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DIVISIBILITY OF ADVANCED DEGREES IN NORTH CAROLINA—AN EXAMINATION AND PROPOSAL

BUDDY O.H. HERRING*

I. INTRODUCTION

In 1981 North Carolina joined the growing list of states¹ that have adopted an equitable distribution scheme for dividing marital property. One issue subject to much litigation in equitable distribution states is whether an advanced degree earned during marriage is a proper subject for equitable distribution.² The North Carolina statute does not deal with the subject of advanced degrees directly, but states that professional and business licenses are to be treated as separate property.³

The treatment of advanced degrees becomes especially troublesome when the divorce occurs shortly after the advanced degree is obtained. Often one spouse has given up advanced educational opportunities or lucrative employment opportunities to relocate with the student spouse, and has devoted all of his or her efforts to finance the educational and living expenses of the family. Since all the couple's resources are devoted to the educational endeavor, no other assets are accumulated. Thus, when the marriage ends, the only "marital asset" is the advanced degree obtained by the student spouse. The question then arises whether that degree is a proper subject for division under equitable distribution law.

Because North Carolina has not dealt directly with the subject of advanced degrees in its equitable distribution statute, the question becomes whether North Carolina courts will interpret the statute broadly to include the degree, as well as the license, as separate property. The statute clearly distinguishes between the education and the license.⁴

Property division is of even greater importance now that most states

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1. States which have adopted equitable distribution statutes are Alabama, Alaska, Arkansas, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming.

2. See Report of Conference on "New Developments in Family Law and Practice," 9 FAM. L. REP. (BNA) 2041, 2042 (Nov. 16, 1982).

3. N.C. GEN. STAT. § 50-20(b)(2) (1984).

4. See *id.* § 50-20(b)(2), (c)(7).

have abolished fault grounds for alimony, or have restricted alimony to those cases in which the spouse requesting alimony is clearly a dependent spouse. Frequently, the non-student spouse is not a dependent spouse and would not qualify for alimony. Also, in most instances, the only "asset" the couple has acquired during the marriage is the advanced degree. Thus, North Carolina's allocation⁵ to the non-student spouse of a greater share of the marital property for his or her contribution to the education of the student spouse is meaningless.

This article examines how other states with equitable distribution laws have treated advanced degrees upon divorce, and proposes the best way for North Carolina to handle advanced degrees upon dissolution of a marriage. No attempt will be made to examine the divisibility of the practice which the degree-holding spouse develops as a result of the license he holds.⁶

II. HOW THE STATES TREAT THE ADVANCED DEGREE—AN OVERVIEW

Most equitable distribution statutes do not deal directly with the subject of the advanced degree. Those that do are usually similar to North Carolina's statute and either deal only with the resulting license or practice, or consider the contribution made by a spouse to the other's education as a factor in the division of the marital property.⁷ Indiana⁸ and California,⁹ for example, have dealt specifically with advanced degrees in their equitable distribution statutes. The Indiana statute provides that if there is little or no marital property to be divided, then the non-degree earning spouse may receive an award for his or her financial contribution to the education of the other spouse.¹⁰ Where the statutes do not specifically address the divisibility of the degree, courts have had to decide whether an advanced degree is a proper subject for equitable distribution. While many of the cases dealing with this matter are settled before trial, an increasing number are making their way not only to trial, but to the appellate court level.¹¹

There is no uniformity in the judicial treatment of the divisibility of the advanced degree. The state courts' treatment of the issue may be divided into four distinct categories. First are the courts which hold that

5. *Id.* § 50-20(c)(7).

6. See *In re Marriage of Nichols*, 43 Colo. App. 383, 606 P.2d 1314 (1980); *Heller v. Heller*, 672 S.W.2d 945 (Ky. App. 1984); *Litman v. Litman*, 115 Misc. 2d 230, 453 N.Y.S.2d 1003 (1982), *rev'd*, 93 A.D.2d 695, 463 N.Y.S.2d 24 (N.Y. Sup. Ct. 1983).

7. *E.g.*, IOWA CODE § 598.21(e) (1981).

