

1988

Karen C. Martinez v. Jess M. Martinez : Brief of Petitioner

Utah Supreme Court

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UTAH SUPREME COURT
BRIEF

UTAH
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DOCKET NO. 880198

IN THE SUPREME COURT OF THE STATE OF UTAH

KAREN C. MARTINEZ,

Plaintiff/Respondent,

v.

JESS M. MARTINEZ,

Defendant/Petitioner,

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Case No. 880189-SC

Priority No. 13

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BRIEF OF DEFENDANT/PETITIONER

ON PETITION FOR WRIT OF CERTIORARI TO THE
UTAH COURT OF APPEALS, RELATED TO AN
APPEAL FROM A DECREE OF DIVORCE OF
THE SECOND JUDICIAL DISTRICT COURT,
DAVIS COUNTY, UTAH
THE HONORABLE RODNEY S. PAGE,
JUDGE PRESIDING

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Attorneys for Plaintiff/Respondent

FILED

DEC 21 1988

Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

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| KAREN C. MARTINEZ, | : | |
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| Plaintiff/Respondent, | : | |
| | : | |
| v. | : | |
| | : | |
| JESS M. MARTINEZ, | : | Case No. 880189-SC |
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TABLE OF CONTENTS

| | |
|---|-----|
| TABLE OF AUTHORITIES | iii |
| STATEMENT OF ISSUES PRESENTED FOR REVIEW | v |
| JURISDICTIONAL STATEMENT | 1 |
| STATEMENT OF THE CASE | 2 |
| RELIEF SOUGHT ON APPEAL | 3 |
| STATEMENT OF FACTS | 4 |
| SUMMARY OF ARGUMENTS | 13 |
| ARGUMENT | 16 |
| POINT I | 16 |
| THE UTAH COURT OF APPEALS ERRED IN ITS CREATION OF THE DOCTRINE OF EQUITABLE RESTITUTION. | |
| POINT II | 36 |
| THE TRIAL COURT'S DECISION WAS A FAIR AND REASONABLE METHOD TO COMPENSATE THE PLAINTIFF FOR ANY EFFORT EXPENDED BY HER WHILE THE DEFENDANT WAS ATTENDING SCHOOL AND IT SHOULD HAVE BEEN AFFIRMED BY THE UTAH COURT OF APPEALS. | |
| CONCLUSION | 40 |
| ADDENDUM | 44 |

TABLE OF AUTHORITIES

| <u>UTAH STATUTES AND RULES CITED</u> | <u>Page</u> |
|---|--|
| Section 30-3-1, <u>Utah Code Ann.</u> (1953 as amended) | 1 |
| Section 30-3-5, <u>Utah Code Ann.</u> (1953 as amended) | 13, 40 |
| Rule 4, <u>Rules of the Utah Supreme Court</u> | 1 |
| Rule 4A, <u>Rules of the Utah Supreme Court</u> | 1 |
| Rule 43, <u>Rules of the Utah Supreme Court</u> | 1 |
| Rule 48, <u>Rules of the Utah Supreme Court</u> | 2 |
| <u>UTAH CASES CITED</u> | |
| <u>Argyle v. Argyle</u> , 688 P.2d 468 (Utah 1984) | 27 |
| <u>Bader v. Bader</u> , 19 Utah 2d 407, 424 P.2d 190 (1967) | 38, 40 |
| <u>Burnham v. Burnham</u> , 26 UAR 16 (Utah 1986) | 27 |
| <u>Dority v. Dority</u> , 645 P.2d 56 (Utah 1982) | 27 |
| <u>English v. English</u> , 565 P.2d 409-410 (Utah 1977) | 27 |
| <u>Gardner v. Gardner</u> , 748 P.2d 1076 (Utah 1988) | 13, 22-23, 41 |
| <u>Higley v. Higley</u> , 676 P.2d 379 (Utah 1983) | 27 |
| <u>Jones v. Jones</u> , 700 P.2d 1072 (Utah 1985) | 27 |
| <u>Martinez v. Martinez</u> , 754 P.2d 69 (Utah App. 1988) | 1, 3, 12, 14, 16, 30-32, 34-35, 41-42 |
| <u>Olsen v. Olsen</u> , 704 P.2d 564 (Utah 1985) | 32 |
| <u>Petersen v. Petersen</u> , 737 P.2d 237 (Utah App. 1987) | 13, 17, 19, 21-22, 30, 31, 41 |
| <u>Rayburn v. Rayburn</u> , 738 P.2d 238 (Utah App. 1987) | 13, 22, 30, 41 |

