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THE PROFESSIONAL DEGREE AS MARITAL PROPERTY UNDER NORTH CAROLINA'S EQUITABLE DISTRIBUTION STATUTE

I. INTRODUCTION

The Legislature in enacting the North Carolina Act for Equitable Distribution of Marital Property\(^1\) altered the common law approach of dividing property upon divorce strictly according to record title.\(^2\) Under the new statute, marriage is viewed as a joint venture to acquire property through monetary and non-monetary efforts of each spouse.\(^3\) The Legislature authorizes the courts to reward these mutual efforts by dividing marital property in an equitable fashion.\(^4\) Marital property is that real or personal property acquired during marriage which is traceable to the joint efforts of both spouses.\(^5\) Under the new statute, only that property classified as "marital property" becomes divisible by the court.\(^6\) The appellate courts of North Carolina have had little opportunity to inter-

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6. N.C. Gen. Stat. § 50-20(c) (Cum. Supp. 1983) states "there shall be an equal division by using net value of marital property unless the court determines an equal division is not equitable. If the court determines that an equal division is not equitable the court shall divide the marital property equitably."

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pret the new statute and have not faced the difficult issue of whether a professional degree obtained by one spouse during marriage should be classified as marital property. The statute classifies professional licenses as separate, non-divisible property. While this classification exempts the professional license from distribution in North Carolina, the Legislature left unclear the issue of whether a professional degree could be valued and distributed upon divorce. Other equitable distribution states have faced the issue. This comment focuses on these states' ap-


8. While N.C. GEN. STAT. § 50-20(c)(7) (Cum. Supp. 1983) allows direct or indirect contributions made by one spouse to help educate or develop the career potential of the other spouse to be considered in dividing marital property, it does not specify that the degree is marital property, such that its value could be divided between the spouses. For an excellent general treatment of the degree as marital property under equitable distribution laws see Note, Ought the Professional Degree Be Divisible Upon Divorce? 22 WM. & MARY L. REV. 517-59 (1981); Moore, Should a Professional Degree be Considered a Marital Asset Upon Divorce? 5 AKRON L. REV. 543-55 (1982); Kenderdine, Contributions to Spouses' Education: The Search for Compensation When the Marriage Ends, 5 OKLA. L. REV. 409-43 (1980); Annot., 4 A.L.R.4th 1294 (1981).

9. N.C. GEN. STAT. § 50-20(b)(2) (Cum Supp. 1983) states "all professional licenses and business licenses which would terminate on transfer shall be considered separate property. See also, Sharp, supra note 2, at 269; and see N.C. GEN. STAT. § 50-20(b)(3) (Cum. Supp. 1983) where the legislature amended our equitable distribution statute defining marital property to include vested pension and retirement benefits.

10. Professor Sharp, supra note 2, at 269 apparently interprets the word "license" in North Carolina's statute comprehensively to include the professional degree. In reviewing the case law most courts refer to the contributing spouse's interest in the degree without reference to the license. A few courts have referred to the degree and license interchangeably. Moss v. Moss, 639 S.W.2d 370, 374 (Ky. App. 1982) specifically distinguished the degree from the license stating:

The two are not the same. A degree may be a marital investment. A license, however, is an illusory asset, one which represents merely a potential for increased earnings. The license is no more and no less than the authorized right to engage in the profession selected. To say the license has no value obviously would be wrong, but it is just as obvious that such value is only intrinsic and intangible and not equated with dollar amounts as are things of extrinsic and tangible value.

11. While several community property states have decided the issue, they are beyond the scope of this comment. Briefly, the community property states have rejected the argument for finding the degree to be community property. California has continued to reject the degree as property from Todd v. Todd, 272 Cal.
proaches and outlines North Carolina courts' possible responses when the contributing spouse demands a share of the other's future earnings derived from the professional degree.12

II. APPROACHES TOWARD COMPENSATING THE CONTRIBUTING SPOUSE

The North Carolina courts, in seeking the proper remedy for the contributing spouse, might look to other jurisdictions for guidance. Cases in other jurisdictions offer varied solutions which are confusing at an initial glance. The various approaches include the denial of any property right in the degree, the denial of the property right but recovery under a restitutional/unjust enrichment theory, a finding of a divisible property interest only in limited cases, and a finding of a divisible property right in all cases. The ultimate factor considered by the various courts in addressing the issue is the relative equity in each case. Essentially, in those cases where equity could be achieved without classifying the degree as property, the courts refused to make the property classification. In those cases where equity could be achieved only by classifying the degree as property, that classification was made.


A. Denial of Property Status in the Degree

Most courts have refused to classify the degree as a distributable property interest. These courts have differed in what relief, if any, should be granted to the contributing spouse. Most cases granting no further relief have been cases in which the contributing spouse had already received compensation in some other manner. For example, in the most recent case which rejected the property status of the professional degree, *Severs v. Severs*, the contributing spouse was awarded child support of $450 per month, rehabilitative alimony of $300 per month, 75% interest in the $166,500 home, the family automobile, $6,400 worth of sterling silver, attorney fees and costs.

