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FOCUS ON FAMILY LAW

THE EQUITABLE DISTRIBUTION OF PROFESSIONAL DEGREES UPON DIVORCE IN NORTH CAROLINA

CAROLE S. GAILOR* AND MEREDITH J. McGILL**

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I. INTRODUCTION

Despite the increasing body of appellate decisions on the equitable distribution of marital assets, no appellate decisions in North Carolina have addressed the issue of the classification of a graduate or professional degree earned during the marriage as marital property and its consequent valuation and distribution as a divisible marital asset.

The ratification of the legislation commonly known as "An Act for the Equitable Distribution of Marital Property," made effective October 1, 1981, to all cases subsequently filed seeking an absolute divorce, caused sweeping reform in the North Carolina divorce laws, which theretofore essentially judicially disregarded any consideration of distribution or allocation of real or personal property acquired during the marriage by either or both spouses. Aliquot was believed to be the great leveler in adjusting the divorcing spouses' relative financial positions, but it failed significantly to achieve parity. The unfair results of the prior laws affecting marital dissolutions were amply demonstrated in the case of Leatherman v. Leatherman, in which the court found that the wife had no interest in her husband's corporation, formed during their thirty-year marriage, to which she had made significant non-monetary contributions.

The Act for Equitable Distribution of Marital Property was intended to be a remedial statute premised upon the recognition that marriage is "a partnership, a shared enterprise to which both spouses make valuable contributions, albeit in different ways." It is in this context that the North Carolina trial and appellate courts

2. Id.
4. Id. at 627, 256 S.E.2d at 798.
5. Id.
will wrestle with the dilemma commonly referred to as the “university degree-divorce decree” or the “student-spouse-working spouse” syndrome.

As of this writing, thirty-one states have rendered decisions as to whether a graduate or professional degree should be considered marital property. Only three states have judicially declared that graduate or professional degrees are distributable property. In a controversial and cogent opinion, the New York Court of Appeals (New York’s highest appellate court) ruled that a physician’s increased earning capacity resulting from a professional license to practice medicine obtained during the marriage is divisible property at divorce. In Michigan, one panel of a divided court of appeals ruled that the wife was entitled to a percentage share of the present value of earnings attributable to her husband’s law degree. In Massachusetts, a wife who supported her husband through graduate orthodontic training was deemed entitled to share in the value of her husband’s license.

gree and certificate of admission" 15 constituted an asset susceptible to distribution.

Appellate courts reject the concept of a graduate or professional degree as property, reasoning that an academic degree does not fall within the scope of traditional definitions of property, which include characteristics of an exchange value and nontransferability. 16 Other courts have found that the valuation of a degree, or the determination of the present value of the enhanced earning capacity arising therefrom, is either too speculative 17 or a mere expectancy interest. 18 Nevertheless, the majority of courts that reject the concept determine that equitable principles require that the working spouse be compensated in some manner for her or his contributions to the acquisition of the advanced degree earned by the student spouse during the course of the marriage. The courts have utilized multiple theories for compensation, including restitution based on unjust enrichment of the student spouse, 19 reimbursement, 20 periodic, lump sum, or distributive alimony awards, 21 and

18. See, e.g., In re Marriage of Weinstein, 128 Ill. App. 3d 234; Pacht, 13 Ohio App. 3d 363, 469 N.E.2d 918.
unequal property divisions.\textsuperscript{22}

This article will examine the concept of the advanced degree as property subject to equitable distribution in the context of the North Carolina equitable distribution of marital property statute and the prevalent theories of compensation to the working spouse within the scope of North Carolina's statutory property distribution and spousal maintenance schemes.

II. NORTH CAROLINA DOES NOT PER SE EXCLUDE GRADUATE AND PROFESSIONAL DEGREES FROM CONSIDERATION AS PROPERTY SUBJECT TO EQUITABLE DISTRIBUTION

North Carolina's equitable distribution statute sets out language providing for specific and expansive inclusions of property in the distributable marital estate\textsuperscript{23} and for specific exclusions by defining separate property.\textsuperscript{24} The statute does not specifically include

\begin{itemize}
  \item (Mo. Ct. App. 1982); Sullivan v. Sullivan, 37 Cal. 3d 762, 691 P.2d 1020 (1984); Lehmicke v. Lehmicke, 339 Pa. Super. 559, 489 A.2d 782 (1985). \textit{See also} Frausto, 611 S.W.2d 656; and \textit{Haugan}, 117 Wis. 2d 200, 343 N.W.2d 796.
  \item Geer v. Geer, 84 N.C. App. 471, 353 S.E.2d 427 (1987); Wilcox v. Wilcox, 173 Ind. App. 661, 365 N.E.2d 792 (1977); \textit{Jones}, 454 So. 2d 1006; \textit{Grosskopf}, 677 P.2d 814; Scott, 645 S.W.2d 193. \textit{See also} \textit{IND. CODE ANN. § 31-1-11.511(c) (Burns 1987)}.
  \item N.C. GEN. STAT. § 50-20(b)(1)(1983) provides:
    \begin{quote}
    For purposes of this section:
    `Marital Property' means all real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of separation of the parties and presently owned, except property determined to be separate property in accordance with subdivision (2) of this section. Marital property includes all vested pension and retirement rights, including military pensions eligible under the federal Uniformed Services Former Spouses' Protection Act.
    \end{quote}
  \item N.C. GEN. STAT. § 50-20(b)(2)(1983) provides:
    \begin{quote}
    `Separate Property' means all real and personal property acquired by a spouse before marriage or acquired by a spouse by bequest, devise, descent, or gift during the course of the marriage. However, property acquired by gift from the other spouse during the course of the marriage shall be considered separate property only if such an intention is stated
\end{itemize}
graduate or professional degrees from the marital estate. It provides only that, "All professional licenses and business licenses which would terminate on transfer shall be considered separate property." The authority to license, in general, is understood to be a statutory creation whereby a state or municipality is empowered to tax and regulate particular professions or occupations. North Carolina statutes specifically provide for the licensing and regulation of certain professional occupations as a prerequisite to the practice of those professions, which include physicians, certified public accountants, architects, and attorneys at law. Most courts either use the terms "degree" and "license" interchangeably or find that the terms are so inextricably connected as to make the distinction immaterial. However, one court distinguished a license and professional degree as follows:

The two are not the same. A degree is a marital investment, one which is subject to cost basis analysis. 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 intrinsic and intangible, and not equatable with dollar amounts as are things of extrinsic and tangible

in the conveyance. Property acquired in exchange for separate property shall remain separate property regardless of whether the title is in the name of the husband or the wife or both, and shall not be considered to be marital property unless a contrary intention is expressly stated in the conveyance. The increase in value of separate property and the income derived shall be considered separate property. All professional licenses and business licenses which would terminate on transfer shall be considered separate property. The expectation of nonvested pension or retirement or other deferred compensation rights shall be considered separate property.

In making an effort to distinguish a license from a professional degree, that case acknowledged the different nature of each asset, an issue that usually is ignored wholly by jurisdictions both recognizing that the advanced degree is property and rejecting the concept. However, North Carolina's equitable distribution statute intrinsically defines licenses as property, albeit separate property. The principles of statutory construction require that statutory language be given its plain and commonly understood meaning to effect the legislative intent. Clearly, the North Carolina legislature was prepared to embrace in the Equitable Distribution of Property Act a definition of property substantially broader than that recognized in a majority of states.

III. The Evolving Conceptual Basis of Property

In the fifty-three jurisdictions that have enacted statutory schemes for the division and distribution of marital assets upon divorce, recognizing legal and equitable principles of commonality of ownership, trial and appellate courts first classify an asset as either marital (or community property) or separate property. Unfortunately, few states have addressed the issue premised in their distributive statutes (e.g., what qualifies as "property"?), and the answer has evolved on a case by case basis with little uniformity of result.

Traditional concepts of property evolved from Blackstonian theory, which recognized as property only those things that had a physical existence and over which absolute dominion and control could be exerted. Alienability of property was considered an at-
tribute of dominion and control and became inextricably linked with the definition of property by traditionally oriented commentators and courts. As agrarian societies gave way to the progress of the Industrial Revolution, courts began to recognize more incorporeal and intangible interests such as goodwill, trade secrets, and mineral rights as falling within the definition of property and deserving the protection of the property laws. The physicalist principles of the Blackstonian concept of property allowed no protection for such interests and diminished the utility of the traditional property laws. The more modern and progressive view of property is synthesized in the Restatement of Property, which views property as a collection of legal relations between owners and nonowners. Owners of property are determined to have certain rights, privileges, powers, and immunities accorded them by virtue of ownership. Correlatively, non-owners have a set of duties, liabilities, or disabilities, but no rights relative to owners.