OTHER STATUTES CITED

| | |
|---------------------------------------|-------|
| Section 14-10-113(2) (C.R.S. 1973) | 20 |
| Section 14-10-114(1)(a) (C.R.S. 1973) | 24-25 |
| Section 14-10-114(1)(b) (C.R.S. 1973) | 24-25 |

OTHER JURISDICTIONS CITED

| | |
|---|--------------|
| <u>Archer v. Archer</u> , 493 A.2d 1074 (Md. June 12, 1985) | 27-30 |
| <u>Graham v. Graham</u> , 555 P.2d 527 (Colo. App. 1976) | 19-20, 21 |
| <u>In re Marriage of Graham</u> , 574 P.2d 75 (Colo. 1978) | 19-25 |
| <u>In re Marriage of Olar</u> , 84 C.A. 0329 (Colo.App. Oct. 17, 1985 [unpub.]) | 24-26 |

STATEMENT OF ISSUES PRESENTED
FOR REVIEW

POINT I

THE UTAH COURT OF APPEALS ERRED IN ITS
CREATION OF THE DOCTRINE OF EQUITABLE
RESTITUTION.

POINT II

THE TRIAL COURT'S DECISION WAS A FAIR AND
REASONABLE METHOD TO COMPENSATE THE PLAINTIFF
FOR ANY EFFORT EXPENDED BY HER WHILE THE
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| JESS M. MARTINEZ, | : | Case No. 880189-SC |
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BRIEF OF DEFENDANT/PETITIONER

JURISDICTIONAL STATEMENT

This case arises from a divorce action filed in Davis County, State of Utah, pursuant to the provisions of Section 30-3-1, Utah Code Ann. (1953). An appeal was filed with the Utah Supreme Court, pursuant to the provisions of Rule 4 of the Rules of the Utah Supreme Court. Pursuant to the provisions of Rule 4A of the Rules of the Utah Supreme Court, this matter was transferred to the Utah Court of Appeals. The Utah Court of Appeals issued its opinion in connection with the original appeal on April 19, 1988, in the case of Martinez v. Martinez, 754 P.2d 69 (Utah App. 1988).

Pursuant to the provisions of Rule 43 of the Rules of the Utah Supreme Court, a Petition for Writ of Certiorari was filed in the Utah Supreme Court by Defendant/Petitioner. That Petition

was granted and the Utah Supreme Court now has jurisdiction pursuant to the provisions of Rule 48 of the Rules of the Utah Supreme Court.

STATEMENT OF THE CASE

This is a divorce case. The wife, the Plaintiff/Respondent in this matter, filed a Complaint against her husband, the Defendant/Petitioner. Subsequently, the parties entered into a written Stipulation and Settlement Agreement which was signed by both parties and filed but, evidently, never implemented (R. 10). The Plaintiff then, through new counsel, filed an Amended Complaint seeking a Decree of Divorce, asking for custody, alimony, child support, a property award of the home, furniture, a cash settlement for a portion of the husband's medical degree, and attorneys' fees. The Defendant secured counsel, answered, counterclaimed and asked for, among other things, an award of joint custody, an equitable distribution of the real and personal property and debts of the marriage, and an order requiring him not to pay alimony.

The case was tried before the Honorable Rodney S. Page on May 31, 1985. Each side was represented by counsel and presented documentary evidence, as well as their own testimonies. In addition, the Plaintiff presented the testimony of two witnesses in connection with her position on the Defendant's medical degree. After hearing closing arguments, the trial court issued

its ruling. The Findings of Fact and Conclusions of Law and a Decree of Divorce were signed and filed on October 7, 1985, after the Defendant had objected to portions of the Findings and Decree as prepared by Plaintiff's counsel and the trial court had ruled on the same. No post trial motions were filed by Plaintiff nor did she object to any of the findings made by the Court at trial. The Plaintiff filed her Notice of Appeal on November 6, 1985. No cross-appeal was filed.

On April 19, 1988, the Utah Court of Appeals issued its opinion. On May 17, 1988, Defendant/Petitioner filed a Petition for Writ of Certiorari with this Court seeking a review of the Court of Appeals decision related to the doctrine of equitable restitution, its sua sponte increase of the trial court's alimony and child support awards and its award of the dependency exemptions. On September 7, 1988, this Court granted that Petition as to the equitable restitution issue only.