Flatly rejecting the wife's request to value the degree and distribute a share of its value, the *Severs* court stated:

> The wife's claim to a vested interest in the husband's education and professional productivity, past and future, is unsupported by any statutory or case law. Indeed, such an award by the trial court would transmute the bond of marriage into the bonds of involuntary servitude contrary to the Amendment XIII of the United States Constitution.

Contrary to the approach taken by other states' courts, the court in *Severs* summarily disposed of the issue without any detailed analysis of Florida's equitable distribution statute. To the extent the wife in *Severs* had recovered significant assets in the trial court's award, the appellate court had no compulsion to construe its equitable distribution statute to find a vested interest in the degree.

Unlike the *Severs* court, other states' appellate courts that denied a property interest in the degree have more fully analyzed their equitable distribution statutes. In 1978, Colorado's Supreme Court, in *Graham v. Graham*, said that nothing in the Colorado equitable distribution statute suggested that the Colorado Legislature had intended for the term "property" to apply to a degree. The husband in *Graham* received an M.B.A. degree after his wife had provided over three years of financial support to the family.

14. *Id.* at 993.
15. *Id.* at 994. (Emphasis added).
Upon attaining the degree, the husband filed for divorce. The couple had accumulated no assets to be divided unless the court was willing to classify the degree as divisible property. Arguing against the "property" status of the degree, the court stated:

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 the open market. It is personal to the holder. It terminates on the 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. 17

The Graham majority opinion reflects the position taken by earlier decisions denying property status for the professional degree. This position reflects the initial unpopularity of the contributing spouse's effort to make a financial recovery by having the other spouse's degree characterized as divisible property.

Consistent with this position, the New Jersey Supreme Court in Stern v. Stern, 18 interpreting its equitable distribution statute, refused to consider a husband's enhanced earning capacity as a lawyer or his degree as a "particular item of property eligible for distribution." Affirming the lower court's refusal to give the contributing spouse an interest in the degree or enhanced earning capacity it represented, the state supreme court stated: "potential earning capacity is doubtless a factor to be considered by the trial

17. 574 P.2d at 77. The dissent in Graham, influenced by the fact that no other assets were available for distribution, provided an argument for subsequent courts considering alternative remedies while continuing to reject the degree as property:

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 such cases as this, equity demands that courts seek extraordinary remedies to prevent extraordinary injustice.

574 P.2d at 78 (Carrigan, J., dissenting).

judge in determining what distribution will be 'equitable' and it is even more relevant to the issue of alimony, but it should not be deemed property within the meaning of the statute."^19

In a similar action where the contributing spouse was seeking recovery based on her husband’s enhanced earning capacity, the Illinois Court of Appeals, in Goldstein v. Goldstein^20 refused to engage in the speculation involved in valuing the enhanced future earnings flowing from education. In so ruling, the court followed its previous decision of In re Marriage of Evans^22 in which the court refused to recognize the future benefits arising out of employment as divisible property under its equitable distribution statute.\^23

Illinois' neighboring state, Indiana, also with an equitable distribution statute, was also called upon to classify the future income of the supported spouse as property. A review of the Indiana appellate court decisions on the issue reflects the treatment given to the issue elsewhere in the United States during the late 1970's. In Wilcox v. Wilcox,^24 the wife sought a property classification for her husband’s Ph.D. Typical of those cases denying any claim to the degree by the contributing spouse, the appellate court noted that of the $42,000 worth of marital assets, the trial court had already awarded $39,000 to the contributing spouse. The Wilcox court, in interpreting its statute, failed to find the degree or the future income based thereon to be divisible property.\^25 Two years later, the court of appeals in In re Marriage of McNamara,^26 reaffirmed Wilcox in denying divisible property status in the law degree of the supported husband, but the court did award the contributing wife $3,600. The Supreme Court of Indiana affirmed the court of appeals decision to the extent it denied the degree property status,^27

19. 331 A.2d at 260.
21. 423 N.E.2d at 1204.
23. 426 N.E.2d at 857.
24. 173 Ind. App. 661, 365 N.E.2d 792 (1977). Incidentally, there was already $42,000 worth of marital assets of which the wife received an award of $39,000.
27. 399 N.E.2d 371 (Ind. Ct. App. 1980). The dissent in the court of appeals viewed the award as being grounded upon restitutional theories which the major-
but reversed the monetary award finding no statutory authority for it. 28

The general theme in the decisions of the courts that have addressed the issue has been to allow recovery where the facts presented revealed gross inequities. No recovery has been allowed in those cases where the contributing spouse has already been compensated, either directly or indirectly, for the contribution toward the attainment of the other spouse's degree. Different results have even been reached in the same jurisdiction because the cases presented different facts. New York provides an example. 29

In Lesman v. Lesman, 30 the wife did not contribute money to her husband's education. The trial court awarded $200 weekly for maintenance and another $100 weekly for child support. 31 In that case, the court saw no need for it to fashion an equitable remedy. 32 Refusing to classify the degree as martial property, the lower Lesman court stated: "we must bear in mind that the pursuit of a degree is in reality an individual effort, for it is the person who obtains the degree that must solely study, learn and pass examinations to acquire it." 33 The Supreme Court, Appellate Division, on appeal of Lesman 34 found the reasoning of Mahoney v. Mahoney, 35 a New Jersey case on the issue, persuasive and consequently affirmed the lower court Lesman decision holding that the professional degree did not fall within the traditional concepts of property.