8. IND. CODE ANN. § 31-1-11.5-11(b) (Burns 1980).

9. CAL. CIV. CODE §§ 4800.3, 4801(a)(1) (West Cum. Supp. 1985).

10. IND. CODE ANN. § 31-1-11.5-11(b) (Burns 1980).

11. *Lauter, Whose Law Degree Is It?*, NAT'L L.J., Nov. 28, 1983, at 1, col. 2.

advanced degrees are not property within the meaning of their states' equitable distribution statute and therefore not subject to any type of division.¹² Second are the courts which hold that, even if the advanced degree is property within the meaning of the equitable distribution statutes, the valuation problems are so difficult and speculative as to prohibit division.¹³ Third are the courts which hold that the degree is not property, but award the non-degree spouse reimbursement for financial contributions to the obtaining of the degree.¹⁴ Fourth are the courts which hold the degree to be property subject to division under state equitable distribution statutes.¹⁵ In this final category, there is a split of authority as to how to value the property, but division is allowed.¹⁶ A more thorough evaluation of the merits and pitfalls of each theory follows for the purpose of proposing the best course for North Carolina.

III. COURTS WHICH HOLD THAT ADVANCED DEGREES ARE NOT PROPERTY WITHIN EQUITABLE DISTRIBUTION STATUTES AND THEREFORE ARE NOT SUBJECT TO DIVISION UPON DIVORCE

*In re Marriage of Graham*¹⁷ is the leading case for the view that an advanced degree is not property under the equitable distribution statute and therefore not subject to division upon divorce. Addressing the specific issue of whether an advanced degree is property within the meaning of the equitable distribution act, the Colorado Supreme Court, in a 4-3 decision, held that the degree was not property. The court reasoned that:

[a]n educational degree . . . 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.¹⁸

The court noted that the non-degree-holding spouse was not without remedy, and specifically permitted lower courts to consider the contribution of the non-degree spouse to the education of the other spouse in

12. *In re Marriage of Graham*, 194 Colo. 429, 574 P.2d 75 (1978).

13. *Hughes v. Hughes*, 438 So. 2d 146 (Fla. Dist. Ct. App. 1983).

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

15. *Woodworth v. Woodworth*, 126 Mich. App. 258, 337 S.W.2d 332 (1983).

16. *See O'Brien v. O'Brien*, 114 Misc. 2d 233, 452 N.Y.S.2d 801 (N.Y. Sup. Ct. 1982).

17. 194 Colo. 429, 574 P.2d 75 (1978).

18. *Id.* at 432, 574 P.2d at 77.

dividing the couple's marital property.¹⁹ Also, where maintenance was sought and need demonstrated, the non-degree spouse's contribution to the education of the other spouse would be a relevant factor in setting the award.²⁰ The fact that the wife sought no maintenance and that there was no other marital property to be divided should not lead a court to disregard the usual meaning of the term "property" and subject the advanced degree of the husband to division.

A number of courts have followed the rationale in *Graham* and have held that the advanced degree is not property and therefore not subject to division under the equitable distribution law.²¹ In addition, most community property states generally agree with the *Graham* rationale. In *Wisner v. Wisner*,²² an Arizona opinion, the court defined an education as an intangible property right, the value of which cannot be properly characterized as property subject to division.²³

In California, an influential community property state, courts hold that an advanced degree is not property subject to division. In *Todd v. Todd*,²⁴ the California appellate court held that a professional degree was "[a]t best . . . an intangible property right, the value of which, because of its character, cannot have a monetary value placed upon it for division between spouses."²⁵

Another reason state courts have been reluctant to hold that an advanced degree is property subject to division was advanced by the California Court of Appeals in *In re Marriage of Aufmuth*,²⁶ where the court observed that valuing a professional degree as an asset in the marital estate would necessarily require a division of the post-divorce earnings and efforts of the degree-holder. Such a result would be inconsistent with the philosophy that only assets acquired during the marriage are subject to division.

The *Aufmuth* rationale is not limited to community property states.

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

20. *Id.*

21. See *In re Marriage of Goldstein*, 97 Ill. App. 3d 1023, 423 N.E.2d 1201 (1981); *In re Marriage of McManama*, 272 Ind. 483, 399 N.E.2d 371 (1980); *Wilcox v. Wilcox*, 173 Ind. App. 661, 365 N.E.2d 792 (1977); *Ruben v. Ruben*, 123 N.H. 358, 461 A.2d 733 (1983); *Lesman v. Lesman*, 110 Misc. 2d 815, 442 N.Y.S.2d 955 (1981).

22. 129 Ariz. 333, 631 P.2d 115 (Ariz. Ct. App. 1981).

23. *Id.* at 340, 631 P.2d at 122; see also *Muckleroy v. Muckleroy*, 84 N.M. 14, 498 P.2d 1357 (1972).

24. 272 Cal. App. 2d 786, 78 Cal. Rptr. 131 (1969).