RELIEF SOUGHT ON APPEAL

The Defendant/Petitioner seeks an order from this Court vacating that portion of the opinion in Martinez v. Martinez, 754 P.2d 69 (Utah App. 1988), which pertains to the creation of the doctrine of equitable restitution and affirming the trial court's overall support, property and debt awards, except as may have been modified by the Court of Appeals related to the alimony, child support and dependency exemption issues,

Defendant/Petitioner's Petition for Writ of Certiorari having been denied as to those issues.

STATEMENT OF FACTS

Marital History and Respective
Contributions of the Parties

The parties married on June 6, 1968, when Defendant was an E-5 in the United States Army (Tr. 4). At that time, both had a high school education (Tr. 6). After a year of marriage, the parties moved to Hill Air Force Base where the Defendant obtained employment as an instrument repair mechanic and earned \$8,000-9,000.00 per year (Tr. 5). From 1968 through 1977 the Defendant was continuously employed and was the primary income producer (Tr. 52-53). Between 1968 and 1982, the date of the parties' separation, the Plaintiff worked part time for a total of three years (Tr. 52). Plaintiff's Exhibit A, set forth below, reflects the income of the parties during the time they lived together and one year after their separation.

FAMILY INCOME

| | <u>TOTAL</u> | <u>HUSBAND</u> | <u>WIFE</u> | <u>OTHER</u> |
|------|----------------------------|----------------|-------------|--------------|
| 1973 | \$10,840 | \$10,840 | | |
| 1974 | 11,411 | 11,381 | | \$ 30.36 |
| 1975 | 13,324 | 13,323 | | |
| 1976 | 14,797 | 14,464 | \$ 116 | |
| 1977 | 15,968 | 13,089 | 2,663 | 216.00 |
| | ----- MEDICAL SCHOOL ----- | | | |
| 1981 | 11,248 | | | 64.00 |
| 1982 | 26,990 | | | 189.00 |
| 1983 | 35,579 | | | 185.00 |

In 1970, after leaving the Army, the Defendant decided to attend college, and Plaintiff reluctantly agreed (Tr.13). At that time, Defendant was working and receiving education benefits from the G.I. Bill (Tr. 53). Defendant received those benefits for his four years of college and the first year of medical school at the University of Utah. That income, together with the monies Defendant was earning while working, supported his family while he was in school and paid for his tuition and books (Tr. 34). In addition, during this time, the parties purchased a home and built an equity which was ultimately used to purchase a second home (Tr. 57), the residence involved in this divorce action. He also saved money which was then used to support the family during the last three years of medical school (Tr. 34).

At the conclusion of his undergraduate work, the Defendant decided that he wanted to go to medical school. He applied twice and was finally accepted by the University of Utah in 1977 (Tr. 7). The Plaintiff was adamantly opposed to his decision (Tr. 14, 31, 33), and the Defendant testified that the marriage almost broke up at that time (Tr. 14).

During the marriage, Plaintiff did not work except in 1978, 1979 and 1980, when she was employed as a part-time waitress (Tr. 34 and 53). During that period, she thought she netted around \$200.00 per month. She also thought those sums were used for

regular living expenses (Tr. 35). While she worked, the Defendant stayed home and watched the children (Tr. 30, 35).

In addition to Defendant's earnings and the benefits from his G.I. Bill, he also received \$7,000.00 from his mother's estate which went to general family expenses (Tr. 53). Defendant took out three student loans, one of which was for \$20,000.00 (Tr. 54), and all of which he is now repaying and for which the Plaintiff is not responsible (R. 215).

The Defendant graduated from medical school in 1981 and secured an internship in Danville, Pennsylvania, through the National Intern Matching Program (Tr. 7). The parties moved to Pennsylvania and rented their Utah home (Tr. 52). The Plaintiff objected to the move at the outset (Tr. 16, 55). She ultimately did go; however, after six months she returned to Salt Lake in March of 1982 and, since that time, the parties have been separated (Tr. 18). Her reasons for leaving were that she did not like the area, was uncomfortable in that setting and missed her family, friends and job (Tr. 17). Her dissatisfaction affected the Defendant's work and internship and placed an extreme amount of additional pressure on him (Tr. 17).