In Mahoney, the wife had supported the husband for sixteen months while he obtained an M.B.A. degree. At the time of their divorce they had each independently earned in excess of $20,000 per year. They had no children, had accumulated no property and

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31. 452 N.Y.S.2d at 937.
32. Id. at 939.
34. 452 N.Y.S.2d at 938.
neither claimed alimony. The basic issue for the court was whether the wife should be entitled to recover the funds she expended for their support and his education. The trial court found that the circumstances warranted a finding of a property right in the degree subject to equitable offset upon dissolution of their marriage.\(^{36}\)

The *Mahoney* appellate court decision reflected an awareness of the generally expansive construction of the term "property" as used in the New Jersey equitable distribution statute. Nevertheless, the *Mahoney* court relied strictly on the precedent established in *Stern*, a state supreme court decision, which decided that where a person's earning capacity had been enhanced by the other spouse, that enhancement does not constitute property within the meaning of the equitable distribution statute of New Jersey.\(^{37}\) The *Mahoney* court reasoned that since the enhanced earning capacity could not be distributable as property, "then neither is the degree or license, which is merely the memorialization of the attainment of the skill, qualification and educational background which is the prerequisite of the enhanced earning capacity and on which it is predicated."\(^{38}\)

The New Jersey appellate court in *Mahoney* referred to the doctrinal chaos in other states where the courts seek to give a property interest in the degree in those situations where no other remedy is available to the contributing spouse.\(^{39}\) The Court refused to adhere to this distortion of the property principle and held that the degree was not a distributable property interest.

The New Jersey Supreme Court in *Mahoney*\(^{40}\) concurred with the appellate division in rejecting the professional degree as marital property. Considering the argument for divisible property status, the Supreme Court found no guidance in the equitable distribution statute or its legislative history as to what constituted

\(^{36}\) 442 A.2d at 1064-65.

\(^{37}\) *Id.* at 1065.

\(^{38}\) *Id.* at 1066. This attempt was evidently to alleviate much of the confusion among the various states which dealt with the issue by interchanging the property concept in equitable distribution with other equitable means of compensating the wife, such as the lower court decision of *Mahoney* had done by adopting a new property division theory as an equitable remedy.

\(^{39}\) *Id.* at 1067.

“property.”41 Citing a broad range of assets and interests that were subject to equitable distribution,42 the court stated it "has never subjected to equitable distribution an asset whose future monetary value is as uncertain and unquantifiable as a professional degree or license."43 This refusal to classify the degree as divisible property has remained the majority rule among the states with equitable distribution statutes. However, relief for the contributing spouse has been offered by the majority of these courts denying the property status by applying various equitable principles, apart from any statutory scheme. A few of the states that have denied the property classification for the degree have relied on other statutory remedies to compensate the contributing spouse. Daniels v. Daniels44 represents the first attempt by a court to compensate a divorced wife who aided her husband in his scholastic endeavors during their marriage. Noting that no tangible assets were available for distribution to the wife, the Ohio appellate court held that the husband's future earning capacity in the medical profession was "property which the trial court had a right to consider in making the award of alimony."45 In the subsequent Ohio case of Lira v. Lira46 the Daniels decision was interpreted and affirmed. The Lira court said that a medical license was an element to be considered in an award of alimony, but was not an asset subject to division.47

41. 453 A.2d at 531.
42. Unmatured vested private pensions, military retirement payments and disability benefits, unliquidated claims for benefits under workmen's compensation and personal injury claims. Id.
43. Id.
45. 185 N.E.2d at 775.
47. 428 N.E.2d at 448. See also Colvert v. Colvert, 568 P.2d 623 (Okla. 1977); Zahler v. Zahler, Conn. Superior Court, New Haven Dist., 8 Fam. L. Rep. (BNA) 2694 (1982) where the spouse's contribution was considered in making an award for alimony. See also Hill v. Hill, 182 N.J. Super. 616, 442 A.2d 1072 (1982), aff'd and modified, 91 N.J. 506, 453 A.2d 537 (1982) and Szot v. Szot, 425 So.2d 172 (Fla. Dist. Ct. App. 1983) on the use of rehabilitative alimony to compensate the contributing spouse. Beyond being a factor in determining the alimony award, the anticipated earning capacity of the spouse has also been characterized as a "financial resource" to be considered in awarding maintenance and child support. In re Marriage of Vanet, 544 S.W.2d 236 (Mo. 1976). See also recent cases of In re Lundberg, 107 Wis.2d 1, 318 N.W.2d 918 (1982) and Roberto v. Brown, 107 Wis. 2d 17, 318 N.W.2d 358 (1982) (companion case) where the Wisconsin court, while following the precedent of Dewitt v. Dewitt, 98 Wis. 2d 44, 296 N.W.2d 761 (Wis. App. 1980) holding the degree was not property, employed the maintenance stat-
The apparent inequity involved where the various courts have refused to classify the degree as property is alleviated where the courts have offered the spouse recovery on some other equitable grounds. Only in those cases where the contributing spouse has already been compensated for her efforts will the courts deny property status as well as an alternative recovery.