25. *Id.* at 791, 78 Cal. Rptr. at 135. However, the California Family Law Act has recently been amended to provide for reimbursement of "community contributions to education or training of a party that substantially enhances the earning capacity of the party." CAL. CIVIL CODE § 4800.3(b)(1) (West Cum. Supp. 1985). Pursuant to that amendment, the California Supreme Court reversed a trial court denial of compensation for contributions to education. *In re Marriage of Sullivan*, 134 Cal. App. 3d 634, 184 Cal. Rptr. 796, *rev'd*, 37 Cal. 3d 762, 691 P.2d 1020, 209 Cal. Rptr. 354 (1984).

26. 89 Cal. App. 3d 446, 152 Cal. Rptr. 668 (1979).

In *Mahoney v. Mahoney*,²⁷ the New Jersey Supreme Court reasoned that, even giving the term “property” an “expansive interpretation” would not allow the court to characterize an advanced degree as property.²⁸ The court stated that to subject the degree to distribution would, in effect, require the distribution of future earnings, violating the principle of the equitable distribution law that only property acquired during the marriage is subject to distribution. Future earnings which result from an advanced degree are really property acquired after the marriage. The New Jersey court was also concerned about the speculative nature of such an award.²⁹ Valuation problems, as set forth in *Mahoney*, are such frequent concerns that courts really do not decide the issue of whether or not the degree is property, but deny division based on the valuation problems alone.

IV. COURTS WHICH DO NOT ALLOW DISTRIBUTION OF ADVANCED DEGREES PRIMARILY BECAUSE OF VALUATION PROBLEMS

As noted in the previous section, many courts which have confronted the problem of the divisibility of advanced degrees are troubled with the problem of valuation.³⁰ These courts pinpoint the crux of the problem as not whether the degree is property which can be divided, but if divided, how it should be valued so as not, in effect, to divide future earnings.

In *Hughes v. Hughes*,³¹ a Florida appellate court stated that if the educational degree is property to be divided, the proper measure of its value must be calculated by the possible future earnings it would generate and not by its cost. The court then concluded that such measure of value was just too imprecise, uncertain, and speculative to provide the basis for an award.³² The court was not as concerned with whether or not the degree was property as with the degree’s value.

The valuation problem often plays an important role in a court’s decision that the degree is not property, because the court often reasons that any valuation of the degree must be tied to the future earnings which it will generate. “[T]he value of a professional degree for purposes of property distribution is nothing more than the possibility of enhanced earnings that the particular academic credential will provide.”³³ To value an

27. 91 N.J. 488, 453 A.2d 527 (1982).

28. *Id.* at 495-96, 453 A.2d at 531.

29. *Id.* at 466-69, 453 A.2d at 532-33; accord *Hughes v. Hughes*, 438 So. 2d 146 (Fla. Dist. Ct. App. 1983); *In re Marriage of Goldstein*, 97 Ill. App. 3d 1023, 423 N.E.2d 1201 (1981); *In re Marriage of McManama*, 272 Ind. 483, 399 N.E.2d 371 (1980); *DeWitt v. DeWitt*, 98 Wis. 2d 44, 296 N.W.2d 761 (1980).

30. See cases cited *supra* note 29.

31. 438 So. 2d 146 (Fla. Dist. Ct. App. 1983).

32. *Id.* at 146.

33. *Mahoney*, 91 N.J. at 496-97, 453 A.2d at 532.

asset in this manner is highly speculative. As the court pointed out in *DeWitt v. DeWitt*:

[w]hether 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 speciality, location or manner which generates less than 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 on the prediction of the degree holder's success at the chosen field may bear no relationship to the reality he or she faces after divorce.³⁴

As the court stated in *Mahoney*, "valuing a professional degree in the hands of any particular individual at the start of his or her career would involve a gamut of calculations that reduces to little more than guesswork."³⁵

In addition to the speculative nature of such a valuation, there were two other valuation problems troubling the *Mahoney* court. First was the problem that any award based on future earnings would amount to dividing assets which were acquired after the marriage terminated,³⁶ although equitable distribution statutes only provide for division of property acquired during the marriage.³⁷ Thus, by making an award based on future earnings, a court would be making an award of property not the subject of the equitable distribution act.³⁸ The second problem was the fact that a property division, unlike an alimony award, is not modifiable.³⁹ If the degree holder failed to live up to the court's expectations, the finality of the property distribution precluded a remedy.⁴⁰ Thus, the likelihood was increased that a particular equitable distribution would prove unfair if the court miscalculated the value of the degree. As the court stated in *DeWitt*, "[t]he 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."⁴¹

In the normal equitable distribution award, a court divides property which exists in some form or another. Once the court decides how the division shall take place, the property is transferred. Even in the case of a distributive award, there is usually other property awarded to the

34. *DeWitt*, 98 Wis. 2d at 58, 296 N.W.2d at 768; see also *Mahoney*, 91 N.J. at 498, 453 A.2d at 532.