After the Plaintiff left, the Defendant secured a residency as an emergency medical room physician in Pennsylvania which was to be completed in 1986 (Tr. 8). Upon Plaintiff's return to Utah, she secured a job with Mountain Fuel Supply, where she

worked full time until just prior to trial. At trial, she stated she had just voluntarily gone to three-quarter time so she could spend more time with her children and get an education (Tr. 48, 59). Mountain Fuel will pay all costs of her education and allow her to continue working (Tr. 48). She nets \$846.00 per month (Tr. 42). At trial her monthly expenses were \$2,056.00 (Ex. F, Tr. 43, 58), which included a \$309.00 per month mortgage payment on the Utah home (Tr. 26). No definite amounts were presented by her as to any additional expenses (Tr. 26).

At the time of trial, Defendant was employed under a two-year contract with Cannonsberg General in Pennsylvania (Tr. 3). One year was left under that contract (Tr. 100), and no evidence was presented as to what he intended to do when the contract expired. At trial he testified he intended to complete his residency in 1986 and was not yet Board Certified (Tr. 8). Under his employment contract in effect at the time of trial, he earned \$100,000.00 per year, or \$8,333.00 per month, and netted \$7,100.00 per month after deducting certain expenses such as malpractice insurance, but before deducting taxes (Tr. 9-11 and 66). He put one-half of his gross earnings in a tax account (Tr. 102), had no tax deductions or shelters (Tr. 103), and had nothing left in the tax account after April 15 of each year (Tr. 102). He is paying back his student loans (Ex. 3), and had expenses, including the \$1,100.00 temporary support payment, of

\$4,337.00 (Ex. 3). His net monthly salary after taxes was \$4,022.00 (Tr. 102). He had no outside employment (Tr. 100). The oldest child of the parties lived with him from October, 1983 until July, 1984 (Tr. 49-50). That child then went back with Defendant one day after trial to live with him (8/29/85, Tr. 4). In August, 1984, Plaintiff requested \$1,650.00 per month temporary support (R. 74), and the court granted her \$1,100.00 per month (R. 87) which the Defendant paid up through trial (Tr. 107).

Ruling of the Trial Court

After each side gave their closing arguments, the trial court ruled as follows:

1. It granted Plaintiff a Decree of Divorce (R. 213).
2. It awarded Plaintiff the custody of the parties' three children, subject to Defendant's reasonable visitation rights (R. 213).
3. It ordered Defendant to pay \$300.00 per month per child as child support (\$900.00), subject to a \$100.00 per month per child abatement if any of the children came to live with him, and further subject to that support continuing until each child reached the age of 21, so long as they were full-time students and not married (R. 213).
4. It gave Defendant tax exemptions for the two older

children and gave Plaintiff the exemption for the youngest (R. 213-214).

5. It ordered Defendant to provide medical insurance on the children and a life insurance policy on his life naming the children as beneficiaries (R. 214).

6. It ordered Defendant to pay Plaintiff \$400.00 per month alimony for five years with that award not to terminate should she remarry within the first three years (R. 214).

7. It gave Plaintiff the marital residence subject to a lien in Defendant's favor payable when the youngest child reached 18 or 21 years of age if the child was a student living at home, when the home was sold or when she cohabits with an adult male not her spouse but not payable upon her remarriage (R. 214-215).

8. It gave each party the personal property in their respective possessions (R. 215).

9. It ordered each party to pay the debts which they incurred after separation and ordered the Defendant to pay approximately \$20,000 in student loans (R. 215-216).

10. It ordered the Defendant to pay his attorneys' fees and \$2,500.00 to Plaintiff for her attorneys' fees and costs (R. 216).

The court made the following specific findings related to the Defendant's medical education:

9. During the course of the marriage, the parties lived together as husband and wife

for approximately 14 years, having separated during March, 1982, and having lived separate and apart since that time. (R. 205)

10. During the period 1977 through 1982, the parties experienced a particularly stressful period while Defendant was engaged in medical school. During that time Defendant did not work, and the family obligations were met by a series of student loans, a bequest from the estate of Defendant's mother and income earned by Plaintiff during her employment. During the 14 years that the parties lived together, Plaintiff assisted extensively in Defendant's obtaining a college education, medical degree and internship. In addition, Plaintiff made substantial sacrifices in order to facilitate the completion of Defendant's medical schooling and internship. (R. 205-206)

. . .