B. The Cost-Reimbursement Approach

The majority of those jurisdictions refusing to classify the degree as divisible property under the equitable distribution statutes do grant equitable relief for the contributing spouse in some form. One Kentucky court initially granted the marital property classification to a degree in limited cases. The appellate court in Kentucky in Inman v. Inman,48 though expressing reservations about its decision,49 nonetheless affirmed the circuit court's classification of a professional degree as marital property where such classification represented the only means of achieving an equitable result.50 Rather than determine the value of the degree in these limited situations, the appellate court favored measurement of the wife's interest by her actual monetary contribution to the degree.51 The unanimous appellate court decision of Moss v. Moss52 clarified Kentucky's position as to the property rights in a professional license as contrasted with a professional degree. While agreeing that Mrs. Moss had an interest in recouping her investment in her husband's pharmacy degree,53 the court distinguished the license from the degree. The court viewed the professional license as an

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49. This decision creates "another field for battle in an already complex and delicate area of marital property." 578 S.W.2d at 268.
50. Id., citing the clearest cases where the husband is put through school followed by immediate dissolution with no marital property having been accumulated by the couple, with the wife having no right to alimony, and no entitlement to maintenance. See Leveck v. Leveck, 614 S.W.2d 710 (Ky. App. 1981) where the court held that an equitable result could be reached through an award of maintenance without the treatment of the license as marital property.
51. 578 S.W.2d at 270.
52. 639 S.W.2d 370 (Ky. App. 1982).
53. This includes "the amount spent for direct support and school expenses during the period of education, plus reasonable interest and adjustments for inflation." 578 S.W.2d at 289.
illusory, intangible asset merely representing a potential for increased earnings. On the other hand, the court viewed the professional degree as a marital investment subject to cost basis analysis.54

The issue finally reached the highest court in Kentucky in Inman v. Inman.55 The Kentucky Supreme Court could not accept the proposition that a degree received by one spouse, while the other spouse contributed financially to the cost of obtaining the degree, constituted marital property upon dissolution of the marriage.56 However, in dicta the Inman court recognized that the contributing spouse should be compensated. The court said that the measure of recovery would be based on the contributing spouse's monetary contributions toward living expenses, educational costs, and the increased potential in the future earning capacity of the spouse receiving the degree.57

The cost-reimbursement approach found favor with the Oklahoma Supreme Court in Hubbard v. Hubbard.58 Citing the majority opinion in Graham v. Graham59 which held that a degree was not a property interest, the Hubbard court stated:

Clearly a professional degree or license is the intangible and indivisible "property" of its holder and no other person has a vested interest therein. [But Mrs. Hubbard is not] precluded from receiving an award in lieu of property division. . . . [She is entitled to] an equitable claim to repayment for the investment she made in his education and training.60

Relying on the earlier appellate court decision of Inman,61 and the dissent in Graham,62 the Hubbard court saw "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 claim for reimbursement by his wife."63

In line with the Kentucky Supreme Court decision in Inman,
the Minnesota Supreme Court in *DeLaRosa v. DeLaRosa*, recently interpreted its equitable distribution statute and refused to classify the degree as divisible marital property. The Minnesota court opted for the restitutial approach, allowing the working spouse to recover her past investment in the other spouse's education. In *DeLaRosa*, after the trial court's award of restitution was challenged as not specifically authorized by the equitable distribution statute, the Minnesota Supreme Court responded by finding that "the district court . . . has inherent power to grant equitable relief as the facts in each particular case and the ends of justice may require."65

Other states have followed the trend in allowing restitutional approaches while denying a degree divisible property status. The Wisconsin Supreme Court in *Dewitt v. Dewitt*66 was faced with a situation where there were other marital assets available to compensate the wife for her contributions. Arguing against considering the degree as marital property, the court stated:

> We agree that equity compels some form of remuneration for a spouse whose contributions to the marriage have significantly exceeded those of the mate. We cannot agree, however, that equity is served by attempting to place a dollar value on something so intangible as as a professional education, degree, or license.67

Those courts refusing to grant the property classification frequently cite valuation a a primary concern. One case addressed the problem by calling the degree "property," but noted that its value to the contributing spouse was only the funds she expended towards it.68

In the case of *Horstman v. Horstman*,69 the Iowa Supreme Court upheld an award of $18,000 as a property division to a wife where there had been no marital assets accumulated by the couple, other than the degree, while the husband had attended Drake University School of Law. The trial court viewed the joint contributions by the husband and wife as similar to the building of a busi-

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65. 309 N.W.3d at 758.
66. 98 Wis. 2d 44, 296 N.W.2d 761 (1980).
67. 296 N.W.2d at 767.
69. Id. See Note, 56 DEN. L. J. 677 (1979); and Note, 64 IOWA L. REV. 705 (1979).
ness that has good potential for the future.\textsuperscript{70} The Supreme Court of Iowa affirmed the award saying that the dollar value of the award was not derived from calculations based on the husband's future earning capacity, but rather, was measured by the amount of the working wife's contributions to her husband's education, plus interest.\textsuperscript{71} With this decision, the Iowa court appears willing to classify the degree as property but limits its value to an amount recoverable under a comparable cost-reimbursement approach.