35. *Mahoney*, 91 N.J. at 498, 453 A.2d at 532.

36. *Id.*; *DeWitt*, 98 Wis. 2d at 59 n.17, 296 N.W.2d at 768 n.17.

37. *E.g.*, N.C. GEN. STAT. § 50-20(b)(1), (c) (1984).

38. *Hughes*, 438 So. 2d at 150.

39. *DeWitt*, 98 Wis. 2d at 58, 296 N.W.2d at 768.

40. *Hughes*, 438 So. 2d at 58; see also *In re Marriage of Nichols*, 43 Colo. App. 383, 606 P.2d 1314 (1980).

41. *DeWitt*, 98 Wis. 2d at 58, 296 N.W.2d at 768.

spouse which can then be sold to comply with the distributive award. Here, if future earnings are divided, they still must be earned.

Even if a party can convince a court that the degree is property, any decision requires resolution of the valuation problems outlined above. Because of these problems, the majority of jurisdictions do not allow the advanced degree to be divided in an equitable distribution action. However, a significant minority of state courts have either overcome these arguments or have simply found that equity must provide a means of dealing with the inequities present in the situation.

V. COURTS WHICH DO NOT TREAT THE ADVANCED DEGREE AS MARITAL PROPERTY, BUT DO ALLOW THE NON-DEGREE SPOUSE COMPENSATION BASED ON EQUITABLE PRINCIPLES

While the majority of courts have denied recovery to a non-degree spouse, a few jurisdictions have followed equitable principles rather than strictly interpreting the common law to find a means of making some award to the spouse who has contributed to the degree by supporting the family while the other spouse attended school. These awards have usually been based on some theory of restitution or unjust enrichment. The measure of award has varied from one state to another; in most cases, courts have professed to be seeking justice between the parties, and not to be awarding an equitable distribution of marital property.

In *Mahoney*, the court expressly stated that the husband's advanced degree was not viewed as marital property subject to division under New Jersey law, but that it would be unfair not to "do something" to aid the wife who had supported the family while the husband was pursuing a master's degree in business administration. The court stated that:

[i]n this case, the supporting spouse made financial contributions toward 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. . . . 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. . . . 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.⁴²

42. *Mahoney*, 91 N.J. at 500-01, 453 A.2d at 533-34.

In *Mahoney*, the court was concerned with finding a way to compensate the non-degree-earning spouse even though it found that the degree earned during the marriage was not property.⁴³ The court suggested numerous methods for making this “remedial reward.” The *Mahoney* court introduced the concept of reimbursement alimony,⁴⁴ noting that such an award:

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.⁴⁵

The court clearly indicated that this was an equitable remedy, not to be applied in all cases.⁴⁶ Rather, the remedy was especially designed for situations where a “young professional who after being supported through graduate school leaves his mate for greener pastures [because] [o]ne spouse ought not to receive a divorce complaint when the other receives a diploma.”⁴⁷ In other cases different remedies may be more appropriate. The *Mahoney* court mentioned “rehabilitative alimony” and an unequal equitable distribution as possible alternatives.⁴⁸ The important consideration was that a method be found which promotes equity.

[W]here a spouse has received from his or her partner financial contributions used in obtaining a professional degree or license with the expectation of deriving material benefits for both marriage partners, that spouse may be called upon to reimburse the supporting spouse for the amount of contributions received.⁴⁹

The court did not specifically say whether an award of “reimbursement alimony” would be modifiable or adjustable because of changed circumstances,⁵⁰ and would presumably also wait to decide the effect of remarriage on the award.

43. *Id.* at 498-99, 453 A.2d at 532; *see also In re Washburn*, 101 Wash. 2d 168, 677 P.2d 152 (1984).

44. *Mahoney*, 91 N.J. at 501, 453 A.2d at 534. *See also Olah v. Olah*, 135 Mich. App. 404, 354 N.W.2d 359 (1984).

45. *Mahoney*, 91 N.J. at 501, 453 A.2d at 534 (emphasis in original).

46. *Id.* at 502, 453 A.2d at 535.

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

48. *Id.* at 504, 453 A.2d at 535; *see also Saint-Pierre v. Saint-Pierre*, 357 N.W.2d 250 (S.D. 1984).

