Court failed to solve the problem that was presented to it. The four justices in the slim majority were apparently satisfied with explaining *why* they could not solve the problem.

³¹ The wife probably did not request alimony because she was not only able to support herself, but also she had a salary that was 72% of her husband’s salary, therefore she had no *need* for alimony.

Three justices of the Colorado Supreme Court dissented. While their dissents were of no help to Mrs. Graham, their words may have motivated future courts in other states that considered similar cases to make an equitable remedy. The dissenting opinion stated:

The case presents the not-unfamiliar pattern of the wife who, willing to sacrifice for a more secure family financial future, works to educate her husband, only to be awarded a divorce decree shortly after he is awarded his degree. The issue here is whether traditional, narrow concepts of what constitutes "property" render the courts impotent to provide a remedy for an obvious injustice.

In cases such as this, equity demands that courts seek extraordinary remedies to prevent extraordinary injustice. If the parties had remained married long enough after the husband had completed his post-graduate education so that they could have accumulated substantial property, there would have been no problem. In that situation abundant precedent authorized the trial court, in determining how much of the marital property to allocate to the wife, to take into account her contributions to her husband's earning capacity. [citations omitted] *Graham*, 574 P.2d at 78 (Carrigan, J., dissenting; joined by Justices Pringle and Groves). I agree with this beginning of the dissent. But then the dissenting opinion proposes to award wife part of husband's future earning potential that resulted from his academic degrees:

While the majority opinion focuses on whether the husband's master's degree is marital "property" subject to division, it is not the degree itself which constitutes the asset in question. Rather it is the increase in the husband's earning power concomitant to that degree which is the asset conferred on him by his wife's efforts. That increased earning capacity was the asset appraised in the economist's expert opinion testimony as having a discounted present value of \$82,000.

Unquestionably the law, in other contexts, recognizes future earning capacity as an asset whose wrongful deprivation is compensable. Thus one who tortiously destroys or impairs another's future earning capacity must pay as damages the amount the injured party has lost in anticipated future earnings. [citations omitted]

Where a husband is killed, his widow is entitled to recover for loss of his future support damages based in part on the present value of his anticipated future earnings, which may be computed by taking into account probable future increases in his earning capacity. [citations omitted]

Graham, 574 P.2d at 79 (Carrigan, J., dissenting; joined by Justices Pringle and Groves). As explained above, beginning on page 9, neither the academic degrees nor the increased earning potential resulting from these degrees is marital property. The dissent was correct in noting that future earnings can be computed. However, the dissent overlooked the fact that those future earnings were marital property *only if* the marriage continued. In this case, the parties were divorced, so the future (i.e., *after* divorce) earnings of husband are obviously *not* marital property.

In the final, terse paragraph of the dissenting opinion, the minority of three judges hint at the correct solution for this problem:

Perhaps the wife might have a remedy in a separate action based on implied debt, quasi-contract, unjust enrichment, or some similar theory. [citation omitted] Nevertheless, the law favors settling all aspects of a dispute in a single action where that is possible.

Graham, 574 P.2d at 79 (Carrigan, J., dissenting; joined by Justices Pringle and Groves).

This dissenting opinion did not explain why a second action would be necessary to apply the legal

theories of “implied debt, quasi-contract, unjust enrichment, or some similar theory”. My interpretation is that the wife did not plead those theories in her Complaint or Answer, and *res judicata* would forever foreclose her opportunities to plead them in subsequent litigation. This situation emphasizes the importance of having a skilled attorney who has a broad understanding of law (not just experience with traditional divorce law, which was powerless here, because there were no precedents to follow), who has good legal research skills, who is creative at finding novel ways to solve the client’s problem, and who can persuade the judge to adopt that novel solution.

Almost five years before *Graham*, a court in Colorado awarded a supporting spouse “alimony in gross” as a way of reimbursing the supporting spouse. *Greer v. Greer*, 510 P.2d 905 (Colo.App. 1973).

Ten years after *Graham*, the Colorado Supreme Court finally allowed reimbursement of educational expenses in a decision that overruled that part of *Graham*, while continuing to hold that academic degrees are not marital property. *In re Marriage of Olar*, 747 P.2d 676, 680, 682 (Colo. 1987).

Hubbard, 1979

Hubbard v. Hubbard, 603 P.2d 747 (Okla. 1979).