Obviously the remedies available to the contributing spouse vary among the states, but at least some remedy has been created in each state where the facts presented to the court established an inequity. The dissent in \textit{Graham} recognized that in cases where the contributing spouse was issued a divorce decree shortly after the benefitted spouse was awarded a professional degree, equity demands that the courts seek extraordinary remedies for an obvious injustice.\textsuperscript{72} The Supreme Court of New Jersey, while rejecting the degree as divisible property, formulated such an extraordinary remedy in \textit{Mahoney}. In the trial court decision of \textit{Mahoney},\textsuperscript{73} the court, favoring reimbursement for the contributing spouse, stated:

\begin{quote}
[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.\textsuperscript{74}
\end{quote}

Disagreeing with the strictly economic partnership reasoning of past restitutional opinions, the \textit{Mahoney} appellate court reversed\textsuperscript{75} and emphasized that the marital couple most often views their contributions as mutual, for the good of the marriage, and

\begin{itemize}
\item \textsuperscript{70} 263 N.W.2d. at 887.
\item \textsuperscript{71} \textit{Id.} at 891.
\item \textsuperscript{72} 574 P.2d at 78.
\item \textsuperscript{74} 419 A.2d at 1150.
\item \textsuperscript{75} 182 N.J. Super. 598, 442 A.2d 1062 (1982), \textit{rev'd} 91 N.J. 488, 453 A.2d 527 (1982).
\end{itemize}
not for their interest as individuals. The court, emphasizing that divorce represents many disappointments of expectations, financial and non-financial, stated the breakup does not automatically convert the undertaking into a commercial transaction where the wife should recoup her financial investment in the event of failure of expectations.

The state supreme court in Mahoney disagreed with the appellate court's decision and its view of what remedial relief was available to the contributing spouse. Rejecting the appellate court's holding against reimbursement, the Court emphasized:

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.

As a means of finding an equitable remedy, the New Jersey Supreme Court introduced the concept of "reimbursement alimony." The reimbursement alimony concept covered "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." Citing the need for this remedy, the court expressed the view that "marriage should not be a free ticket to a professional education and training without subsequent obligations." By introducing the concept of reimbursement alimony, the Mahoney court avoided the argument made by past courts which refused to apply the equitable remedies of restitution and unjust enrichment, saying such remedies do not apply to a situation as marriage which "is more than an economic undertaking."

76. 442 A.2d at 1070.
77. Id.
78. 91 N.J. 488, 453 A.2d 527 (1982).
79. 453 A.2d at 533.
80. Id. at 534.
81. Id. at 535.
The *Mahoney* court reached a decision consistent with the decisions of a majority of the courts facing the question of what relief for the contributing spouse is proper. In rejecting the degree as divisible property, the *Mahoney* court fashioned a unique equitable remedy to aid the contributing spouse in New Jersey. Courts across the United States are increasingly recognizing the inequity of denying the contributing spouse any recovery in all circumstances. As a result, cost-reimbursement or similar approaches have become prevalent in those states facing the issue.

C. The Share-of-the-Benefits Approach: The Degree as Marital Property

Courts have been continually reluctant to find a divisible property interest in the degree upon divorce. This rejection of the share-of-the-benefits approach is indicative of the courts' willingness to equitably divide only tangible assets. However, several courts to date have demonstrated a willingness to adopt the share-of-the-benefits approach giving the contributing spouse a share of the value of the benefited spouse's degree. All but one of these courts have since been overruled.

93 App. Div. 2d 695, 463 N.Y.S.2d 24 (1983) which addressed the question of whether the actual law practice itself was subject to a distributive award as marital property. That court held the practice was not subject to division since it viewed the law practice as not being a commodity subject to sale or subject to any practical division. The appeal of the *Litman* decision was heard in *Litman v. Litman*, 93 App. Div. 2d 695, 463 N.Y.S.2d 24 (1983). The higher court reversing the lower court decision held that even though the law practice could not be practically divided, the distributive award provision of the New York equitable distribution statute was drafted to cover such a situation and allowed an award of a sum of money in lieu of the actual distribution of the property. North Carolina has such a provision at N.C. GEN. STAT. § 50-20(e) (Cum. Supp. 1983):

In any action in which the court determines that an equitable distribution of all or portions of the marital property in kind would be impractical, the court in lieu of such distribution shall provide for a distributive award in order to achieve equity between the parties. The court may provide for a distributive award to facilitate, effectuate or supplement a distribution of marital property. The court may provide that any distributive award payable over a period of time be secured by a lien on specific property.

The definition section of the statute, N.C. GEN. STAT. § 50-20(b)(3) (Cum. Supp. 1983) defines distributive award: “Distributive award means payments that are payable either in a lump sum or over a period of time in fixed amounts, but shall not include payments that are treated as ordinary income to the recipient under the Internal Revenue Code.”
In New York, the state supreme court, Westchester County, in *O'Brien v. O'Brien*, found the medical degree of the husband to be marital property. The wife in *O'Brien* had made significant monetary contributions towards her husband's medical education, with the only asset held by the couple at divorce being the degree itself. Addressing the problem, the court stated:

[W]hen a spouse finances another's education, and thus high earning capacity, it is unfair to deny her a share of this asset which would not exist but for her efforts . . . . With the passage of the Equitable Distribution Law a profound change has been made in the standards which govern the division of property upon the dissolution of marriage. It is apparent that the legislature envisioned an open property doctrine in the field of matrimonial law by introducing a new concept denominated "Equitable Distribution." It speaks in terms of contributions of the parties, efforts of the parties and recognizes that "marital partners" are "economic partners . . . ." It sets forth specific guidelines and new concepts of what constitutes "property" authorizing courts to seek out equitable remedies within the context of a particular case . . . .