49. *Mahoney*, 91 N.J. at 505, 453 A.2d at 536.

50. *Id.* at 503 n.5, 453 A.2d at 535 n.5. The court failed to mention tax implications of such an award.

Other courts have not deemed it necessary to resort to the creation of a new class of remedy to make an award. In *Hubbard v. Hubbard*,⁵¹ the Oklahoma court faced a situation similar to that addressed by the court in *Mahoney*. A doctor was divorcing his wife of twelve years when he was "on the threshold of a successful professional life." The court agreed with *Graham* "that Dr. Hubbard's license to practice was his own to do with as he pleases," but that his decision did not preclude Ms. Hubbard "from receiving an award in lieu of property division."⁵² The court stated that it would base the award on "equity and natural justice."⁵³

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 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.⁵⁴

The *Hubbard* court determined that because all the resources of the marriage had been devoted to the husband's education, the couple had few conventional assets to divide at the time of divorce. "There is no reason in law or equity why Dr. Hubbard should retain the only valuable asset which was accumulated through joint efforts."⁵⁵ The court refused to be "rendered impotent" in such a situation because of a narrow definition of "property."⁵⁶ It also rejected the idea that Ms. Hubbard be limited to alimony for support and maintenance. The court's reasoning was that such an award "would force her to forego remarriage and perhaps even be celibate for many years simply to realize a return on her investment and sacrifices of the past twelve years."⁵⁷

The Oklahoma court opted instead to follow the dissenting opinion in *Graham*, and turned to the doctrine of quasi contract, reasoning "that Ms. Hubbard has the right to be compensated for the amount of her investment in Dr. Hubbard's education and training to prevent his unjust enrichment."⁵⁸ The measure of the award was to be based on her contribution to his "direct support and school and professional training expenses, plus reasonable interests and adjustments for inflation."⁵⁹

51. 603 P.2d 747 (Okla. 1979).

52. *Id.* at 750.

53. *Id.*

54. *Id.* at 750-51. *But see Washburn*, 101 Wash. 2d at 175-76, 677 P.2d at 157 (criticizing use of unjust enrichment theory as basis for an award).

55. *Hubbard*, 603 P.2d at 751.

56. *Id.*

57. *Id.* at 752.

58. *Id.* at 751.

59. *Id.*

However, the decision was limited to the facts of the case; because this remedy was an equitable one, different facts might warrant a different result.⁶⁰

Several other jurisdictions have allowed a recovery by the non-degree-earning spouse even though they were unwilling to characterize the degree as property.⁶¹ In all of these cases the courts were motivated by equitable considerations. In *DeLa Rosa v. DeLa Rosa*,⁶² the Minnesota Supreme Court stated, "[one] spouse has foregone the immediate enjoyment of earned income to enable the other to pursue an advanced education on a full-time basis. Typically, this sacrifice is made with the expectation that the parties will enjoy a higher standard of living in the future."⁶³ To allow the degree-earning spouse to then walk away with all the benefits of the degree which resulted from joint effort was held to be unconscionable.

Even courts which have adopted the view that the advanced degree is property cite the equitable argument with approval. In *Inman v. Inman*,⁶⁴ the Kentucky Supreme Court, in dictum, stated that, although an advanced degree was not marital property, the non-degree spouse was entitled to compensation for his or her contribution. The compensation should be measured by the non-degree spouse's contribution to the degree and the future earning capacity of the degree-holding spouse. The Kentucky Supreme Court noted that the "law of the case" doctrine prohibited the court of appeals from reversing its earlier ruling⁶⁵ should the issue remain the same on a second appeal.⁶⁶ Although the supreme court's statements concerning advanced degrees are dicta, they indicate a possible change in Kentucky's treatment of advanced degrees. Appellate level courts probably will not treat the advanced degree as marital property, but will instead make some sort of equitable award.

The obvious limitation to the "natural justice" approach to the division of advanced degrees is that its availability depends solely on the equity powers of the court. Many of the decisions limit the remedy allowed to the particular facts of the case. The theory presupposes enormous amounts of discretion in the trial judge, and the decisions fail to define the legal ramifications of some of these remedies. For example, in *Mahoney*, the court left unanswered the issue of how the status of a reimbursement alimony award would be affected by modification or adjustment.⁶⁷

60. *Id.*

61. *Moss v. Moss*, 80 Mich. App. 693, 264 N.W.2d 97 (1978); *DeLa Rosa v. DeLa Rosa*, 309 N.W.2d 755 (Minn. 1981); *Lundberg v. Lundberg*, 107 Wis. 2d 1, 318 N.W.2d 918 (1982).