The majority of states that have considered the issue of whether a professional degree or license should be recognized as marital or community property subject to distribution have relied on traditional property concepts to circumvent including the degree or license in the marital estate. The rationale was best stated (and exhaustively cited thereafter) by Justice Lee of the Colorado Supreme Court in In re the Marriage of Graham. The rationale was articulated as follows:

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

40. 1 W. BLACKSTONE, COMMENTARIES 139 (1897); In re Marriage of Graham, 149 Colo. 429, 574 P.2d 75.
41. Note, supra note 37, at 310.
42. Id. at 310-11.
44. Id.
45. Id.
46. Id.
47. In re Marriage of Weinstein, 128 Ill. App. 3d at 239, 470 N.E.2d at 556.
value on an 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 the cumulative product of many years of previous education, combined with diligence and hard work. It may not be acquired by 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.50

It is apparent from this recital of the characteristics lacking in an advanced degree that the Supreme Court of Colorado and its successors in various jurisdictions rely primarily on the inalienability of the degree or license as a bar to its characterization as property, a reversion to Blackstonian property theory no longer viable in contemporary society. Conversely, under the Restatement view, an owner's bundle of property rights may contain less than all the available rights.51 Therefore, one may possess certain property interests in which he or she has no right of alienation, as in the case of a life tenant of an inalienable life estate.52 Courts that persist in justifying rejection of the graduate or professional degree or an advanced education as property by relying on traditional and limited notions of property run afoul of legislative efforts to broaden the definition of property and property rights deserving protection of the law, particularly in marital dissolution actions.53 Rather than require an asset or interest to exhibit all the traditional characteristics of property or lose its status as "property," the more progressive view recognizes as a protectible property right any valuable interest that public policy dictates should receive legal protection of the property laws.54 Community property and equitable distribution statutes reflect a public policy favoring recognition and protection of all valuable interests acquired by the spouses during the marriage. Such statutes require that courts reflect modern concepts of property as well. The provisions of the Uniform Marital Property Act (hereinafter UMPA) are in accord with the Restatement view. The UMPA's prefatory note discusses the underlying propositions governing the Act:

50. Id. at 77.
51. Note, supra note 37, at 312.
52. Id.
53. Id.
The first is the creation of an immediate sharing mode of ownership. The second proposition is that the sharing mode during marriage is an ownership right already in existence at the end of the marriage. Thus, recognition and perfection of shared and vested ownership rights in marital property are in place at divorce or death. They do not have to come to fruition as a result of a court-ordered and possibly adversary ‘division’ or by a statutorily-sanctioned ‘transfer.’

The UMPA’s premise is that property acquired during marriage is shared and that a present vested ownership right is attached to all property acquired by “the personal efforts of either during the marriage.” The UMPA defines property as any quantifiable interest “present or future, legal or equitable, vested or contingent, in real or personal property.” The ABA’s House of Delegates recommended adoption of the UMPA in 1984 and, in April 1984, Wisconsin adopted the Act, effective October 1, 1986. Legislation to adopt the UMPA is pending in other jurisdictions.

North Carolina historically has adopted a broad view of property rights that are to be afforded legal recognition and protection. In Wilson v. Charlotte, the North Carolina Supreme Court stated: “The word ‘property’ is not such a technical one, that if properly used it has everywhere the same precise and definite meaning. Its meaning varies according to the subject treated of, and according to the context.” In Hildebrand v. Telegraph Co., the supreme court noted, “[the] word ‘property’ extends to every aspect of right and interest capable of being enjoyed as such upon which it is practicable to place a money value.” North Carolina precedent and the underlying purposes of the equitable distribution statute suggest that the courts will interpret broadly the concept of property ownership interest, both intangible and incorporeal, in a man-

56. Id. at 23.
58. Uniform Marital Property Act, XI (15).
60. 74 N.C. 748, 755 (1875).
61. 219 N.C. 402, 408, 14 S.E.2d 252, 256 (1941). Cf. Sarnet v. Farmers and Merchant’s Nat’l Bank, 247 F. 669, 671 (4th Cir. 1917) commonly used to denote everything that is the subject of ownership, corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal, everything that has an exchangeable value or that goes to make up the wealth of an estate. It extends to every species of valuable right and interest and includes real and personal property, easements, franchises, and incorporeal hereditaments.
Equitable Distribution of Degrees

A second failing of courts that cite to traditional property notions is the tendency to ignore the fact that the category “marital property” is a legislative creation, has no precedent in historical property law, and should not be expected to fit within common-law property definitions. It is a statutory creature, is of no meaning whatsoever during the normal course of a marriage and arises full grown, like Athena, upon the signing of a separation agreement or the commencement of a matrimonial action. [Thus] it is hardly surprising, and not at all relevant that traditional common-law property concepts do not fit in parsing the meaning of ‘marital property.’

Chapter 50, Section 20(k) of the North Carolina General Statutes in effect legislatively creates a category of property heretofore unknown in North Carolina:

The rights of the parties to an equitable distribution of property are a species of common ownership, the rights of the respective parties vesting at the time of the filing of the divorce action.

In effect, marital property rights are inchoate rights, arising from joint and several vested ownership rights during the marriage, which accrue and become fixed when a spouse files for dissolution. Although there are no appellate decisions interpreting section 50-20(k), a literal understanding of the provision read in pari materia would suggest an analysis similar to that found in the UMPA.

Third, those states that hesitate to relinquish antiquated property concepts in categorizing assets as property for the purposes of equitable distribution or community property division ignore the social and legislative history leading to the enactment of modern marital dissolution statutes in nearly every state and the District of Columbia. Many states that enacted equitable distribution statutes were formerly “title” states, where upon divorce the spouse who held the undivided title to property retained the

asset free of any claim of his or her spouse. This "title" theory of marital and separate property resulted in gross inequities to the non-titled spouse who might have made significant monetary and non-monetary contributions to the marriage. To adjust the equities, the majority of state legislatures enacted equitable distribution and community property statutes that factored into the property distribution equation consideration of all circumstances relevant to the nature of the asset, its acquisition and value, to determine a just division of assets in the dissolution action.

The conceptual underpinning of the North Carolina equitable distribution statute is that marriage is a partnership in which there are economic elements. Both spouses' contributions to the partnership should be recognized and rewarded as a return on the investment as spouse, homemaker, wage-earner or parent and for conduct supportive of the other's education and career. The language of the North Carolina statute significantly tracks the language of section 236 of the New York Domestic Relations Law, which sets out that state's equitable distribution procedures. North Carolina has relied on New York precedent in its appellate rulings in the equitable distribution field, and therefore the correlation of the language of the New York statute to North Carolina's statute is instructive in light of the O'Brien decision. In O'Brien, the New York Court of Appeals analyzed the language of its domestic relations law with reference to whether a professional license earned during marriage should be considered marital property.

Section 236 provides that in making an equitable distribution of marital property 'the court shall consider: . . . (6) any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services as a spouse, parent, wage-earner and homemaker, and to the career or the career potential of the other party [and] . . . (9) the impossibility or difficulty of evaluating any component asset or interest in a business; corporation, or profession'.

North Carolina's statute provides:

Factors the court shall consider under this subsection are as follows . . . (6) any equitable claim to, interest in, or direct or

66. 489 N.E.2d at 716.
67. Id.
68. 66 N.Y.2d 576, 489 N.E.2d 712.
69. Id. at 584, 489 N.E.2d at 715-16.
indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services, or lack thereof, as a spouse, parent, wage-earner, or homemaker; (7) Any direct or indirect contribution made by one spouse to help educate or develop the career potential of the other spouse; . . . (10) The difficulty of evaluating any component asset or any interest in a business, corporation or profession . . . 70

Of this parallel language in the New York statute the New York Court of Appeals stated:

The words mean exactly what they say: That an interest in a profession or professional career potential is marital property which may be represented by direct or indirect contributions . . . made by caring for the home and family. The Legislature has decided, by its explicit reference in the statute to the contributions of one spouse to the other's profession or career (citations omitted) that these contributions represent investments in the economic partnership of the marriage and that the product of the parties' joint efforts, the professional license should be considered marital property. There is no reason in law or logic to restrict the plain language of the statute to existing practices, however, for it is of little consequence in making an award of marital property, except for the purpose of evaluation, whether the professional spouse has already established a practice or whether he or she has yet to do so.71

The essence of the North Carolina statute is that the contributions of both spouses, monetary and non-monetary, be recognized and ultimately quantified. Given the remedial nature of the statute, the underlying marriage-as-partnership theory, and the broad definition of property interests inherent in the statute itself, it would be consistent for North Carolina, as New York and other minority jurisdictions have done, to recognize the graduate or professional degree as a property interest subject to equitable distribution if the statutory requirements for a finding of "marital property" are satisfied.