21. The court finds that alimony is designed not only to meet the needs of Plaintiff in this case, and is not solely based upon her ability to support herself and Defendant's ability to contribute to that support, but also a means of repayment to Plaintiff for her years spent caring for the household, helping the husband in his educational pursuits and support of the family, and for her involvement through the extensive educational process utilized to obtain the medical training. (R. 208)

. . .

23. The court further finds that the medical degree and training are not specifically a property right subject to distribution by this court under the current law of this state. Such degree and training are applicable only to the determination of alimony and child support. The court has considered the medical training and license to practice only as it impacts income and Defendant's present ability to pay

appropriate alimony and child support. Such income will also be taken into account "in future years as it raises in stability [sic.] the rate of child support." (T.T. Page 135, Line 10) (R. 208)

Plaintiff's counsel prepared the Findings and Decree (R. 203, 212). (Copies have been included in the Addendum to this brief.) She did not make a Motion for a New Trial or for an order to amend the Findings and Decree.

Mrs. Martinez appealed the trial court's decision to this Court. Dr. Martinez did not cross-appeal. Pursuant to Rule 4A of the Rules of the Supreme Court, this Court transferred the case to the Utah Court of Appeals. Mrs. Martinez filed her Appellant's Brief. Dr. Martinez filed his Respondent's Brief. Mrs. Martinez did not file a Reply Brief.

In the original appeal, Mrs. Martinez raised the following claims of error:

1. The trial court erred in connection with the way it dealt with Dr. Martinez's professional degree.
2. The trial court's award of alimony and child support were unjustifiably low.
3. The trial court should not have awarded Dr. Martinez any of the dependency exemptions.
4. The trial court should have awarded Mrs. Martinez more attorneys' fees than it did.

Dr. Martinez responded and argued:

1. The trial court acted within its broad discretion in fashioning a remedy which was fair to both parties.
2. The trial court did not err in the manner it dealt with Dr. Martinez's medical education in that a medical degree is not "property" under Utah statutes; that Mrs. Martinez failed to present adequate evidence to support a finding that a medical degree was a marital asset; and that the trial court properly dealt with compensating Mrs. Martinez for any of her alleged sacrifices in its award of child support, alimony and property and debt distribution.
3. The trial court's award of alimony and child support was fair and reasonable based upon the facts of the case.
4. The trial court's allocation of income tax dependency exemptions was fair and statutorily permissible.
5. The trial court did not err in its award of attorneys' fees.

Oral argument was presented to Judges Davidson, Billings and Jackson of the Utah Court of Appeals and on April, 19, 1988, that Court in a 2-1 decision (Judge Jackson dissenting) issued its opinion, concluding that Judge Page had erred in the way he dealt with Dr. Martinez's medical education, in his awards of alimony and child support, and in his allocation of the dependency exemption. A copy of that opinion (Martinez v. Martinez, 754 P.2d 69 [Utah App. 1988]) has been included in the Addendum to this brief. At no time prior to the issuance of that opinion had either party raised, argued or urged the

creation of the doctrine of equitable restitution, a concept evidently formulated by the majority in its deliberations pertaining to the medical degree issue.

Dr. Martinez timely filed a Petition for Writ of Certiorari with this Court, claiming error by the Court of Appeals in its creation of the doctrine of equitable restitution; its unilateral increase of Dr. Martinez's alimony obligation from \$400.00 per month to \$750.00 per month, and child support obligation from \$900.00 per month to \$1,800.00 per month; and its decision to automatically award dependency exemptions to Mrs. Martinez, the custodial parent.

On September 7, 1988, this Court granted Dr. Martinez's Petition for Writ of Certiorari as to the equitable restitution issue, but not as to the support and dependency exemption issues.

SUMMARY OF ARGUMENTS

POINT I

The Utah Court of Appeals erred in its creation of the doctrine of equitable restitution to deal with the Defendant's medical degree.

Under Utah law, as set out in the Petersen, Rayburn, and Gardner cases, a medical degree or, for that matter, any educational achievement or job training obtained by a party during a marriage, is not "property" as that term is used in Section 30-3-5, Utah Code Ann. (1953). If the education or

training so obtained enhances or increases earning potential, that is to be considered by the trial court in awarding support.