62. 309 N.W.2d 755 (Minn. 1981).

63. *Id.* at 758.

64. *Inman v. Inman*, 648 S.W.2d 847, 849-52 (Ky. 1982).

65. *Inman v. Inman*, 578 S.W.2d 266 (Ky. App. 1979), *rev'd*, 648 S.W.2d 847 (Ky. 1982).

66. *Inman*, 648 S.W.2d at 849.

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

Rather than assume responsibility for this type of uncertainty or risk the creation of a new type of relief, some courts have simply decided that the advanced degree is property, and thus can be divided under an equitable distribution statute.

VI. COURTS WHICH HOLD THE ADVANCED DEGREE OR THE FUTURE EARNINGS IT WILL GENERATE TO BE MARITAL PROPERTY SUBJECT TO DIVISION

The first case to recognize that the non-degree-earning spouse had a legal, as opposed to an equitable, claim to the earned degree or generated future earnings was *In re Marriage of Horstmann*.⁶⁸ In *Horstmann*, the Iowa Supreme Court agreed with the Colorado Supreme Court's reasoning in *Graham* that the advanced degree was not itself property, but held the potential for increased future earning capacity to be an asset eligible for distribution by the court.⁶⁹ The court therefore affirmed the lower court's award of an \$18,000 property division to Ms. Horstmann. Although the court stated that the advanced degree was not property and only future earnings were subject to division, the basis of its award was the cost of obtaining the degree.⁷⁰ There was no effort made to determine what the future earnings might be. Thus, while the court stated it was dividing the future earnings, apparently it was dividing the degree, using the cost of obtaining it as its value.

Inman v. Inman was the first case which actually held that an advanced degree was property subject to division under an equitable distribution statute.⁷¹ While the Kentucky Court of Appeals admitted it had strong reservations about declaring a professional degree to be marital property, such a conclusion was necessary to achieve a just result.⁷² The court said "that the best measure of a spouse's interest in such a degree should be measured by his or her monetary investment in the degree."⁷³ That investment would be determined by the amount each spouse spent in obtaining the degree.⁷⁴ Although the Kentucky Supreme Court, in dictum, indicated that it may not agree with the conclusion that the degree is marital property, only the reasoning of the court in setting an award might be affected, and not its amount.⁷⁵

In two recent cases, courts have declared an advanced degree to be property subject to division and the value of that degree to be measured

68. 263 N.W.2d 885 (Iowa 1978).

69. *Id.* at 891.

70. *Id.*

71. *Inman v. Inman*, 578 S.W.2d 266 (Ky. App. 1979), *rev'd*, 648 S.W.2d 847 (Ky. 1982).

72. *Id.* at 268.

73. *Id.* at 269.

74. *Id.* at 270-71.

75. *Inman v. Inman*, 648 S.W.2d 847, 852 (Ky. 1982). The Kentucky Supreme Court stated:

by the amount of future earnings it will generate.⁷⁶ In *Woodworth v. Woodworth*,⁷⁷ the court stated that it would not be bound by traditional definitions of property but was more “concerned with how best to distribute between the parties what they have once the marriage has for all intents and purposes dissolved.”⁷⁸ Here both parties contributed to the earning of the degree and it was viewed as marital property. The court then rejected the argument that valuation problems are so great as to preclude consideration of advanced degrees as marital property.⁷⁹

[F]uture earnings due to an advanced degree are not “too speculative.”

While a degree holder spouse might change professions, earn less than projected at trial, or even die, courts have proved adept at measuring future earnings in such contexts as personal injury, wrongful death, and worker’s compensation actions. In fact, pain and suffering, professional goodwill and mental distress, within legal issues, have similar valuation “problems.”⁸⁰

After deciding that the advanced degree would be treated as property subject to division, the court rejected the method of valuation adopted by *Inman* and *Horstmann*, and found that the value of the degree should be determined by the future earnings it would generate.⁸¹ The court stated that the cost approach “would provide [the non-degree-holding spouse] no realization of [his or] her expectation of economic benefit from the career for which the education laid the foundation.”⁸² The court also rejected the notion of compensation through alimony, stating that the considerations for alimony are different from those of property division and that alimony can be terminated on remarriage. The *Woodworth* court reasoned that the non-degree-holding spouse should not lose the

This court cannot accept the proposition that an educational degree received by one spouse while the other spouse contributes financially to the cost of obtaining the degree is, upon a dissolution of their marriage, marital property.