IV. COMPENSATION OF THE WORKING SPOUSE FOR CONTRIBUTIONS TO THE ACQUISITION OF A STUDENT SPOUSE'S ADVANCED DEGREE

The majority of jurisdictions that have rejected the concept of

an advanced degree as property have developed varying responses
to the dilemma of fairly compensating the non-degree earning
spouse for his/her contributions to his/her spouse's acquisition of
the degree, which obviously will afford the student spouse en-
hanced future earning capacity. 72 North Carolina adopted this re-
response in the appellate decision of Geer v. Geer. 73

A. Compensation by Alimony or Spousal Maintenance Awards

Spousal maintenance awards are generally based solely on the
actual monetary need of the dependent spouse. 74 In a minority of
states, marital misconduct is a complete bar to alimony or can
serve as a basis for reduction or disallowance of alimony. 75 While
compensation for investment in a professional degree earned by
one's spouse by means of a spousal maintenance award is intellec-
tually problematical in that maintenance is premised on considera-
tion of the actual monetary needs of the dependent spouse to
maintain the standard of living enjoyed during the marriage, it is
not intended to be a device to achieve financial parity between the
parties in the context of a property distribution. Nevertheless, a
substantial number of courts have looked to their spousal mainte-
nance statutes to effect economic justice in these circumstances.
Twenty-three 76 states have enacted statutes permitting their trial
courts to award rehabilitative maintenance for a period of time to
enable the dependent spouse to become economically viable. How-
ever, many states have utilized their statutes for reimbursement
and property division purposes because of an unwillingness to rec-
ognize a graduate or professional degree as marital property. 77 The

72. Supra notes 19-22.
    L. Q. 331, 369 (1986).
75. Id. at 369; Alabama, Connecticut, District of Columbia, Florida, Georgia,
    Hawaii, Idaho, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Mis-
    souri, New Hampshire, North Carolina, North Dakota, Pennsylvania, Rhode Is-
    land, South Carolina, South Dakota, Tennessee, Virginia, West Virginia, and Pu-
    erto Rico.
76. 1985 Survey of Family Law, 11 Fam. L. Rev. 3015, 3017-18 (1985); Ar-
    izona, California, Colorado, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana (for
    incapacitated spouse only), Iowa, Kansas, Louisiana, Maryland, Minnesota, Mis-
    souri, New Hampshire, New York, Oregon, Pennsylvania, Tennessee, Vermont,
    Washington, Wisconsin.
77. Hubbard v. Hubbard, 603 P.2d 747; Mahoney v. Mahoney, 91 N.J. 488,
Supreme Court of New Jersey justified this approach in an inconsistent analysis:

To provide a fair and effective means of compensating a supporting spouse who has suffered a loss or reduction of support, or has incurred a lower standard of living, or has been deprived of a better standard of living in the future, the Court now introduces the concept of reimbursement alimony in divorce proceedings. This concept properly accords with the Court’s belief that regardless of the appropriateness of permanent alimony or the presence or absence of marital property to be equitably distributed, there will be circumstances where a supporting spouse should be reimbursed for the financial contributions he or she made to the spouse’s successful professional training.78

A basic purpose of alimony relates to the quality of economic life to which one spouse is entitled and which becomes the obligation of the other. Alimony has to do with support and standard of living. This approach’s inconsistency was criticized in a subsequent New Jersey case, Reiss v. Reiss,79 in which the court pointed out that alimony and reimbursement are theoretically inapposite.

Alimony is ‘future sustenance and support’ for a divorced person payable by a former spouse, Black’s Law Dictionary (5th ed. 1979), and its award generally involves a determination of the future needs of the recipient and the future ability of the former spouse to pay. The past is relevant only to determine the standard of living to which the recipient became accustomed during coverture. On the other hand, ‘reimbursement’ involves a determination of what was paid in the past. It has nothing to do with the future needs of the recipient or the future income of the payer. It is remarkably similar to the return of a financial advance or investment. Thus, the determination of alimony essentially looks to the future, while reimbursement looks to the past.80

Awarding compensation as reimbursement alimony has the advantages of non-dischargeability in bankruptcy proceedings, and deductibility from the payor’s gross income, provided the statutory and regulatory requirements are met.81 Conversely, alimony awards are includible in the income of the recipient, terminable upon re-

78. Mahoney v. Mahoney, 91 N.J. at 501, 453 A.2d at 534; See also In re Lundberg, 107 Wis. 2d 1; In re Weinstein, 128 Ill. App. 3d 234.
80. Id. at 125, 490 A.2d at 379.
marriage or death, are discretionary with the court, and difficult to collect if paid over a period of years. \(^2\) In addition, alimony has the nebulous quality of being modifiable, \(^3\) an obvious disadvantage and disincentive to the recipient spouse. Two jurisdictions recognize that modifiability of an alimony award which in effect was a distributive award arising out of a property division ultimately could defeat the intention of the trial court to do equity between the parties. \(^4\) These jurisdictions have ruled that reimbursement alimony awards are not modifiable.

The use of the alimony statutes to award financial compensation to a non-student spouse is fraught with pitfalls common to many jurisdictions. If North Carolina's alimony statutes were to be utilized in this manner, the pitfalls would be self-evident. As a prerequisite to an award of alimony in North Carolina, the spouse seeking support must affirmatively prove that the spouse from whom alimony is sought is guilty of marital fault. \(^5\) The states

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83. Lira v. Lira, 68 Ohio App. 2d 164; Stevens v. Stevens, 23 Ohio St. 2d 115.

Grounds for Alimony: A dependent spouse is entitled to an order for alimony when:
(1) The supporting spouse has committed adultery.
(2) There has been an involuntary separation of the spouses in consequence of a criminal act committed by the supporting spouse prior to the proceeding in which alimony is sought, and the spouses have lived separate and apart for one year and the plaintiff or the defendant in the proceeding has resided in this State for six months.
(3) The supporting spouse has engaged in an unnatural or abnormal sex act with a person of the same sex or of a different sex or with a beast.
(4) The supporting spouse abandons the dependent spouse.
(5) The supporting spouse maliciously turns the dependent spouse out of doors.
(6) The supporting spouse by cruel or barbarous treatment endangers the life of the dependent spouse.
(7) The supporting spouse offers such indignities to the person of the dependent spouse as to render his or her condition intolerable and life burdensome.
(8) The supporting spouse is a spendthrift.
(9) The supporting spouse is an excessive user of alcohol or drugs so as to render the condition of the dependent spouse intolerable and the life of the dependent spouse burdensome.
(10) The supporting spouse willfully fails to provide the dependent spouse with necessary subsistence according to his or her means and con-
break down relatively evenly with respect to considering marital fault as a factor in the distribution of marital property. However, North Carolina's equitable distribution statute, which contains no legislative mandate requiring consideration of marital fault, has been judicially interpreted to exclude consideration of marital fault (such as would underlie an award of alimony) with the exception of economic fault. Thus, to utilize the North Carolina alimony statutes to effect compensation (in reality a property distribution or reimbursement) would be antithetical to the purposes of the equitable distribution statute, which are to make property distribution without reference to marital fault of the kind premised in the alimony statutes. Additionally, the fault requirements of the alimony statutes automatically would disqualify from reimbursement or distributive alimony awards spouses found to have committed adultery and, potentially, those spouses found to have committed lesser marital offenses.