Under the unique circumstances of this case, this court finds that the medical school degree and license to practice medicine, obtained by plaintiff during the marriage are marital property as defined in Section 236B(1)(c) and subject to equitable distribution under Section 236B(5)(c). A contrary finding would contradict the spirit and intent of "equitable" distribution of marital assets.

The *O'Brien* decision was in effect overruled by the Appellate Division decision in *Lesman* which held that the degree was not a property interest.

*Lynn v. Lynn* represents another court's finding of the divisible property right in the degree, later to be overruled. In *Lynn*,

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84. 452 N.Y.S.2d at 803.
85. Id. at 803-05.
88. Mahoney v. Mahoney, 182 N.J. Super 598, 442 A.2d 1062 (1982). See id. at 1065, n. 3 where the court felt New Jersey's view of the issue had been misinterpreted by its sister states as rejecting *Stern* by its decision in *Lynn* finding marital property classification in the law degree.
while citing the state of New Jersey as "a dynamic, developing, daring state seeking solutions to equitable distribution problems," and discouraged by the confusion in the other states on the issue, the court favored classifying the degree as marital property in all cases. With the decision, the Lynn court rejected that line of cases refusing such a classification, limiting the remedy to restitutional relief, or favoring the classification only under limited circumstances. The New York trial court in Lynn abhorred the inconsistency of calling the degree property in one case, while refusing such a classification in the next case. By its recent appellate decision in Woodworth v. Woodworth, the State of Michigan becomes the only jurisdiction presently recognizing the professional degree as divisible marital property. The facts of Woodworth entailed the same general inequities facing previous courts deciding the issue—inferior income level of the contributing spouse at the time of divorce and no other assets available to distribute to the contributing spouse. However, the Michigan court felt compelled to give the wife a share of that asset which resulted from the mutual efforts and sacrifices of both parties. Focusing on what equitable solution to take in dividing the couple's assets, the Woodworth court cited two basic methods for compensating the wife—"a percentage share of the present value of the future earnings attributable to the degree or restitution." The court rejected restitution as failing to provide realization of "her expectation of economic benefit from the career for which the education laid the foundation." Arguing for the share-of-the-benefits approach, the court defended against any claim that predicting future earnings by the husband would be too speculative by noting that such predictions are made in wrongful death, loss of consortium, personal injury and workmen's compensation actions. Remanding the case back to the trial court, the appellate court suggested revaluation of the "degree in light of these factors: the length of the marriage after the degree was obtained, the sources and extent of financial support given plaintiff [husband] during his years in law school, and the overall division of the par-

89. 7 Fam. L. Rep. at 3006.
90. Id.
92. 258 N.W.2d. at 334.
93. Id. at 337.
94. Id.
95. Id. at 336.
ties' marital property." The Michigan Supreme Court has not yet passed on the issue.

III. SEEKING THE EQUITABLE APPROACH FOR NORTH CAROLINA

A. Share-of-the-Benefits or Cost-Reimbursement

The overwhelming majority of states refuse to categorize a professional degree as a divisible property interest upon divorce, reflecting a rejection of the share-of-the-benefits approach taken by the Woodworth court and favored by most legal writers. Several factors led to the majority position favoring division of tangible assets only. First, a degree, lacking many of the attributes of property—transferability, objective market value, cash surrender value, lump sum value, value realizable after death—calls for speculation in attempting a valuation of its worth for equitable division. Second, not only would valuing the degree be difficult, the professional may never go into practice, may fail in his profession or may not earn the predicted salary by the court. Basically, classifying the degree as marital property would unduly restrict the personal freedom of the professional where it compels him to pursue a career envisioned by the court.

Proponents of the share-of-the-benefits approach argue that valuing the degree calls for no more speculation than is required in wrongful death actions, damages for pain and suffering, damages for loss of consortium and mental distress. The primary support for the divisibility of the degree stems from dissatisfaction with other approaches, in favor of giving the contributing spouse a return on his or her investment.

Whether opting for the share-of-the-benefits or a cost-reimbursement approach, all jurisdictions facing the disappointed, uneducated spouse whose marriage had accumulated no wealth agree that harshness results where the educated spouse leaves the marriage with an enhanced earning capacity attained and attributable to the other spouse's work and effort. North Carolina should avoid

96. Id. at 337.
98. Id. at 547.
99. 296 N.W.2d at 768.
100. Moore, supra note 97, at 549.
101. Id. at 547.
102. Id. at 553.
this harshness and offer the contributing spouse some monetary benefit upon dissolution.