The facts are sparse in *Hubbard*. The marriage had a duration of 12 years, during which time wife supported husband through undergraduate college, medical school, internship, and residency. The wife then filed for divorce, on grounds of extreme cruelty. The trial court found that the husband would earn *at least* \$ 250,000 during the next 12 years, and the trial court awarded wife 40% of that amount as “alimony in lieu of a division of property”. The trial judge said:

The Court finds that the [wife] helped support the [husband] and the family by being employed throughout the time the [husband] attended pre-medical school and medical school, and has contributed to such support during the [husband’s] internship and residency training. That the [wife] has been the stabilizing force through all of [husband’s] training to be a doctor, and has contributed materially to his medical education.

The court further finds that during the more than twelve years that [wife] worked and helped [husband] obtain his medical degree and train to be a doctor, she could look forward to the time when she would enjoy the prestige and position, as well as the financial comfort, of a doctor’s wife. That the granting of a divorce, through no fault of [wife], prevents her from reaping those rewards. She is relegated to her pre-marital status, except for the acquiring of an insubstantial amount of property, not recompensed for the years she has helped the [husband] to attain his professional standing.

Hubbard, 603 P.2d at 749 (quoting trial court; changed “plaintiff” to “wife”, etc.).

The Oklahoma Supreme Court agreed with *Graham* that future earning potential was not marital property subject to division at divorce, reversed the trial court, and ordered the court, on remand, “to determine the amount of Ms. Hubbard’s contributions to Dr. Hubbard’s direct support and school and professional training expenses, plus reasonable interest” In this way,

the Oklahoma Supreme Court was apparently the first court in the USA to order the supported spouse at divorce to reimburse the supporting spouse for contributions to the supported spouse's education. In extensive remarks justifying this equitable remedy, the Oklahoma Supreme Court said:

While it is true that Dr. Hubbard's license to practice medicine is his own to do with as he pleases, it is nonetheless also true that Ms. Hubbard has an equitable claim to repayment for the investment she made in his education and training. To hold otherwise would result in the unjust enrichment of Dr. Hubbard. He would leave the marriage with an earning capacity increased by \$250,000.00 which was obtained in substantial measure through the efforts and sacrifices of his wife. She, on the other hand, would leave the marriage without either a return on her investment or an earning capacity similarly increased through joint efforts. Without her direct and indirect contributions to his education, training and support, Dr. Hubbard would have been forced to either prolong his education or go deeply in debt. It was because of her efforts that he was relieved of the burden of supporting himself and his family and was able to devote his time and attention to his education interrupted only by some part time employment.

Ms. Hubbard's sacrifices in Mr., now Dr., Hubbard's behalf were made with the anticipation that she and the family would ultimately benefit from the increased earning potential that would accompany her husband's license to practice. That anticipation was not without a basis in fact, for few persons in our current society reap greater financial rewards for their services than medical doctors, particularly neurosurgeons, the specialty for which [Husband] was in training.

It is precisely because of this total joint commitment to Dr. Hubbard's education and training that there were few conventional assets such as an expensive home, furnishings, savings or investments, to divide at the time of the divorce. All the resources of the marriage had been dissipated on Dr. Hubbard's education.

There is no reason in law or equity why Dr. Hubbard should retain the only valuable asset which was accumulated through joint efforts, i.e., his increased earning capacity, free of claims for reimbursement by his wife.

If the parties had remained married for a period of time after Dr. Hubbard began practicing and had accumulated tangible property by means of his increased earning capacity, Ms. Hubbard would have been entitled to have her contributions to his education considered and compensated.

We are not rendered impotent to do equity between these parties simply because the divorce occurred immediately preceding the start of Dr. Hubbard's professional career.

We are persuaded by the suggestion in the forceful dissenting opinion in *Graham* that the doctrine of quasi contract offers a remedy for a spouse in these circumstances. In addition to its observation that in other contexts (tortious injury, wrongful death) the law recognizes and protects a spouse's interest in the earning capacity of the other, that decision stressed the responsibility of the courts to fashion extraordinary remedies to prevent extraordinary injustice.

Hubbard, 603 P.2d at 750-51 (changed "Appellant" to "Husband" for clarity).

Equity would not be served by holding, as [Husband] suggests, that Ms. Hubbard's recovery be limited to alimony for support and maintenance. To do so would force her to forego remarriage and perhaps even be celibate [footnote citing Oklahoma statute] for many years simply to realize a return on her investments and sacrifices of the past twelve years.

Hubbard, 603 P.2d at 751-52 (changed "Appellant" to "Husband" for clarity).

Mahoney, 1982

Mahoney v. Mahoney, 419 A.2d 1149 (N.J.Super.Ch. 1980),
rev'd, 442 A.2d 1062 (N.J.Super.A.D. 1982), *rev'd*, 453 A.2d 527 (N.J. 1982).