Another troublesome and limiting aspect to the utilization of the alimony statutes to compensate the working spouse is the common requirement that an award of alimony be based on need. Where courts require a working spouse to meet the threshold requirements of dependency before awarding alimony, it is unlikely that the spouse who supported the student spouse and the family for a period of years will meet basic dependency standards. In North Carolina, the legislature requires the spouse seeking support

87. N.C. GEN. STAT. § 50-16.6 (Cum. Supp. 1986) provides:
(a) Alimony or alimony pendente lite shall not be payable when adultery is pleaded in bar of demand for alimony or alimony pendente lite made in an action or cross action, and the issue of adultery is found against the spouse seeking alimony . . .
(b) Except as provided in G.S. 50-16.6 in case of adultery, the fact that the dependent spouse has committed an act or acts which would be grounds for alimony if such spouse were the supporting spouse shall be grounds for disallowance of alimony or reduction in the amount of alimony when pleaded in defense by the supporting spouse. (Citations omitted).
to demonstrate dependency in addition to marital fault. 90 This statutory prerequisite has been interpreted to mean that a dependent spouse must demonstrate that he or she is unable to maintain his or her accustomed standard of living established in the several years prior to the separation. 91 Because when the working spouse supports the acquisition of her or his spouse's advanced degree the marriage's early years are typically lean, it would be impossible for a spouse seeking such an award to demonstrate a standard of living which he or she had sacrificed in order to realize in the future. Thus, without sweeping legislative changes, the North Carolina alimony statutes appear to preclude use in effecting compensation by a distributive alimony award to a working spouse who supported the acquisition of his/her spouse's advanced degree. The Geer 92 holding did not choose alimony as the appropriate means of compensating the contributing spouse, and it is unlikely that later appellate decisions will find alimony an appropriate method of achieving economic parity in the arena of the education degree.

B. Compensation by Restitution

A few courts have responded to the student/working-spouse dilemma by formulating a theory of compensation for the working spouse based on principles of restitution, as distinguished from the theory of compensation based on reimbursement. In order to be entitled to restitution, a working spouse would have to demonstrate that the student spouse received a benefit by acquiring the degree during the marriage, that he or she was unjustly enriched at the expense of the working spouse, and that the student spouse will retain all the benefits conferred by the degree to the exclusion of the working spouse. In restitution theory, principles of fairness and equity mandate that the spouse retaining the benefits of the degree make compensation. 93 However, the mere fact that the student spouse retains the benefit of the degree alone is insufficient —

90. N.C. GEN. STAT. § 50-16.1(3) (Cum. Supp. 1986) provides: 'Dependent spouse' means a spouse, whether husband or wife, who is actually substantially dependent upon the other spouse for his or her maintenance or support, or is substantially in need of support and maintenance from the other spouse. See also Pacht v. Judd, 13 Ohio App. 3d 363, 469 N.E.2d 918 (1983).
the retention must be unjust." The Supreme Court of Washington rejected this approach in *Washburn v. Washburn.* In *Washburn,* the court reasoned that the necessity of a finding that the student spouse had been unjustly enriched by the efforts of the working spouse would invite introduction of evidence as to the relative marital fault of the parties in the distribution proceeding. While the objection is of minimal concern in those jurisdictions that already permit introduction of fault evidence, in those states that exclude all consideration of marital fault this approach would be philosophically untenable. Some states, however, such as North Carolina, allow introduction of evidence with regard to economic fault. The relevant evidence of unjust enrichment would necessarily involve economic factors such as marital funds expended for educational expenses and maintenance of the family, lost earnings of the student spouse as well as lost income of the working spouse who may have foregone career opportunities, current earning potential of both spouses, and educational and other debts incurred in support of the student spouse. Therefore, such evidence of unjust enrichment would not be antithetical to the statute or judicial interpretation. While that evidence would have substantial emotional appeal in the typical situation where the student spouse (usually the husband) leaves the working spouse because of involvement with a third party, it has no economic relevance and should be excluded. However, the disparity of the relative future earning capacities of the spouses and foregone career advancements or educational opportunities with consequent loss of past and future earnings could easily establish economic "unjustness" directly resulting from the investment of the marital community in the student spouse's advanced degree. Clearly the restitution approach to compensation would not be precluded under the North Carolina equitable distribution statute on the basis of economic fault considerations.

A minority of jurisdictions have adopted the restitution approach to compensation. North Carolina is so far not among

94. Id.
96. Id. at 176, 677 P.2d at 157.
97. Freed and Walker, supra note 74, at 361.
98. Id. at 361; see supra note 85.
99. Washburn, 101 Wash. 2d 175, 677 P.2d 152.
100. Lynn, 91 N.J. 510, 453 A.2d 539.
them. However, while some of the cases frame the remedy in terms of restitution and unjust enrichment, in effect these courts are making reimbursement. 102 Conversely, some states utilizing the reimbursement theory of compensation for the working spouse in effect have fashioned a restitution-based remedy without any overt reference to unjust enrichment. 103 The distinction between the restitution and reimbursement remedies as articulated in the cases is that reimbursement allows a straight recoupment of monies expended and income foregone, while restitution permits a working spouse to realize the quantified present value of his or her contributions to the attainment of the degree. 104 In Haugen v. Haugen, 105 the Supreme Court of Wisconsin discussed methods of compensation available to a trial court to compensate appropriately a wife who supported her husband through medical school and residency. The court explained the restitutional remedy:

One approach the trial court may consider is the cost value approach whereby it calculates the value of the supporting spouse's contributions, not only in terms of money for education and living expenses but also in terms of services rendered during the marriage . . . the fair market value of homemaking services might be considered along with . . . financial input. Furthermore, the trial court should consider adjusting the value of the supporting spouse's contributions by a fair rate of return or for inflation. Such an award is restitutional in nature. 106

Only by including a calculation of the present value of the monetary and quantifiable non-monetary contributions of the working spouse to attainment of the student spouse's degree, as of the time that the distribution of property is to become effective, can restitution effectively be achieved.

Some courts and commentators have also been supportive of an approach to compensation denominated the "opportunity cost"
EQUITABLE DISTRIBUTION OF DEGREES

This theory recognizes and compensates for income lost by the family unit when the student spouse attends school rather than continuing employment, or for income foregone by the family unit when the working spouse takes a lower paying position to relocate with the student spouse or forfeits promotional opportunities. The inclusion of quantifiable lost income of either spouse which was a direct result of the student spouse attending school fits neatly within the restitution theory in dissolution actions.

North Carolina's equitable distribution statute mandates consideration by the court of "direct or indirect contributions" to the education or career potential of the other spouse. Although the North Carolina Court of Appeals did not utilize the restitutionary framework in Geer, the statutory language is in place to justify a broad restitution approach. This writer suggests that, since the North Carolina court has not thus far indicated its willingness to recognize the professional degree as property, restitution is an appropriate means of compensation under the statute. Such compensation should include "lost opportunity" income as a justifiable "indirect contribution."

C. Compensation by Reimbursement

A number of courts, including North Carolina, have approved the theory of reimbursement in the context of a property division to compensate the working spouse for contributions to the acquisition of the student spouse's advanced degree. Some courts that actually have awarded a form of reimbursement to the working spouse have denominated their remedy as restitution. This is a misnomer. Black's Law Dictionary defines reimbursement as repayment for that which is expended, or making one whole. Restitution, on the other hand, is defined as restoration of both parties to their original condition, or the act of giving equivalent for loss. A classic example of this malapropism is found in the often cited case of DeLa Rosa v. DeLa Rosa. In DeLa Rosa, the wife

107. Id. at 213, 343 N.W.2d at 803.
108. Id.
111. BLACK'S LAW DICTIONARY 1157 (5th ed. 1979).
112. Id. at 1180-81.
113. 309 N.W.2d 755 (Minn. 1981).
worked full-time to support her husband through the balance of his undergraduate education and two and one-half years of medical school before the parties separated. The husband obtained his medical degree after the dissolution of the marriage. In its opinion, the Minnesota Supreme Court, while denominating the remedy as restitutional in nature, stated:

It is this court's view that the award should have been limited to the monies expended by respondent for petitioner's living expenses and any contributions made toward petitioner's direct educational costs. To achieve this result, we subtract from respondent's earnings her own living expenses. This has the effect of imputing one-half of the living expenses and all the educational expenses to the student spouse. The formula subtracts from respondent's contributions one-half of the couple's living expenses, that amount being the contributions of the two parties which were not used for direct educational costs . . . .