Contrary to this position, an award of equitable restitution is, for all practical purposes, the same as treating a professional degree as a marital asset subject to division upon divorce. This is especially true in the Martinez case because the Court of Appeals begins by awarding Mrs. Martinez an increased amount of permanent alimony based upon Dr. Martinez's increased earning capacity. It then also awarded her an amount of equitable restitution, a remedy expressly distinguished from traditional alimony or other spousal support and based on the increased earning capacity of a spouse as a result of that spouse's professional degree.

As a result, the Martinez decision is in conflict with previous decisions of the Court of Appeals and of this Court on an important question of state law. It represents a drastic departure from this law and a theory never raised by the Plaintiff in the court below. Its opinion related to the doctrine of equitable restitution should be vacated.

POINT II

The trial court in this case properly exercised its discretion in fashioning a remedy which considered the individual facts of the case, including the Defendant's education. An integral part of that remedy was an award of alimony to the

Plaintiff which was intended to assist her in connection with her ongoing monthly financial needs and to reimburse her for the effort and monies she claimed she had expended during the period the Defendant was securing his education. In recognizing the assistance she provided (R. 205-206), the trial court ordered certain things not normally done in divorce actions to compensate Mrs. Martinez and make certain that she was adequately provided for.

Under the circumstances of this case, the remedy fashioned by the trial court was fair and equitable. It was not arbitrary or capricious and, consequently, should be upheld. Instead, the Court of Appeals panel accepted some portions of the trial judge's decision, rejected others and created a new remedy never argued, urged, or even mentioned by Mrs. Martinez. What the Court of Appeals failed to recognize was that each aspect of the trial judge's ruling was interrelated with the other aspects in order to arrive at an overall fair and just decision to both parties.

The action on the part of the Court of Appeals to change portions of the trial judge's decisions on a "piecemeal" basis improperly infringes and inhibits the trial court from fashioning an overall remedy which considers all the facts and is fair to both parties.

POINT I

THE UTAH COURT OF APPEALS ERRED IN ITS
CREATION OF THE DOCTRINE OF EQUITABLE
RESTITUTION.

Mrs. Martinez argued to the Court of Appeals that the trial court erred in not including the Respondent's medical education as a part of the marital estate for purposes of property distribution, a position that has been accepted by only a small minority of the state courts which have addressed this issue. She claimed that the parties made an investment in "human capital" and that she was entitled to a return on her investment in Dr. Martinez's medical degree.

Two judges on the Court of Appeals agreed with that concept and concluded that not only should Mrs. Martinez's five-year award of \$400.00 per month alimony be automatically increased to \$750.00 per month permanent alimony, but that she should also receive some sort of quasi alimony/property award to compensate her for her alleged sacrifices and loss of income expectancy. In order to provide that additional award, the panel created a new and unheard of concept and called it "equitable restitution." In so doing, the Court of Appeals erred.

Martinez v. Martinez, 754 P.2d 69 (Utah C.A. 1988), (a copy of which is included in the Addendum to this brief) created a new remedy called "equitable restitution." Under Martinez, an award of this type is now to be considered in divorce cases where one

spouse has obtained a professional degree during the marriage, and the divorce occurs as that spouse begins his/her new career and is on the threshold of increased earning capacity. The Court expressly distinguished this new remedy from all other forms of spousal maintenance or support and stated that "[equitable restitution]" is nothing more than an equitable sharing of the reward of both parties' common efforts and expectations." Id. at 78. An award of equitable restitution evidently will not terminate upon remarriage and may be payable in a lump sum or periodically over time.

The practical and realistic effect of this decision is in conflict of previous rulings by other panels of the Court of Appeals and the dictum of the Utah Supreme Court. The basic and fundamental issue to be decided in this case is whether an advanced degree is marital property subject to consideration and division by a trial court in divorce actions.

The present law in the State of Utah with respect to advanced educational degrees is that such degrees are not property interests or marital assets subject to division upon divorce. This issue was first considered by the Utah Court of Appeals in Petersen v. Petersen, 737 P.2d 237 (Utah App. 1987). (A copy of this case has been included in the Addendum to this brief.) In Petersen, the parties had been married for 20 years, during which time Dr. Petersen earned his medical degree. While

he was in school, he earned approximately \$1,000.00 per year and Mrs. Petersen worked full time for one year and part time for the remaining three years. The couple also received additional monies from Mrs. Petersen's parents.