We do, however, recognize the issue of how to fairly compensate a person who has supported his or her spouse while the other spouse was in school, when the marriage is dissolved before the family is able to realize the benefits from the spouse’s advanced education

If the issue were before this court, we would be constrained to the view that the proper formula to be followed in placing a value on an educational degree secured by a spouse, to which the other spouse contributed financially, is to measure the recovery by the amount of money the non-college going spouse contributed toward living expenses, the amount of money contributed for educational costs, and the potential for increase in future earning capacity made possible by the degree, thus not treating the degree as marital property.

Id.

76. *Woodworth v. Woodworth*, 126 Mich. App. 258, 337 N.W.2d 332 (1983); *O’Brien v. O’Brien*, 114 Misc. 2d 233, 452 N.Y.S.2d 801 (N.Y. Sup. Ct. 1982).

77. 126 Mich. App. 258, 337 N.W.2d 332 (1983).

78. *Id.* at 265, 337 N.W.2d at 336.

79. *Id.* at 266, 337 N.W.2d at 336.

80. *Id.* at 266-67, 337 N.W.2d at 336.

81. *Id.* at 269, 337 N.W.2d at 337.

82. *Id.* at 268, 337 N.W.2d at 337 (citing Comment, *Divorce After Professional School: Education and Future Earning Capacity May Be Marital Property*, 44 MO. L. REV. 329, 335 (1979)).

benefits of the degree simply because he or she remarries.⁸³ Thus, the court held that the correct method by which to measure the value of an advanced degree for equitable distribution purposes would be "to estimate what the person holding the degree is likely to make in the particular job market and subtract from that what he or she would probably have earned without the degree."⁸⁴

The court in *Woodworth*⁸⁵ did not answer the argument that, in effect, it had divided non-marital property when it divided future earnings. In addition, the court's analogy to valuation problems in personal injury, worker's compensation, and wrongful death cases failed to recognize that, in those cases, a fund usually exists to pay any award, even if it is speculative.

While *Woodworth*,⁸⁶ *Horstmann*,⁸⁷ *Inman*,⁸⁸ and *O'Brien*,⁸⁹ appear to stand for the proposition that an advanced degree should be considered marital property and a division made as a matter of right, at least one court has interpreted these cases to hold little more than that a court may make an equitable award. In *Watling v. Watling*,⁹⁰ the Michigan Court of Appeals refused to follow *Woodworth* and instead stated that a court must look at all the facts and decide what is most equitable.⁹¹

If *Watling*⁹² indicates a trend, *Woodworth* and its progeny will not receive a wide following. More likely, courts will adopt the position stated by *Mahoney*.⁹³

VII. A RECOMMENDATION FOR NORTH CAROLINA

As evidenced by the foregoing discussion, dissolution of a marriage where the major asset is an advanced degree has produced results which are neither simple nor uniform. Most state statutes do not assist in the resolution of the issue. Most state statutes simply provide, as does North Carolina's, that one of the factors to consider in making an equitable distribution of marital property is the "direct or indirect contribution made by one spouse to help educate or develop the career potential of the

83. *Woodworth*, 126 Mich. App. at 267-68, 337 N.W.2d at 336.

84. *Id.* at 269, 337 N.W.2d at 337 (citing Krauskopf, *Recompense for Financing Spouse's Education: Legal Protection for the Marital Investor in Human Capital*, 28 U. KAN. L. REV. 379, 382-84 (1980)).

85. 126 Mich. App. 258, 337 N.W.2d 332 (1983).

86. *Id.*

87. 263 N.W.2d 885 (Iowa 1978).

88. 578 S.W.2d 266 (Ky. App. 1979), *rev'd*, 648 S.W.2d 847 (Ky. 1982).

89. 114 Misc. 2d 233, 452 N.Y.S.2d 801 (N.Y. Sup. Ct. 1982).

90. 127 Mich. App. 624, 339 N.W.2d 505 (1983).

91. *Id.* at 625, 339 N.W.2d at 507.

92. *Id.*

93. 91 N.J. 488, 453 A.2d 527 (1982). *But see* Krauskopf, *supra* note 84; Note, *Family Law: Ought a Professional Degree Be Divisible As Property Upon Divorce?*, 22 WM. & MARY L. REV. 517 (1981).

other spouse.”⁹⁴ This is only helpful if there is marital property to divide; it does not apply if no marital property has been acquired. Thus, North Carolina must either categorize the advanced degree as property subject to the equitable distribution law or find another workable solution.