This formula achieves nothing more than a return of monies expended by the working spouse. It makes no adjustment for the present value of the expended funds. In DeLa Rosa, the wife had provided support to the husband from 1972 to 1977 while he attended school. However, she did not receive any funds from the reimbursement award (or interest thereon) until 1981, nearly ten years after the initial contributions were made and four years after the parties separated. Clearly, the reimbursement award in DeLa Rosa not only was not adequate but was not restitution. Similarly in Lehmicke v. Lehmicke the court adopted the equitable principles articulated in Mahoney v. Mahoney where the New Jersey Supreme Court awarded compensation to the working wife of a student spouse through reimbursement alimony. In Lehmicke, the allowable items of reimbursement were monetary contributions toward the student spouse's educational costs including household expenses, education-travel related expenses, and "other contributions" accepted by the student spouse. In addition, the court considered the parties' relative contributions to the support of a child born while Dr. Lehmicke pursued his degree. The court

114. Id. at 756.
115. Id. at 759.
117. Id. at 564, 489 A.2d at 787; see infra § IV C of this article.
119. Id. at 564, 489 A.2d at 787.
made no provision to assess the present value of the enumerated expenditures even though Mrs. Lehmicke's financial support of her husband's educational pursuits lasted from 1970 to 1973, and the final decision in the case was not rendered until 1985.\textsuperscript{120}

The theory of compensation by reimbursement was raised to new heights of confusion in \textit{Inman v. Inman}.\textsuperscript{121} While ostensibly approving the reimbursement theory, it made nonsense of the property and reimbursement theory.

\textit{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 \textit{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}.\textsuperscript{122}

Obviously, the value of the advanced degree is quantified by calculating enhanced earning capacity. The distinction between the value of an advanced degree \textit{per se} and the value of the enhanced earning capacity resulting from the acquisition of the degree is semantic at best. To declare that the professional degree is not property and then to place a value on that degree with reference to the potential increase in earning capacity made possible by the degree is anomalous.\textsuperscript{123}

\begin{itemize}
  \item \textsuperscript{120} Lehmicke v. Lehmicke, 339 Pa. Super. 559, 489 A.2d 782 (1985).
  \item \textsuperscript{121} 648 S.W.2d 847 (Ky. 1982).
  \item \textsuperscript{122} \textit{Id.} at 852. (emphasis added).
  \item \textsuperscript{123} The converse analysis is presented in an article by Mullenix, \textit{The Valuation of an Educational Degree at Divorce}, 16 \textit{LOYOLA L.A.L. REV.} 227 (1983), where the author in the process of valuing an educational degree promotes a restitution theory of compensation. Mullenix engrafts the labor theory on valuation of an educational degree, i.e., the value of an education is the labor time it took to acquire it, and what the student spouse owes back to the family at the time of divorce. Thus the working spouse becomes entitled to support at fifty percent of
\end{itemize}
In *In re Marriage of Sullivan*, the Supreme Court of California withheld opinion on an appeal from the trial court’s denial of compensation for the wife’s contributions to her husband’s professional education during marriage, in deference to pending legislation amending California’s Family Law Act. The amendment to the Family Law Act provides for reimbursement to the community for “community contributions to education or training of a party that substantially enhances the earning capacity of a party.”

the professional spouse’s actual income for the same period of time it took for the student spouse to earn the degree. This entitlement would be awarded without regard to the direction of the marriage or accumulation of other assets. This approach ignores the realities obvious to any practitioner: (1) the student spouse’s income must be tracked annually for a period of years; (2) the student spouse’s income may be minimal for the early years of practice; or (3) the spouse may defer or depress his income for the allowed time period. These writers’ primary objection to Mullenix’s approach is that there is simply no rational relationship to or reward of the working spouse’s non-monetary or monetary contributions.

125. *Id.* at 767, 691 P.2d at 1023, nn. 3-4, quoting CAL. CIV. CODE §§ 4800, 4800.3, 4801 (West 1984) (as amended). That section provides further in pertinent part:

3. Chapter 1661 amended sections 4800 and 4801 of the Civil Code and added section 4800.3. At the time of filing of this opinion, the changes had not been published in code form. Accordingly, the citations in this opinion are to session and chapter members.
4. The reimbursement provision states in full: Section 4800.3 is added to the Civil Code, to read:

(a) As used in this section, ‘community contributions to education or training’ means payments made with community property for education or training or for the repayment of a loan incurred for education or training.

(b) Subject to the limitations provided in this section, upon dissolution of marriage or legal separation:

(1) The community shall be reimbursed for community contributions to education or training of a party that substantially enhances the earning capacity of the party. The amount reimbursed shall be with interest at the legal rate accruing from the end of the calendar year in which the contributions were made.

(2) A loan incurred during marriage for the education or training of a party shall not be included among the liabilities of the community for the purpose of division pursuant to Section 4800 but shall be assigned for payment by the party.

(c) The reimbursement and assignment required by this section shall be reduced or modified to the extent circumstances render such a disposition unjust, including but not limited to any of the following:

(1) The community has substantially benefited from the education, training or loan incurred for the education or training of the party. There
Based on the amendment to the California Family Law Act, the California Supreme Court reversed and remanded with instructions to calculate appropriate reimbursement compensation to the wife. Pursuant to Section 4800.3(b)(1) of the California Civil Code, reimbursement must include "interest at the legal rate accruing from the end of the calendar year in which the contributions were made." While the California reimbursement statute does not address calculation of the present value of contributions by the working spouse, allowing interest will result in a closer approximation of present value and a fairer adjustment between the parties. The idea of reimbursement in equitable distribution and community property decisions is, unfortunately, rarely well thought out, and little meaningful guidance was available for the North Carolina Court of Appeals to consider when it adopted the reimbursement theory of compensation in Geer v. Geer.

Geer solidly embraces the reimbursement theory, and the holding is clearly patterned after decisions of other states. However, Geer suffers a major flaw in its treatment of reimbursement economics.

is a rebuttable presumption, affecting the burden of proof, that the community has not substantially benefited from community contributions to the education or training made less than 10 years before the commencement of the proceeding. . . .

(2) The education or training received by the party is offset by the education or training received by the other party for which community contributions have been made.

(3) The education or training enables the party receiving the education or training to engage in gainful employment that substantially reduces the need of the party for support that would otherwise be required.

(d) Reimbursement for community contributions and assignment of loans pursuant to this section is the exclusive remedy of the community or a party for the education or training and any resulting enhancement of the earning capacity of a party. However, nothing in this subdivision shall limit consideration of the effect of the education, training or enhancement, or the amount reimbursed pursuant to this section, on the circumstances of the parties for the purpose of an order for support pursuant to Section 4801.

(e) This section is subject to an express written agreement of the parties to the contrary.

126. 691 P.2d at 1023.
127. See supra notes 95-101 and accompanying text.
The court of appeals’ decision in Geer is logically consistent with North Carolina’s equitable distribution statute. Our state’s equitable distribution statute, while expressly treating professional licenses as separate property, also expressly states that a court must consider in equitable distribution actions “[a]ny direct or indirect contribution made by one spouse to help educate or develop the career potential of the other spouse.”\(^{130}\) The North Carolina Court of Appeals in Geer based its decision to affirm the trial court’s order of reimbursement for the contributing spouse on this statute and allowed reimbursement for both direct and indirect contributions made by the contributing spouse to the professional spouse’s education.\(^\text{131}\)

In Geer, the wife supported her husband throughout his undergraduate education. Later, the wife continued her education in medical school, and her husband gave up his job so he could move out of state with her. The husband was subsequently unable to find commensurate employment, but he contributed to the family support throughout the years that the wife was in medical school. The wife also worked during her graduate education to support the family unit.\(^\text{132}\)

The trial court in Geer ordered the plaintiff/wife to execute a deed to the marital residence to the defendant/husband as a method of satisfying reimbursement to the husband for his contributions to the plaintiff’s advanced degree.\(^\text{133}\) Considered as reimbursable “costs of medical education” by the trial court were moving costs, extra child care costs, costs in selling homes, and tuition and supplied expenses.\(^\text{134}\)

The appellate court recognized the contributions of both plaintiff and defendant in defraying the costs of the plaintiff’s medical education and remanded to the trial court that portion of the judgment allowing the defendant credit only for his contributions.\(^\text{135}\) Also, the North Carolina Court of Appeals disallowed costs of the sale of two homes as indirect costs of the medical education but allowed moving costs and extra child care costs to be included in the category of indirect costs of the plaintiff’s

\(^{131}\) 84 N.C. App. at 478, 353 S.E.2d at 431.
\(^{133}\) Id. at 474, 475, 353 S.E.2d at 429.
\(^{134}\) Id. at 477, 353 S.E.2d at 430.
\(^{135}\) 84 N.C. App. 471, 479-80, 353 S.E.2d 427, 432.
The serious flaw in the *Geer* decision is that the court of appeals failed to award to Mr. Geer reimbursement equivalent to the present value of his out-of-pocket expenditures. Absent a present value calculation, Mr. Geer could not be made whole, since the 1987 reimbursement came fully nine years past the monies spent in contribution. Basic economic theory dictates that such an adjustment be made in order to achieve a balance of reimbursement and compensation.