The share-of-the-benefits approach appears the least attractive in cases where no harshness exist, such as where the marriage has accumulated substantial wealth and the contributing spouse can be compensated from existing marital property for the expenditures made for the education of the benefited spouse. If the North Carolina courts hold that the degree can be distributed as marital property, the value of the degree must be distributed in all equitable distribution claims, even in those situations where the marriage has accumulated substantial assets. Adopting the share-of-the-benefits approach would necessitate speculative valuations which might not otherwise be required. These valuations would be complicated and proof at trial would be time-consuming and generally expensive. These predictions as to future value of the degree, while possible, would always lack the substantial degree of certainty desired and would either unfairly under-compensate the contributing spouse or over-tax the benefited spouse. While speculation is involved in wrongful death and other similar actions, such speculation is necessary as no other alternative is available. If the beneficiaries of the decedent's estate are to be entitled to funds the deceased would have earned if he had lived, what other alternative would be available except for speculation of what his future earnings might have been?

North Carolina should offer the contributing spouse an equitable solution in some form of recoupment and our courts should refrain from finding the degree to be marital property. Any cost recovery approach could be easily litigated, and proving the entitlement would be far less complicated than if speculation of future income was attempted in the share-of-the-benefits approach.

**B. Should North Carolina Adopt Either Approach**

In many cases the contributing spouse in North Carolina can be adequately compensated for her contribution without applying a particular equitable doctrine. For instance, where the parties do not have equal or comparable earning capacities or education, rehabilitative alimony might be available.\(^\text{103}\) Alimony statutes also

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\(^{103}\) In Hill v. Hill, 91 N.J. 506, 453 A.2d 537 (1982) rehabilitative alimony was the basis of an award to the disappointed wife who had sought to enhance her own income earning capacity by pursuing educational and professional objectives. There appears to be no statutory mandate or case law in North Carolina preclud-
give recompense where the parties respective income situations warrant. The alimony route for compensating the spouse is popular because it remains modifiable in case the professional spouse fails in his career expectations.¹⁰⁴

However, there are drawbacks in using the alimony statute to compensate the contributing spouse. Alimony terminates at death or remarriage where a property division would not.¹⁰⁵ Thus, with alimony the funds may be cut off before the spouse has sufficient compensation. In addition, alimony funds would not be available where fault grounds are absent.¹⁰⁶ Where the contributing spouse is at fault in the dissolution, the court can reduce the amount of alimony awarded or may even bar alimony entirely as where adultery is the fault ground. The court, in its discretion, may reduce the amount of alimony in any case. Where the couple's standard of living has been low because the parties were financing the education, the contributing spouse may be deemed to be the supporting spouse and unqualified to receive alimony.¹⁰⁷ Due to these drawbacks, the North Carolina courts should be reluctant to rely solely on alimony to assist the contributing spouse and should be willing to apply an existing equitable remedy or, if necessary, create a new one where the situation warrants.

C. Choosing the Equitable Remedy

The difficulty facing the North Carolina court which chooses to interpret the equitable distribution statute as encompassing the degree within the separate property classification will lie in how to compensate the wife where no other assets exists to divide¹⁰⁸ and where she is not qualified to receive alimony. Unless an equitable doctrine can be relied upon or an equitable remedy created, North Carolina would expose its citizenry to the harsh results obtained

¹⁰⁴ Moore, supra note 97, at 551.
¹⁰⁷ See N.C. Gen. Stat. § 50-16.1(3)-(4) (1976) and Williams v. Williams, 299 N.C. 174, 261 S.E.2d 849 (1980). See also Quigley v. Quigley, 54 Md. Ct. Spec. App. 45, 456 A.2d 1305 (1983) where the wife, whose income was higher than that of her husband’s, was held not entitled to have the court reserve the alimony issue in case she should be in need of it in the future.
through pre-equitable distribution solutions in dividing property at divorce.

North Carolina's equitable distribution statute mandates fairness in the division of marital property, but where fairness cannot be achieved because marital property is lacking, suitable equitable alternatives should be available. Under present North Carolina law concerning property rights of married persons, the court would likely refuse to rely on the doctrine of unjust enrichment to provide reimbursement for the contributing spouse. The equitable principle of unjust enrichment does not apply where the services are rendered gratuitously or in discharge of some legal obligation. The Supreme Court of North Carolina in *Leatherman v. Leatherman* and *Mims v. Mims* held that services performed among spouses and interspousal transfers are presumed gratuitous. In finding the contributing spouse's efforts gratuitous, where the spouse contributes monetarily to the education of the other spouse, the doctrine of unjust enrichment would be inapplicable.

In *Leatherman*, the supreme court held that services performed by the wife in the family-owned business where presumed gratuitous. The critical question here is whether the presumption that services rendered to the family-owned business are gratuitous, will be carried over by the court to apply to situations where one spouse contributes to the education of the other. If the presumption is applied, the contributing spouse will recover only upon showing that an express or implied agreement existed for reimbursement. The basis of the presumption is derived from the fact:

that certain relations existing between the parties raise a presumption that no payment was expected for services rendered or support furnished by the one to the other. The presumption by itself repels what the law would otherwise imply—that is, a promise to pay for them; but this presumption is not conclusive, and may in its turn be overcome by proof of an agreement to pay, or of facts and circumstances from which the jury may infer that payment was intended by one of the parties and expected by the other.