The parties were married in July 1971. The wife was continuously employed during the marriage. The husband was a full-time student for 16 months, at the end of which time he earned a M.B.A. degree. Except for those 16 months, husband was also employed during the marriage. The husband's tuition was paid by money from his former employer (the U.S. Air Force) and Veteran's Administration benefits.³² The wife earned a M.Sc. in microbiology during the marriage, by attending university part-time while her employer paid the entire cost of her tuition. The parties separated in October 1978.

Their "modest" assets were divided by agreement of the parties. The wife did not ask for alimony, because, at the time of the trial in May 1980, she was then earning \$ 21,000/year and her husband was then earning \$ 25,600/year.³³ However, wife sought reimbursement of \$ 15,500, which was half of the amount she contributed to the marriage³⁴ during the time her husband was a full-time student plus half of the amount that her husband paid for his tuition.³⁵ The trial court ordered the husband to reimburse the wife \$ 5000, without explaining the source of the \$ 5000 value.³⁶ The appellate court reversed the decision of the trial court, agreeing with *Graham* that an academic degree was not marital property³⁷ and holding that both parties "left the marriage with comparable earning capacity and comparable educational achievements."³⁸

³² 442 A.2d at 1064.

³³ 442 A.2d at 1065.

³⁴ This amount included money spent on "rent, food, entertainment, utilities, debt service, etc." 419 A.2d at 1150. I note that there are inconsistencies amongst the three reported opinions in the exact amount that wife sought. The differences in amount are small and of no consequence to the discussion of the legal issues in this essay.

³⁵ 442 A.2d at 1065.

³⁶ 453 A.2d at 530.

³⁷ 442 A.2d at 1065-69.

³⁸ 442 A.2d at 1071.

The New Jersey Supreme Court reversed the decision of the appellate court, agreed with *Graham* that academic degrees were not marital property, created the concept of “reimbursement alimony” to compensate a supporting spouse for the *cost* of the supported spouse’s degree (including living expenses), and then remanded the case to the trial court to determine the amount of reimbursement alimony.

The *Mahoney* case has a number of quotable paragraphs that illustrate how judges think about the concept of reimbursing educational expenses. For example, the trial court wrote:

A working spouse who contributes to the education of another spouse does so certainly with the expectation that there will be in the future some benefit derived from such a sacrifice. The court is convinced that the facts of this case and the interrelationship of the parties mandate some credit to the working spouse by the spouse who pursued and achieved an education during the marriage. To ignore the contributions of the sacrificing spouse would be to work an injustice, an unfair advantage to the spouse who has gained the education and degree without obligation. There would be an unjust enrichment of the educated spouse.

.... There can be no doubt that real dollars were contributed by Mrs. Mahoney as an investment in her future marriage which is now dissolved. She seeks a credit for one-half the monies contributed by her during the period of her husband's educational process. The figure \$28,700 includes rent, food, entertainment, utilities, debt service, etc. It would be speculation for the court to attempt to reconstruct what the parties might have done if plaintiff had merely been unemployed during this critical period. There is certainly a reciprocal obligation on the part of each spouse to support the other under such conditions. The traditional notions of the male being the wage earner of the marriage are being rejected by many and conflicting roles which couples assume in a marriage today and certainly were discarded herein.

Mahoney, 419 A.2d at 1150.

and the New Jersey Supreme Court wrote:

This Court does not support reimbursement between former spouses in alimony proceedings as a general principle. Marriage is not a business arrangement in which the parties keep track of debits and credits, their accounts to be settled upon divorce. Rather, as we have said, “marriage is a shared enterprise, a joint undertaking ... in many ways it is akin to a partnership.” *Rothman v. Rothman*, 65 N.J. 219, 229, 320 A.2d 496 (1974); *see also Jersey Shore Medical Center-Fitkin Hospital v. Estate of Baum*, 84 N.J. 137, 141, 417 A.2d 1003 (1980). But every joint undertaking has its bounds of fairness. 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 spouse giving anything in return, an unfairness has occurred that calls for a remedy.

In this case, the supporting spouse made financial contributions towards her husband's professional education with the expectation that both parties would enjoy material benefits flowing from the professional license or degree. It is therefore patently unfair that the supporting spouse be denied the mutually anticipated benefit while the supported spouse keeps not only the degree, but also all of the financial and material rewards flowing from it.