*Geer* also falls short, though not as seriously, in its failure to recognize non-monetary contributions of one spouse to the other's professional education. Though perhaps not as readily quantifiable as out-of-pocket expenditures, the contributions of homemaking and child care are certainly an essential part of maintaining the family unit during the professional spouse’s education. Government publications are replete with calculations of the value of homemaker/child care worker labor, and these types of data provide a solid basis for quantifying such non-monetary contributions to the degree acquisition.

### D. Compensation by Property Division

A minority of states denying recognition of a degree as property subject to distribution have resolved the compensation issue by making disproportionate awards to the working spouse from the assets of the marital estate, often with additional distributive cash awards. The difficulty with disproportionate property distribution in the context of compensating the non-degree earning spouse is that, typically, all the marital resources have been channeled into educational costs and family maintenance, with the result that there is little accumulation of potentially distributable marital assets. The decisions of several cases where the remedy was a disproportionate property distribution reveal that some assets had been accumulated that constituted a marital estate. In *In re the Marriage of Weinstein*, the parties had accumulated a marital estate worth $120,000.00. After declaring that the husband’s graduate degree was not a marital asset, the court awarded sixty-two percent of the marital estate to the wife, and thirty-eight percent to

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136. *Id.* at 480, 353 S.E.2d at 432.
137. 84 N.C. App. 471, 480, 353 S.E.2d 427, 432.
Similarly, in Wilcox v. Wilcox, a wife was awarded 100 percent of the total marital assets and an additional $3,000.00 in cash when the court ruled that the future earnings of the husband, a tenured professor, were not property subject to distribution upon dissolution. In one case where the court ordered a $12,000.00 "property settlement" which caused the wife to receive in excess of 100 percent of the marital assets, the Missouri Court of Appeals specifically noted that the husband had in excess of $18,000.00 in separate property from which to pay the award. Clearly, this remedy has only limited utility which is severely limited by a minimal or non-existent marital estate or by a student spouse with little liquidity in separate property.

North Carolina's equitable distribution statute provides for a distributive award "in order to achieve equity between the parties." Thus, North Carolina trial courts could utilize a combination of an unequal property division and an installment cash award to compensate a working spouse who is found to have made substantial monetary and non-monetary contributions in support of a student spouse's attainment of his/her educational goals.

V. Valuation of a Graduate or Professional Degree

A number of those courts, having determined that the professional license or degree may not be fairly characterized as property capable of distribution, have advanced the argument that the valuation of a license or degree, or the future earning capacity to be derived therefrom, is too speculative and cannot be accurately quantified for purposes of distribution. The primary rationale is that the valuation of such an event as the initiation or continua-

139. Id. at 246, 470 N.E.2d at 555.
141. Id. at 666, 365 N.E.2d at 794.
142. See also Grosskopf v. Grosskopf, 677 P.2d 814 (Wyo. 1984), where the trial court divided a marital estate of $72,000.00 equally but assigned liabilities of nearly $45,000.00 to the husband resulting in a net negative liability of approximately $9,000.00 as the husband's marital share.
144. Id. at 197.
tion of a professional practice, or of such an uncertain amount as the worth of the degree over an indeterminate duration of practice, is so uncertain as to be meaningless. In *Lesman v. Lesman*, the New York Appellate Court wrote:

> [I]t is almost impossible to predict what amount of enhanced earnings, if any, will result from a professional education. The degree of financial success attained by those holding a professional degree varies greatly. Some even may earn less from their professional practices than they could have earned from non-professional work. Moreover, others, due to choice or factors beyond their control, may never practice their profession.

While it cannot be argued that the valuation of a professional degree or license may be more difficult than the valuation of certain tangible assets, the valuation of intangible property interest has been successfully performed by courts since the turn of the century. In such heavily litigated issues as future earning capacity in wrongful death or personal injury cases and the goodwill involved in a professional practice, the North Carolina courts have managed to tackle valuation with apparent agility and with satisfactory results. Other jurisdictions have recorded similar success in these and other areas of litigation, including pain and suffering and mental distress.

One commentator analogizes the valuation of the professional degree to valuation of money, noting that what is being measured in both cases are things not intrinsic to the physical items but the “exchangeability” of money and education as a socially imputed value. The readily ascertainable value of money is provided by the currency itself, but the actual value itself is as fully intangible

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147. *Id.*
as the value of education. These commentators note that both the methodology and the statistics necessary to measure enhanced earning capacity improved by a degree have long been utilized by courts. Courts which have recognized the professional degree or license as property subject to distribution acknowledge the similarity of these cases to others where intangibles have been evaluated, and these courts are singularly unimpressed by the argument that current valuation techniques are inappropriate or inadequate.

That education has an economic value is established by United States Department of Commerce statistics which demonstrate that the greater the number of years of education, the greater the individual's earning capacity. The next step is to measure the difference between the earning capacity prior to earning the degree and the earning capacity demonstrated or expected upon its attainment. The following valuation methods have been utilized by courts to calculate the value of an advanced or professional degree.

In order to determine the portion of future earnings subject to distribution upon marital dissolution, two preliminary steps must be taken: (1) a determination of the future earning capacity of the student spouse as of the date of the parties' separation, taking into account the degreed spouse's age; and (2) determination of the portion of earnings attributable to the educational degree.

A. Establishing Actual Future Earning Expectancy

The process begins by determining future earning expectancy based on age and annual rate of income calculated from the separation date as well as the expected length of future employment;

152. Id.
153. Id.
156. Fitzpatrick and Doucette, supra note 151, at 515, citing the U. S. Department of Commerce finding that: "on the average, a person with an elementary school education has a lifetime earnings expectancy of approximately $325,000.00 in 1972 dollars. The corresponding figure for a high school graduate is $450,000.00, and for a college graduate $725,000.00."
157. Id. at 516.
158. Id.
both are ascertained from data relating to the particular profession. These factors are overlaid by the variables of inflation, labor productivity, and the professional's "age-earning" cycle (a statistic which takes into account advancing age, education, and experience). From these calculations, a total future income figure is reached. The total future income figure is then adjusted to factor in the possibility that the professional may die or become disabled prior to realization of the total future income. Finally, the adjusted future income is discounted to "present value," a figure which reflects the theoretical interest earned by the future income and the inflation rate that will operate upon the future income.

B. Establishing Proportion of Future Earnings Attributable to the Educational Degree

The value of a degree is the difference between the degree-enhanced earning capacity (as established by the above calculation) and the earning capacity of the individual, at the same present age, had he or she foregone the advanced educational opportunity represented by the degree. To calculate the figure for the annual income for the individual's work without the professional degree and the annual income with the degree, statistics must be obtained from the Bureau of Labor pertinent to the professions in the location where the individual is and will be employed. The income for the professional after the degree and before the degree will be affected differently by the overlaid factor of the age-earning cycle. The final step is to apply the subtraction process described earlier, namely to subtract from the present value amount of the professional's future earnings expectancy with the degree the present value amount of the future earnings expectancy had the individual continued at the employment for which he/she would have qualified without the degree. The result is the present value of the professional degree, the intervening factor between the two levels of employment.