A majority of the state courts have held that the advanced degree is not property subject to division.⁹⁵ It is unlikely that North Carolina courts would join the minority and find the degree to be marital property, especially in view of the North Carolina position on professional degrees and licenses.⁹⁶ Thus, if public policy in North Carolina favors compensation upon divorce for a non-degree spouse, such compensation must be authorized either by legislation or by the state supreme court’s exercise of its equity powers.

Rather than a series of different and conflicting district court decisions and the accompanying uncertainty those decisions present to attorneys and judges, it is suggested that the best course for North Carolina is to amend its equitable distribution act. North Carolina should adopt the current trend to allow the non-degree spouse some recovery for his or her contribution to the education of the degree-earning spouse. As the court stated in *Mahoney*, “[t]he 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.”⁹⁷

The first issue to resolve is what form the remedial award should take. There are inherent disadvantages to using alimony or reimbursement alimony as the vehicle for recovery. Alimony awards terminate on remarriage, and in North Carolina do not apply to all divorces.⁹⁸ The concept of reimbursement alimony is not widely accepted, and even states which have adopted the concept have not addressed all of the ramifications of such an award.⁹⁹ The easiest and most practical type of award would be a money judgment not limited to existing property to the non-degree-earning spouse. This is the approach taken in Indiana.¹⁰⁰

The final question is how to value the award. Should North Carolina

94. N.C. GEN. STAT. § 50-20(c)(7) (1984).

95. *E.g.*, *In re Marriage of Graham*, 194 Colo. 429, 574 P.2d 75 (1978).

96. N.C. GEN. STAT. § 50-20(b)(2).

97. *Mahoney*, 91 N.J. at 501, 453 A.2d at 534.

98. N.C. GEN. STAT. § 50-16.2 (1984). *See also* 1 R. LEE, NORTH CAROLINA FAMILY LAW § 34 (4th ed. 1979).

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

100. When the court finds there is little or no marital property, it may award either spouse a money judgment not limited to the existing property. However, this award may be made only for the financial contribution of one spouse toward tuition, books, and laboratory fees for the higher education of the other spouse. IND. CODE ANN. § 31-1-11.5-11(c) (Burns 1980).

follow *Woodworth*,¹⁰¹ and base the award on future earnings, or should it follow *Indiana*¹⁰² and *Mahoney*¹⁰³ and base the award on the amount of the financial contribution of the non-degree-earning spouse to the degree? An award based on potential future earnings is too speculative. This is especially true where the court must anticipate a person's success in a given field. The analogies drawn by the court in *Woodworth*,¹⁰⁴ to workmen's compensation and personal injury awards ignore the fact that many of these awards are paid out of a fund. For example, if goodwill is valued at a certain sum, the business may be sold to pay the award; if an award is based on projected future earnings in a wrongful death action, there is usually an insurance policy to pay the judgment. In making an award based on the future earnings of a degree holder, there is no existing fund from which to pay the award. An award based on future earnings involves speculation and makes an award of property not acquired during marriage.¹⁰⁵ For these reasons, North Carolina should adopt the cost approach to valuing the award.

North Carolina should amend its equitable distribution statute to allow a court, in cases where little or no marital property is found, to render a money judgment, not limited to present property, in favor of the non-degree-earning spouse. The award should be limited to the financial contribution that spouse made toward the education of the degree-earning spouse.¹⁰⁶ It should include living expenses, tuition, books, fees, school travel, and any other related costs. The court should also be empowered to secure such a judgment with a lien on separate property of the degree-earning spouse. Such an amendment would equitably resolve the dilemma, and would bring a degree of certainty to an area wrought with confusion and unfairness. Its adoption would place North Carolina in an intellectually leading position with regard to this difficult problem.

101. 126 Mich. App. 258, 337 N.W.2d 332 (1983).

102. IND. CODE ANN. § 31-1-11.5-11(c) (Burns 1980).

103. 91 N.J. 488, 453 A.2d 527 (1982).

104. 126 Mich. App. at 266-67, 337 N.W.2d at 336.

105. See *supra* notes 26-31 and accompanying text.

106. See Moore, *Should a Professional Degree Be Considered a Marital Asset Upon Divorce?*, 15 AKRON L. REV. 543 (1982). Cf. Comment, *The Professional Degree As Marital Property Under North Carolina's Equitable Distribution Statute*, 6 CAMPBELL L. REV. 101, 124 (1984) (cost-recovery approach whereby "contributing spouse" awarded "a return on the investment to the extent of one-half of the cost of living . . . during the school years, plus whatever sum has been expended for tuition, books and other costs of attaining the degree") *Id.*