Furthermore, it is realistic to recognize that in this case, a supporting spouse has contributed more than mere earnings to her husband with the mutual expectation that both of them – she as well as he – will realize and enjoy material improvements in their marriage as a result of his increased earning capacity. Also, the wife has presumably made personal financial sacrifices, resulting in a reduced or lowered standard of living. Additionally, her

husband, by pursuing preparations for a future career, has foregone gainful employment and financial contributions to the marriage that would have been forthcoming had he been employed. He thereby has further reduced the level of support his wife might otherwise have received, as well as the standard of living both of them would have otherwise enjoyed. In effect, through her contributions, the supporting spouse has consented to live at a lower material level while her husband has prepared for another career. She has postponed, as it were, present consumption and a higher standard of living, for the future prospect of greater support and material benefits. The supporting spouse's sacrifices would have been rewarded had the marriage endured and the mutual expectations of both of them been fulfilled. The unredressed sacrifices – loss of support and reduction of the standard of living – coupled with the unfairness attendant upon the defeat of the supporting spouse's shared expectation of future advantages, further justify a remedial reward. In this sense, an award that is referable to the spouse's monetary contributions to her partner's education significantly implicates basic considerations of marital support and standard of living – factors that are clearly relevant in the determination and award of conventional alimony.

To provide a fair and effective means of compensating a supporting spouse who has suffered a loss or reduction of support, or has incurred a lower standard of living, or has been deprived of a better standard of living in the future, the Court now introduces the concept of reimbursement alimony into divorce proceedings. The concept properly accords with the Court's belief that regardless of the appropriateness of permanent alimony or the presence or absence of marital property to be equitably distributed, there will be circumstances where a supporting spouse should be reimbursed for the financial contributions he or she made to the spouse's successful professional training. Such reimbursement alimony should cover *all* financial contributions towards the former spouse's education, 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.

Mahoney, 453 A.2d at 533-534.

In proper circumstances, however, courts should not hesitate to award reimbursement alimony. Marriage should not be a free ticket to professional education and training without subsequent obligations. This Court should not ignore the scenario of the young professional who after being supported through graduate school leaves his mate for supposedly greener pastures. One spouse ought not to receive a divorce complaint when the other receives a diploma. [footnote: *New York Times*, Nov. 21, 1982, at p. 72, col. 2.] Those 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. [FN5]

[FN5.] This decision recognizes the fairness of an award of reimbursement alimony for past contributions to a spouse's professional education that were made with the expectation of mutual economic benefit. We need not in the present posture of this case determine the degree of finality or permanency that should be accorded an award of reimbursement alimony as compared to conventional alimony. As noted, an award of reimbursement alimony combines elements relating to the support, standard of living and financial expectations of the parties with notions of marital fairness and avoidance of unjust enrichment. We must also recognize that, while these cases frequently illustrate common patterns of human behavior and experience among married couples, circumstances vary among cases. Consequently, it would be unwise to attempt to anticipate all of the ramifications that flow from our present recognition of a right to reimbursement alimony. We therefore leave for future cases questions as to whether and under what changed circumstances such awards may be modified or adjusted.

Mahoney, 453 A.2d at 535.

This paragraph and footnote 5 in *Mahoney* add common-sense observations to the technical legal analysis and explain why the holding makes sense. The remarks “Marriage should not be a free ticket to professional education One spouse ought not to receive a divorce complaint when the other receives a diploma.” were quoted with approval in *Guy v. Guy*, 736 So.2d 1042, 1045-46 (Miss. 1999).

Bold 1990

Bold v. Bold, 542 A.2d 1374 (Pa.Super. 1988), *vacated and remanded*, 574 A.2d 552 (Pa. 1990).

During their seven-year marriage, the husband was a full-time student for five years in an undergraduate college and then in a chiropractic school. While the husband was a full-time student, the wife “earned more than \$ 97,000”, which was used to pay the living expenses of the parties. The husband’s tuition and other educational expenses were paid from his veteran’s benefits, a student loan, and approximately \$ 19,000 earned from part-time employment.³⁹ In 1981, about two years after the husband graduated from chiropractic college, the parties separated and the marriage ended.