159. Id. at 517.
160. Id.
161. Id.
162. Id. at 518.
163. Id. at 519.
164. Id. at 520.
165. Id.
C. Establishing the Portion of the Professional Degree Includable in the Marital Estate

Two methods have been developed for determining the portion of the degree attributable to the efforts and expenditures of the marital community. The first and less complicated strategy involves comparing the number of marital years during the degree process to the total number of years necessary to obtain the degree and applying the pro-rated number as a fraction to the total economic value of the professional degree. 166 This method presumes that each year of the professional degree process has an equivalent impact upon the increased ability to earn attributable to the degree. 167 The resulting calculation is as follows:

\[
\text{Present Value of Education Degree} - \frac{\% \text{ of Marital Years Invested in Degree}}{\text{Degree Attributable to Marital Estate}} = \text{Present Value of Degree Attributable to Marital Estate}
\]

The second method is to calculate the difference between the individual’s earning capacity with the professional degree and the earning capacity of the individual who theoretically left professional education on the date of marriage. 168 An added variable appears with this formulation in those cases where a portion of the education has already been completed when the marriage begins. Therefore, the added year(s) of professional education must be factored in and the total educational years, while not sufficient for the professional degree, may be analogized to a Master’s Degree in the degree field. 169 The valuation procedure remains the same as previously detailed, so that the present value of future earning capacity with a Master’s Degree is subtracted from the present value of the future earning capacity with the completed professional degree. 170 The result is the present value of future earning capacity or the professional degree acquired during the marriage and subject to distribution upon marital dissolution. 171

D. Analysis of the Degree Valuation Methods

These two methods for valuing a professional degree appear to

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166. Id.
167. Id. at 520-21.
168. Id. at 520.
169. Id. at 521.
170. Id. at 522.
171. Id.
be the most financially accurate and equitably satisfying answers to the educational degree valuation problem facing modern courts.  

Several courts' objection that such valuation is erroneously based upon earnings accumulated after the marriage dissolution is without substance since all future earning calculations are discounted to present value and since the essence of the increased earning capacity, the earning of the degree itself, occurred during the marriage. Also, in this context, most reimbursement or restitutionary awards are garnered from post-marital earnings, and most distributive awards involve some use of post-marital income.

One criticism of the degree valuation formula is that it fails to take into account the fact that the working spouse was denied use of income that the student spouse could have earned if he or she had been employed, which could have been used to purchase tangible marital assets, make investments, or support a higher standard of living. This criticism, however, is incompatible with the underlying premises of the degree-as-property approach. First, degree valuation seeks to reward spousal sacrifice during the degree earning period and to account for contributions of the marriage community toward the final product of increased earning capacity. To award the supporting spouse lost income in addition to a marital share of the present value of the educational degree would allow a double recovery by the working spouse. Recognizing and valuing the degree encompasses all elements of the marital community's investment in the degree and makes a reasonable return on that investment.

Another criticism of the degree valuation approach is that where the divorce occurs years after the degree is obtained, the value of the degree merges with the value of goodwill of a professional practice, so that the apparent separation of the degree from goodwill achieved in the future earning capacity calculation is flawed, and again a double recovery may be allowed. However, this objection ignores the fact that, while goodwill is undeniably linked to the cumulative impact of individual talent, which ac-

counts for much greater variation of a professional practice, the value of a degree can be separated from the value of the professional practice.\textsuperscript{176} Professional practice valuation involves the measurement of the worth of such factors as efficiency and good management as well as goodwill. On the other hand, valuation of a degree or license measures the investment in human capital.\textsuperscript{177}

It may be more accurate to use the license or degree valuation only in situations where the professional practice is in its early stages. This limiting of the degree valuation is based upon the relative influence of the professional education as compared with the influence of experience on the earnings of a professional practice.\textsuperscript{178} It has been established (and is consistent with human experience) that:

\[
\text{[A]fter about five years, experience, reputation, contacts, privileges, and personal politics become dominant factors in establishing a professional practice. Thus, the relative contribution attributable to the education, degree, or license lessens over time and eventually disappears.}\textsuperscript{179}
\]

As a matter of fact, limiting the incidents of degree valuation in this manner is entirely consistent with the rationale for including the educational degree or license as property. In marital circumstances where one spouse supports the other during a course of professional degree program only to be divorced shortly after the other’s receipt of the professional degree, there is very little traditional marital property to distribute. In recognition of the inequities created by this situation, coupled with the realization that the professional degree is an item of both present and future value, some courts began to treat the professional degree as part of the marital estate that could be valued and distributed upon the disso-

\begin{enumerate}
\item \textsuperscript{176} Zaumeyer, \textit{Valuation Advice: Keep License and Practice Apart}, 9 \textit{Family Advocate}, No. 2, 19-23 (1986).
\item \textsuperscript{177} \textit{Id.} at 20.
\item \textsuperscript{178} \textit{Id.}
\item \textsuperscript{179} \textit{Id.} This table reflects the relative influence of professional education in light of experience on earnings growth during the early years of professional careers:
\end{enumerate}
lution of the marriage.\textsuperscript{180}

One analysis of the degree as a valuable marital asset appears to figure most accurately the place of the student degree among the property of a marriage. This analysis builds on a long-recognized economic principle of future productivity value, that is, human capital.\textsuperscript{181} Human capital is the collection of talent, skills, and knowledge that increases productivity; therefore, human capital is viewed by these theorists as wealth.\textsuperscript{182} Therefore, the invest-

180. See supra notes 11-14. In \textit{In re Marriage} of Horstmann, 263 N.W.2d 885, 891 (Iowa 1978), the Iowa Supreme Court recognized that the husband's legal education was the only significant marital asset. The court stopped short of terming the education "property" subject to distribution but cited the "potential for increase in future earnings capacity made possible by the law degree and certificate of admission conferred upon the husband with the aid of his wife's efforts which constitutes the asset for distribution by the court."

These writers contend that there is no cognizable distinction between the value of the degree and the "potential for increase in future earning capacity made possible by the degree . . . ." \textit{Id}.


182. \textit{Id.} at 381. The theory is recognized in writings as early as Plato's. The rebirth of the concept, according to Kranskopf, is attributed to Theodore W. Shultz's premise that Western society engages in deliberate investment of skills and knowledge and that the dramatic economic growth of our society is attributable to a rise in human capital per worker.
ment in human capital is to be encouraged on public policy principles.183

In applying the human capital concept to the family setting, the family is viewed as a “firm” that seeks to maximize its collective welfare.184 When one spouse decides to return for education with the financial support of the employed spouse, there are certain economically significant events common to each family situation. First, the student spouse’s potential earnings will be foregone during the period of schooling, the “investment” period. Second, the supporting spouse will provide the financial underwriting to allow the student spouse to forego the earnings. Third, the supporting spouse often foregoes other economically beneficial opportunities available to himself or herself during this investment. Finally, the family unit has an expectation of future gain, a return on the investment that will continue throughout the rest of the marriage.185 The early dissolution of such a marriage causes the supporting spouse, the investor, to lose the expected return on the investment that would have resulted to the family unit had the marriage continued, and it creates unjust enrichment for the student spouse.186

Allowing recompense for the supporting spouse upon the dissolution of the marriage is consistent with traditional notions of property recognized in tort and contract law.187 More importantly, recompense futhers the public and familial good by encouraging

183. Id. at 380.
184. Id.
185. Id.
186. Id.
187. Professor Kranskopf notes by example the legal protection afforded a person’s proprietary interest in his own skills in Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977). In contract law, protection of commercial investments allows for recovery of reliance and expectation interests. Kranskopf relates also the protection of personal skills in the entertainment and sports areas by personal managing statutes. See Kranskopf, supra note 181, at 388-91. Unjust enrichment principles can be easily applied to the marital relationship as well. The remedy most appropriate, under this view, is not measured by costs to the person conferring the benefit, as the cost in this context confers a much larger profit to the recipient. In the degree situation the remedy that fits the wrong most closely is the constructive trust, according to Kranskopf. The constructive trust forces the disgorging of profit if there has been an increase in property value due to the benefit conferred. Elements necessary to impose this equitable remedy present in the student/supporting spouse context are: 1) confidential relationship; 2) a promise; 3) transfer in reliance thereon; and 4) unjust enrichment.
investment in human capital.\textsuperscript{188}

Current "no-fault" divorces and accompanying economic settlement plans provide for maintenance through property division. Such settlements are deemed preferable to alimony, since property division is final and nonmodifiable, payment is more certain, and the parties need no longer contract with each other.\textsuperscript{188} These maintenance provisions are justified primarily by recompense for foregone earning capacity and by contribution to the welfare of the family.\textsuperscript{190}

Courts have traditionally awarded periodic maintenance to a homemaker spouse of a long-term marriage, apparently to cover lost earning opportunities. Property is awarded to the homemaker spouse as payment for that spouse's investment in the other spouse's earning capacity.\textsuperscript{191} A court's award of periodic maintenance would not be sufficient, since this does not provide for the return on investment expected by the spouse who supported the family during the investment period. Also, periodic maintenance does not take into account opportunities foregone by the supporting spouse.\textsuperscript{192}

Rehabilitative maintenance has been used as a remedy to enable the supporting spouse, the investor, to develop potential earning capacity of his or her own.\textsuperscript{193} The shortcoming of this approach is that, unless the training costs and increase in future earnings for both the investor and investee are approximately equivalent, the investor will not be adequately compensated for his or her contribution in money and foregone opportunities.