111. 305 N.C. 41, 286 S.E.2d 779 (1982).
112. 297 N.C. at 622, 256 S.E.2d at 796.
Under the equitable distribution statute, the marriage is viewed as an economic unit with both parties being involved in a joint venture contributing monetarily and non-monetarily towards the goals of the family. Like the family-owned business in Leatherman, the courts might find that the wife’s probable intent at the time she contributes to the husband’s education is to benefit the family-unit, with no expectation of being compensated for her efforts.

In Mims, the supreme court established a rebuttable presumption in favor of treating interspousal transfers of tenancy by entirety property as a gift. The rationale of the court in establishing these presumptions was the recognition that these interspousal transfers are largely motivated by love and affection and out of a desire to make a gift.114 The court in Mims rejected an argument that no gift is intended where one of the two spouses pays all the consideration for property which is placed in joint names.115 Basically in cases involving spouses, the North Carolina courts are refusing to keep score of spousal contributions in case one day the marriage fails and reimbursement is sought.

In considering the proper equitable remedies for the contributing spouse in the professional degree situation, the courts should consider the fact that Mims involved real property. Records at the Register of Deeds office should accurately reflect actual ownership of real property. Had the Mims court held that a resulting trust existed in favor of the husband, these records at the courthouse would be obsolete. The gift presumption in Mims was necessary under real property law and that result should not be incorrectly applied to the professional degree situation. In deciding whether unjust enrichment should be appropriate for the contributing spouse, the courts should reflect on the intent of the contributing spouse at the time of the contribution. Surely the spouse contributing to the other’s education does so to enhance the income-producing capacity of the other spouse and the family in general. That contributing spouse’s expectations are financial and the courts in these cases should allow the parties to keep score in case the benefited spouse chooses to divorce the contributing spouse leaving no marital property to divide.

Restitution might be an appropriate remedy in those situations where the facts warrant implying the existence of a contract

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114. 305 N.C. at 53, 286 S.E.2d at 788.
115. Id. at 43, 286 S.E.2d at 781-82.
between the husband and wife to provide for one's education with a reciprocal duty of reimbursement. Most couple's concerned with their contractual rights in case of divorce following the education of one spouse would possibly expressly contract for recompense. Therefore, it is doubtful the North Carolina courts would readily imply contracts in the divorce-after-graduation situation.

The present status of North Carolina law in the area of equitable remedies would appear to handicap the courts in providing the wife recompense where no marital assets are accumulated at divorce, or where the contributing spouse fails to qualify for alimony. Ideally, to follow Minnesota's lead in DeLaRosa\textsuperscript{116} where it was held that the "[d]istrict court . . . has the inherent power to grant equitable relief as the facts in each particular case and the ends of justice may require"\textsuperscript{117} would be one way North Carolina courts could justify awarding the contributing spouse her contribution toward the degree. This alternative would give the district court judges significant leverage and discretion in determining the contributing spouse's entitlement in a given case.

Our state could also follow the lead of Mahoney\textsuperscript{118} which introduced the concept of reimbursement alimony to adequately provide recompense for the contributing spouse. Nothing in North Carolina's statutory or case law appears to preclude adoption of such a concept. This alternative should be available only in those cases where no other equitable or legal remedy is available or where the facts otherwise disallow recovery of the contributing spouse's contribution to the education of the other spouse. Regardless of the equitable approach taken by the North Carolina courts, the relief in favor of the contributing spouse should include the monetary contribution to the degree including tuition, books and other expenses, plus the benefited spouse's share in the family's cost of living during the school years.

IV. Conclusion

With the passage of the Equitable Distribution Act in North Carolina the Legislature sought to offer each spouse recognition of their monetary and non-monetary contributions to the marriage. Although many states with equitable distribution statutes have been asked to treat the professional degree as marital property

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117. Id. at 758.
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subject to division upon divorce, only one has done so. These states refuse to speculate on the value of the degree and view the degree as being personal to the holder. While North Carolina should follow the majority's lead in rejecting the degree as marital property, it should offer some type of cost-recovery approach in its search for justice under its laws.

Refusal to establish a means of compensating the contributing spouse who has put the other spouse through school, while rejecting the divisibility of the degree, would be unwarranted. A cost-recovery approach which offers the contributing spouse a return on the investment to the extent of one-half of the cost of living of the couple during the school years, plus whatever sum has been expended for tuition, books and other costs of attaining the degree, has generally proven more popular than approaches which attempt to place a value on the degree itself. Seeking remedies beyond the equitable distribution statute appears to offer the greatest precedential value in dealing consistently with a situation where the equities involved prove different in almost every case. Although there are other means of compensating the contributing spouse in some cases without adopting the cost-recovery approach—such as awarding the contributing spouse the larger of the amount of marital property divided between the two, or considering the contribution when awarding alimony, or through separate maintenance, or other support provisions—there will be cases where no remedy exist for the contributing spouse unless the North Carolina courts are willing to adopt one.

The states that have been slow to offer these equitable alternatives have been those in which other means were available for compensating the contributing spouse. North Carolina, when faced with the question of how to fairly compensate the contributing spouse where no logical means are available, should be willing to create an equitable remedy to promote justice and fairness under its laws, whether by adopting the concept of reimbursement alimony, referring to the equitable powers inherent with the trial court, or by articulating some other remedy.

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