The trial judge was apparently too busy to handle the case, so a hearing was conducted before a master. The master recommended that the wife receive \$ 33,000 in “reimbursement alimony”. The judge approved the award, but changed the name to “reimbursement equity”. The trial court wrote:

He [the master] took into consideration the fact that [husband] spent the first five years of the marriage in school. As a result of his education, [husband] now has a substantial increase in his earning capacity. [Husband] contributed approximately \$5,300 per year, while [wife] annually contributed three times that amount. That is, from 1974 through 1979, [wife] invested \$34,000 more than the [husband] did into the marriage. Second, the master considered that the parties separated when [husband’s] increased earning potential was only beginning to be realized. Thus, [wife] was precluded from enjoying the benefits of her five year investment in [husband], that is, in his potential for increased earnings. During that time, she sacrificed her ability to accumulate and to save assets, and her lifestyle. Finally, the master considered the different lifestyles that the parties now enjoy. [husband] has the benefit of tax deduction [sic], savings accounts, retirement plans, and expensive automobiles, while [wife] drives a 1974 Volkswagen and lives in an apartment without the luxury of a shower. 574 A.2d at 555-56 (quoting trial court; changed “defendant” to “husband”, etc.)

The Pennsylvania Superior Court, an intermediate appellate court, vacated the award of \$ 33,000, with the following explanation:

Summarizing the facts, this case presents the not unfamiliar situation in which one spouse works toward a professional degree while the other spouse provides support and

³⁹ The amounts earned by the parties differs in the opinions of the Superior Court and Supreme Court. The amounts stated here were found by the trial court and accepted by the Pennsylvania Supreme Court, 574 A.2d at 552.

maintains the home. Mr. Bold spent the first five years of the marriage completing his college education. During that time, his earnings were minimal, averaging approximately \$4,000 per year. On the other hand, Mrs. Bold earned in excess of \$80,000 and used the money to support the household. The marriage ended at a point in time when Mr. Bold's earning potential was just being realized and before the couple could enjoy the fruits of their labors. While Mr. Bold has embarked upon a lucrative career path, Mrs. Bold anticipates no likelihood of increasing her earnings absent an advanced degree which, she testified, would require five years of schooling.

542 A.2d at 1377.

Marriage is not a business enterprise which requires a strict economic accounting for all financial aid rendered during its course. Rather, each party owes the other a duty of support. Accordingly, principles of equity will intervene only when one party has been unjustly enriched by financial contributions rendered which exceed that imposed by the law.

Instantly, the evidence indicates that Mrs. Bold did not contribute to the cost of Mr. Bold's academic degree. While pursuing a degree, Mr. Bold received educational benefits from the Veterans Administration in excess of \$12,000, he obtained a student loan in the amount of \$1,187.15, and he earned approximately \$16,000 at various jobs. The evidence also shows that Mr. Bold's educational costs were approximately \$14,300. Although Mrs. Bold worked and contributed to her husband's support while he was attending school, her contributions did not exceed that required by the law for the benefit of the family. Because the evidence fails to establish that Mr. Bold was unjustly enriched by his former spouse's contributions, we conclude the court erred in fashioning an equitable remedy pursuant to Section 401(c) of the Divorce Code. Accordingly, the order directing that Mr. Bold pay appellee the sum of \$33,000 is vacated.

542 A.2d at 1379.

The Pennsylvania Supreme Court vacated the opinion of the Superior Court and remanded the case to the trial court. The Pennsylvania Supreme Court wrote:

While we agree with Superior Court that marriage is not a business enterprise in which strict accountings are to be had for moneys spent by one spouse for the benefit of the other, it appears to us that this case does not involve strict accountings, but gross accountings. Supporting spouses in these cases feel entitled to reimbursement, we believe, not because they have sacrificed to support the other spouse, but because they are, to use a strong word, "jettisoned" as soon as the need for their sacrifice, albeit in part a legal obligation, comes to an end. In retrospect, perhaps unintentionally, the supporting spouse in such a case can be said to have been "used." At least this is the perception of the supporting spouse, and we believe that this perception is not totally without foundation in all cases. On the other hand, we cannot completely disregard the legally imposed obligation of support. With a view to balancing the extremes, we hold, therefore, that separate and apart from the equitable distribution of marital property, *consistent with fairness*, [FN5] the supporting spouse in a case such as this should be awarded equitable reimbursement to the extent that his or her contribution to the education, training or increased earning capacity of the other spouse exceeds the bare minimum legally obligated support as reflected in the guidelines promulgated by this Court. [FN6]

[FN5] Among other matters of fairness, a court considering a claim for equitable reimbursement will have to consider the length of time the parties were married after the supported spouse began to enjoy the financial benefits of his or her increased earning

capacity and the use to which these increased earnings were put. If the supported spouse contributed his or her increased earnings to the marriage and sufficient time has passed such that the supporting spouse has enjoyed these financial benefits commensurate with his or her contribution to the education or training that made them possible, equitable reimbursement would be inappropriate.