The remedy of in-gross maintenance appears to be the best method of ensuring that an investing spouse is compensated for a contribution to the other spouse's increased earning capacity under the human capital theory.\textsuperscript{194} As Professor Kranskopf notes: "The most significant advantage of in gross maintenance is that it allows compensation tailored to protect expectation interests rather than

\begin{itemize}
\item \textsuperscript{188} Id. at 394-95.
\item \textsuperscript{189} Id. at 396-97.
\item \textsuperscript{190} Id. at 398.
\item \textsuperscript{191} Id. at 399.
\item \textsuperscript{192} Id. See also Inman v. Inman, 578 S.W 2d 266.
\item \textsuperscript{193} Morgan v. Morgan, 81 Misc. 2d 616, 366 N.Y.S.2d 977, (1975), rev'd, 52 A.D. 804, 383 N.Y.S.2d 343 (1976), reversed on ground that New York law allowed alimony based only on present circumstances of the parties, implying that rehabilitative alimony was not authorized.
\item \textsuperscript{194} Kranskopf, supra note 181, at 400-01.
\end{itemize}
providing only 'damages' in the form of periodic alimony for the lost opportunities of the relying spouse." 95 This type of maintenance award would be nonmodifiable and would best serve the investing spouse who cannot increase his or her earning capacity because of illness or age; it also would protect the investing spouse of a marriage with limited material assets. 96

The amount of the in-gross maintenance award would vary, under the human capital model, according to the evidence of expectations. In other words, evidence of present value of the increased earning capacity can be submitted. If there is no expert evidence to this effect, then a restitutionary award for costs expended by the investor would be the only appropriate award. 97 An increase in earning capacity of the investor attributable to the couple's efforts would be subtracted from the increase in earning capacity of the investee, as would any educational debts still to be paid by the investee spouse. 98

The human capital model, with its recognition of value of investment in human capital, seems to be both rooted in sound economic principle and to be practically adaptive to the marital dissolution situation. The analysis of the human capital concept reveals that it fits traditional legal concepts such as recompense and prevention of unjust enrichment. In the marriage involving an investing spouse and a recipient/investee, the adoption of the human capital concept will foster an equitable settlement upon dissolution, a settlement that will compensate for foregone opportunities and expectations as well as provide restitution for costs expended in investment.

VI. Conclusion

The inclusion of the professional degree among marital assets at the time of marital dissolution is occurring with increasing frequency. Recognizing that a degree is a thing of value to which the marital community has contributed is a sound step in achieving economic parity between former spouses. First, it is indisputable that the acquisition of a degree typically enables one spouse to command higher job status and earnings over a lifetime. Second, especially in short-term marriages, the degree is often one of the

195. Id. at 401.
196. Id.
197. Id.
198. Id. at 402.
few assets that the marital community has accumulated. For one spouse to exit the marriage with that asset, to which the other spouse has undeniably contributed labor and financial resources, is not only inequitable, but it also is inconsistent with both community property and equitable distribution theory. Further, refusing to recognize the value of the professional degree and to account for that value upon divorce discourages two individuals from planning and working together for the good of the marital unit. For this reason, judicial compensation for the contributions of one spouse toward the degree of the other spouse creates a more equitable society in the broadest sense.

It is the methodology for compensation that provides fertile ground for debate. Treating the degree as property is problematic on several counts. The professional degree does not share components of property in the traditional sense, and many courts are hesitant to embrace the more progressive concepts of property espoused by the Uniform Marital Property Act. However, it bears emphasizing that the creature known as "marital property" was born of legislative efforts and, as such, the offspring cannot be expected to share many familial characteristics with the historical concept of property. Moreover, the conceptual basis of community property and equitable distribution legislation involves the recognition of marriage as a partnership to which both partners contribute. Upon that partnership’s dissolution, all circumstances relevant to the acquisition and value of marital assets are considered pursuant to the statutory scheme of property distribution. Certainly valuing the asset once it is so determined is more involved than finding the professional degree to be property. This article has discussed valuation procedures, including establishing future earning capacity and determining the increased earning capacity attributable to the professional degree. While any valuation of intangible property involves certain variables, courts have been successful in valuing intangible property for nearly a century. The argument that we cannot treat the professional degree as property simply because the determination of value may be difficult is logically inconsistent with approaches taken in other areas of the common law.

North Carolina’s property caselaw is expansive enough to incorporate the professional degree as a marital asset within the existing definition of property. However, given the tendency of our state courts to adopt traditional approaches, it is unlikely that the North Carolina judiciary will treat the professional degree as property divisible upon divorce. The court of appeals’ decision in Geer...
v. Geer did not even address the treatment of the degree as property, although a review of the available caselaw at the date of decision indicates that a discussion of that treatment would have resulted in a stronger decision.

Courts that hesitate, for whatever rationale, to assign to the professional degree the attributes of property and proceed with its valuation nonetheless can accomplish results consistent with the intent of equitable distribution and community property statutes. Traditional compensation methods such as reimbursement and restitution as well as other compensatory methods, such as disproportionate property awards, can be successfully employed to compensate the non-degree spouse for his/her contributions. Reimbursement is probably the least complicated method of compensation, although such compensation is woefully inadequate unless made at present value of the resources expended. The North Carolina decision in Geer illustrates reimbursement theory, which is an incomplete fit into a factual framework and which resulted in an insufficient and unequal compensation.

Restitution, based on principles of equity, seeks to compensate a spouse who incurred a detriment by conferring a benefit (the degree) upon the other spouse so that he/she is unjustly enriched. This article has alluded to one philosophical problem courts have had when attempting to apply restitution theory to the spousal degree situation, namely the requirement of a finding of unjust enrichment. This element invites interjection of fault evidence, and many jurisdictions disallow introduction of all fault evidence in property distribution hearings. Evidence of certain marital fault such as adultery would, of course, be irrelevant to the issue of unjust enrichment and should be excluded. However, other states, including North Carolina, allow evidence of economic fault to be introduced. Economic fault (and loss) would easily find a place in the context of unjust enrichment theory, as a consideration of the economic injustice rendered by the community investment made with no return on the investment for one member of the marital community. The major difficulty seen by these writers in applying restitution theory in this area is that many courts who purport to be employing restitutionary principles are, in fact, merely misnaming reimbursement and applying its principles instead. North Carolina’s equitable distribution statute could clearly encompass restitution concepts, with its requirement that trial courts consider a spouse’s indirect and direct contributions that aid the education and/or develop the career potential of the other spouse.
Finally, some courts have chosen to compensate the contributing spouse by awarding a greater share of the marital property to that spouse upon distribution. The problem with the property distribution approach is that often there is a dearth of marital property to be distributed, especially in short-term marriages or in those that disintegrate shortly following the marital unit's investment of resources in the acquisition of the degree. Where the professional degree is the most significant asset of the marital community, the distribution of property to compensate contribution to degree acquisition does not present a viable approach.

The 1987 North Carolina Court of Appeals decision in *Geer* does not address the threshold question of the degree as "property" of the marital community to be valued and distributed. However, *Geer* is significant in its recognition of the value contributed by one spouse's financial resources invested in the other spouse's degree. A more comprehensive decision would have recognized and compensated the spouse's non-monetary contributions, which certainly facilitated the acquisition of the degree. *Geer* is self-limiting in its failing to address non-monetary or indirect contributions of the non-degree spouse or bring to present value the monetary contributions. The result is that resources invested in the degree acquisition are rewarded inadequately by compensation occurring nearly ten years after the investment. Certainly "equitable" distribution is not achieved without adjusting the compensation to present value, and later decisions by the North Carolina courts should rectify this inequity.