[FN6] It is deceptive to reason, as Superior Court does, that because Mr. Bold paid his actual educational expenses through part-time jobs, loans and veteran's benefits, Mrs. Bold did not contribute to his educational costs. Had Mrs. Bold not earned in excess of \$97,000 and had she not contributed this income to the family during the years Mr. Bold was in school, Mr. Bold would have been unable to expend his lesser earnings on educational expenses. Clearly, Mrs. Bold subsidized Mr. Bold's educational enterprise, and, therefore, paid, albeit indirectly, part of the cost of Mr. Bold's education. 574 A.2d at 556.

Despite the assertion in *Bold*, the phrase “bare minimum legally obligated support” is *not* defined in previous opinions of Pennsylvania appellate courts. In the context of evaluating that phrase, note that a spouse has *no* legal obligation to pay for the college education of the other spouse.⁴⁰ There are no further opinions on the *Bold* case in the Westlaw database, so the final result in this case is not known.

⁴⁰ *Rosner v. Rosner*, 108 N.Y.S.2d 196, 201 (N.Y.Dom.Rel.Ct. 1951)(“There is no obligation on the part of a spouse to provide for his wife the funds which she requires to attain a professional status. The marital vows do not, in my judgment, include by implication such obligations. It is within the realm of probability and it might very well be proper for a husband to help his spouse in achieving what this petitioner desires. There is, however, no legal obligation to do so.”); *Church v. Church*, 630 P.2d 1243, 1251 (N.M.App. 1981)(agreeing with *Rosner*).

5. Bankruptcy

If the supporting spouse is awarded reimbursement of educational expenses by a divorce court, could the supported spouse discharge that debt in bankruptcy court? The answer appears to be “no”, but there have been only a few reported cases on this point. The attorney for the supporting spouse should try to get the divorce court to use an appropriate label for the award, to make it more difficult for the supported spouse to later discharge the debt in a bankruptcy proceeding. To assist attorneys for supporting spouses, I mention the following information that I found in 1994 while working on a case in Pennsylvania.

- *Stranathan v. Stowell*, 15 B.R. 223, 227, 5 Collier Bankr.Cas.2d 640, 8 Bankr.Ct.Dec. 472 (Bankr.D.Neb. Nov 12, 1981)(“The debtor takes the position that the lump sum alimony was intended to compensate Mrs. Atkinson for her contributions to his professional education. I find this to be the case. However, this does not mean that the award is thereby excluded from the category of alimony, maintenance or support. Almost all awards of alimony, maintenance or support are intended in part to compensate the recipient spouse for efforts and resources devoted to the marriage. I find that the award was in the nature of alimony and is nondischargeable in this proceeding.”);
- *In re Jenkins*, 94 B.R. 355, 360 (Bankr.E.D.Pa. Sep 21, 1988)(“Intent, though, is relevant in determining the nature of the obligation for it is possible, if not likely, that the parties or the state courts will have achieved what they intended. The bankruptcy inquiry, though, is to determine the function of the debt. To the extent the obligation serves the financial purpose behind alimony (or support or maintenance) it is nondischargeable, whatever it is called. To the extent the debt is to divide property irrespective of financial need, it is dischargeable. In some instances, the debt will serve both functions and thus be partly dischargeable.”);
- *In re Marriage of Francis*, 442 N.W.2d 59, 64 (Iowa, Jun 14, 1989)(“We think the case before us exemplifies the situation calling for an award of reimbursement alimony rather than a property settlement. Not only does such an award bear a closer resemblance to support than a division of assets, alimony carries tax benefits to the payor and assurance to the payee that the award will not be discharged in bankruptcy.”);
- *Buccino v. Buccino*, 580 A.2d 13, 20, n. 19 (Pa.Super. 1990)(“... even if we were to agree with husband that the divorce court intended to compensate wife for contributions to his dentistry degree and career advancement, such a finding would not dissuade us also from finding that the award was in the nature of alimony or support. Husband's argument regarding the \$200 per week payment fails under any analysis.”).

Additionally, physicians, or other professionals with an earning capacity well above average, are *not* a sympathetic plaintiff in bankruptcy court, when they seek to discharge loans that paid for their education.

- *U.S. Dept. of Health and Human Services v. Smith*, 807 F.2d 122 (8th Cir. 1986)(Medical student received loan to finance his medical education. He would not need to repay the loan if he practiced medicine in a region of the USA with a shortage of physicians. After becoming a licensed physician, he decided not to practice in such a region. The court held that the physician must repay the loan, which was not dischargeable in bankruptcy.)

- *In re Bakkum*, 139 B.R. 680, 682 (Bankr.N.D.Ohio 7jan1992)(“There is a strong legislative and judicial policy against allowing the discharge of student loans in bankruptcy.” [citations omitted]);
- *Matthews v. Pineo*, 19 F.3d 121 (3rd Cir. 1994)(Court refused to discharge physician’s medical school debt of approximately \$ 400,000, including penalties and interest.)
- *U.S. v. Kephart*, 170 B.R. 787 (W.D.N.Y. 1994)(Bankruptcy court refused to discharge physician’s total debt of \$ 625,000 from medical school loans, including default penalties and interest.);
- *In re Ogren*, 1996 WL 671356 (Bankr.N.D.Iowa 1996)(Attorney sought to discharge in bankruptcy \$ 49,000 of student loans. “Debtor does not lack usable job skills. She has a legal degree and is able to perform a variety of skills, as evidenced by her tax work, work for a city attorney, D.B.E. certification, and ability to present her case before the court in this matter. The Court concludes that Debtor has not met her burden of showing that she can not maintain a minimal standard of living for herself or her dependents if she is required to repay her student loan, that this is likely to continue, or that she has made a good faith effort to repay her student loan. Her student loan obligation to ISAC must be excepted from discharge.”);
- *In re Stewart*, 175 F.3d 796 (10th Cir. 1999)(Bankruptcy court refused to discharge physician’s total debts of \$ 837,000.).

Students who accept educational loans, then later attempt to use a bankruptcy court to avoid repaying those loans are morally indistinguishable from supported spouses who divorce their supporting spouse and then deny that any reimbursement is owed to the supporting spouse. It is shameful to attempt to change the terms of an agreement to avoid obligations *after* one has received the benefit of the agreement.

6. Written Contract

In reading cases on this topic, I have found only a few reported cases that mention a contractual basis for reimbursement of the supporting spouse. However, none of these cases involved a written contract. Here are a few reported cases that mention contracts in the context of reimbursing a supporting spouse for educational expenses:

- *Church v. Church*, 630 P.2d 1243 (N.M.App. 1981)(Supporting spouse alleged fraud, breach of contract, and unjust enrichment. Trial court dismissed for failure to state a claim upon which relief could be granted, without giving any reason(s) for that dismissal. The appellate court reversed the dismissal, except for wife’s claim that she be reimbursed for her “household services and emotional support to husband” during his medical studies, and remanded for trial. There is no further opinion for this case in the Westlaw database.);
- *Pyeatte v. Pyeatte*, 661 P.2d 196, 199-201(Ariz.App. 1982)(“Two issues are before us: (1) The validity of an oral agreement entered into by the husband and wife during the marriage, whereby each spouse agreed to provide in turn the sole support for the marriage

while the other spouse was obtaining further education; and, (2) whether the wife is entitled to restitution for benefits she provided for her husband's educational support in a dissolution action which follows closely upon the husband's graduation and admission to the Bar. The word "agreement" is used as a term of reference for the stated understanding between the husband and wife and not as a legal conclusion that the agreement is enforceable at law as a contract.

....

Upon examining the parties' agreement in this instance, it is readily apparent that a sufficient mutual understanding regarding critical provisions of their agreement did not exist. For example, no agreement was made regarding the time when appellee would attend graduate school and appellant would be required to assume their full support. Both parties concede that appellee could not have begun her masters program immediately after appellant's graduation because his beginning salary was not sufficient to provide both for her education and the couple's support. Appellee told appellant she was willing to wait a year or two until he "got on his feet" before starting her program. Nothing more definite than that was ever agreed upon. Furthermore, although appellee agreed to support appellant while he attended law school for three years, no corresponding time limitation was placed upon her within which to finish her education. Even if we assume that the agreement contemplated appellee's enrolling as a full-time student, the length of time necessary to complete a masters degree varies considerably depending upon the requirements of the particular program and the number of classes an individual elects to take at one time. Such a loosely worded agreement can hardly be said to have fixed appellant's liability with certainty.

The agreement lacks a number of other essential terms which prevent it from becoming binding. Appellee's place of education is not mentioned at all, yet there are masters programs available throughout the country. Whether or not they would be required to relocate in another state should she choose an out- of-state program was not agreed upon. Appellant testified at trial that "that particular problem was really never resolved." Nor was there any agreement concerning the cost of the program to which appellee would be entitled under this agreement. There can be several thousand dollars' difference in tuition, fees, and other expenses between any two masters programs depending upon resident status, public versus private institutions, and other factors. Appellant testified that at the time of the "contract," neither he nor his wife had any idea as to the specific dollar amounts that would be involved.");

- *Haugan v. Haugan*, 343 N.W.2d 796, 798 (Wis. 1984)("The wife testified that at the time of the marriage she and her husband shared the expectation that she would support him while he obtained his medical education and that he would support her after he began his medical practice, allowing her to pursue the career of a homemaker, wife, and mother. The husband argued that the record did not establish a 'mutual agreement' since it contained no evidence of a written or formalized agreement. The trial court concluded that 'no mutuality of such "contract" had been established' and that the wife's expectation was 'not an express or implied contractual arrangement.' Nonetheless, cognizance must be taken of the fact that the husband had a general idea of the wife's expectations. ");
- *Kuder v. Schroeder*, 430 S.E.2d 271 (N.C.App. 1993)(Wife sued for breach of oral contract, as well as unjust enrichment. The trial judge dismissed her Complaint. In a terse opinion, the appellate court affirmed the dismissal, because each spouse has a legal duty to support the other spouse, and such a duty can *not* be "abrogated or modified by agreement of the parties to a marriage.")

It is well-established law that agreements that can not possibly be fulfilled within one year of the time of the agreement *must* be in writing.⁴¹ This means that pre- and post-nuptial agreements about educational expenses *must* be in writing, before courts of law will enforce the contract. However, this is a requirement of *law*, and does not prohibit *equitable* remedies, such as restitution, in a divorce court. Strangely, none of the above cases have mentioned the legal requirement for a written contract, although the oral contracts were rejected by judges for other reasons, such as indefiniteness.

Elsewhere,⁴² I have reviewed the history of pre- and post-nuptial agreements in the USA and remarked on the desirability of such agreements, given the epidemic of divorces in the USA and the expense of divorce litigation. Having a written contract about educational expenses during marriage would definitely establish the agreement of the supporting spouse for accepting a diminished standard of living during this education, and for contributing income earned by the supporting spouse to the educational expenses of the supported spouse, in return for a higher standard of living after the supported spouse's graduation and other future benefits specified in the written contract. More importantly, such a written agreement should include a paragraph that explicitly states how the supported spouse will compensate the supporting spouse if divorce by either party interrupts the reward that was promised to the supporting spouse during the expected continuation of the marriage.

⁴¹ The so-called "Statute of Frauds" in England in 1677, now in state statutes. See Restatement (Second) of Contracts, § 110(1)(e) and § 130 (1981).

⁴² Ronald B. Standler, *Pre-Nuptial and Post-Nuptial Contract Law in the USA*, <http://www.rbs2.com/dcontract.pdf> (Aug 2003).

7. Conclusion

The supporting spouse has a clear entitlement at divorce to reimbursement of the educational expenses of the supported spouse, when *both* (a) the education increased the earning potential of the supported spouse *and* (b) the marriage ended before the supporting spouse could be compensated either by an increased standard of living for many years or by receiving an extra amount of marital property at divorce. Despite this clear legal entitlement, supporting spouses in each divorce case with this issue often need to spend at least tens of thousands of dollars on attorney's fees to fight the same court battles in each case of this type.

Nearly everyone who goes through divorce feels hurt, but when the supported spouse (and his/her attorney) absolutely deny that the supported spouse owes reimbursement of educational expenses — well, that adds financial injury to insult. In my opinion, lawyers for the supported spouse who zealously make every possible argument to deny reimbursement of educational expenses are really shooting their own client in the foot, by motivating the supporting spouse to have a protracted and expensive litigation, instead of an amicable settlement. In my opinion, the way to avoid such an *unnecessary* battle is:

- (1) the supported spouse should understand the law,
- (2) the supported spouse should control his/her attorney to avoid *unreasonable* posturing, and
- (3) the supported spouse *should* offer (or accept) a settlement proposal that includes full reimbursement of educational expenses that were paid from income earned by the supporting spouse.

The supported spouse should also recognize that by being generous and also offering to reimburse the cost of his/her living expenses (even if not required by law), expensive litigation may be avoided, which may actually reduce the total cost of the divorce (including legal fees, alimony *pendente lite*, etc.) for the supported spouse. Fighting in court for every possible victory can be very expensive.

Finally, I urge that judges consider ordering the supported spouse to reimburse half of what he/she could have earned if he/she had not been a full-time student during the marriage, for reasons given above at pages 17-18. Such reimbursement truly honors the law that each spouse has a legal duty to support the other spouse.

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