In addition to a more traditional award of property and maintenance, the trial court awarded Mrs. Petersen a \$120,000.00 cash settlement, characterizing this award as a property award with respect to the medical degree. On appeal, the Court of Appeals was squarely faced with the issue of whether Dr. Petersen's medical degree was a property interest subject to division as a marital asset. In concluding that it was not, the Court began by noting that "the majority of jurisdictions that have considered the issue have held that advanced degrees or professional licenses are not property." Id. at 239 (citations omitted). Thereafter, the Court proceeded to analyze and compare the characteristics and attributes of a recognized property interest such as a retirement plan with the characteristics of an educational degree. The Court stated:

Property can be bought, sold, and devised. Bona fide degrees cannot be bought; they are earned. They cannot be sold; they are personal to the named recipient. Upon the death of the named recipient, the certificate commemorating award of the degree might be passed along and treasured as a family heirloom, but the recipient may not, on the strength of that degree, practice law or medicine. In this case, the court awarded the parties' home to Mrs. Petersen. But it might have awarded the home to Dr. Petersen

or it might have ordered the home sold and the net proceeds divided. The Court had no such alternatives with the medical degree precisely because the degree is not property.

Id. at 240. From this analysis as well as from an analysis of the cases from other jurisdictions, the court concluded that an "advanced degree is or confers an intangible right which, because of its character, cannot properly be characterized as property subject to division between the spouses." Id. at 241.

One of the cases analyzed and relied upon by the Petersen court in reaching this conclusion is a leading case in the area of professional degrees: In re Marriage of Graham, 574 P.2d 75 (Colo. 1978). In this case, the Supreme Court of Colorado affirmed a decision of the Colorado Court of Appeals, Graham v. Graham, 555 P.2d 527 (Colo. App. 1976), which held that an M.B.A. degree was not marital property subject to division by the court. In Graham, the husband acquired a Bachelor of Science degree in engineering and physics and an M.B.A. during a six-year marriage. The wife had worked full time throughout the marriage and contributed 70% of the total income which was then used for family living expenses and for the husband's educational expenses during the marriage. The husband had worked only part-time. In addition, the wife had done most of the housework and had cooked most of the meals. In the divorce action, the trial court found the husband's education to be a marital asset and, based on the husband's expected future earnings, valued the education at

\$82,836.00 and awarded the wife a \$33,134.00 cash settlement. On appeal, the trial court's decision was reversed. The Colorado Supreme Court analyzed CRS Section 14-10-113(2) which requires the court to consider all relevant factors in making a division of marital property and concluded that the husband's education was not marital property within the meaning of that statute. In so holding, the court concluded:

An educational degree, such as an MBA, is simply not encompassed even by the broad views of the concept of "property." It does not have an exchange value or any objective transferrable value on an open market. It is personal to the holder. It terminates on death of the holder and is not inheritable. It cannot be assigned, sold, transferred, conveyed, or pledged. An advanced degree is an accumulative 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 terms.

Id. at 77.

Both of these cases present a well-reasoned and solid basis for concluding that an educational degree is not a property interest and is not a marital asset subject to division between the parties to a divorce action. It does not follow from that position, however, that the non-student spouse is left without a remedy. Instead, many of the jurisdictions that conclude that a degree is not property provide for an adequate remedy through an

increased award of spousal support and maintenance. The law in these jurisdictions provides that the amount of this award falls within the sound discretion of the trial court after consideration of all the relevant factors in each case. Among these are the fact that one spouse has obtained an advanced degree during the course of the marriage, the extent to which the non-student spouse worked to support the family, and the sacrifice of that spouse's own educational and professional advancement.

This is the position taken by the Utah and Colorado courts. In Petersen, supra, Judge Orme stated that "[i]n this state, traditional alimony analysis is the appropriate and adequate method for making adjustments between the parties in cases of this type." Id. at 242. While in a footnote to this quotation the Court expressed concern over the situation where the parties are divorced just as the student spouse is graduating and on the threshold of increased earning capacity, it reaffirmed its position that an award of maintenance is the proper remedy and stated:

In another kind of recurring case, typified by [Graham v. Graham], 574 P.2d 75 (Utah 1978) where divorce occurs shortly after the degree is obtained, traditional alimony analysis would often work hardship, because, while both spouses have modest incomes at the time of divorce, the one is on the threshold of a significant increase in earnings. Moreover, the spouse who sacrificed so the other could attain a degree is precluded from

enjoying the anticipated dividends the degree will ordinarily provide. Nonetheless, such a spouse is typically not remote in time from his or her previous education and is otherwise better able to adjust and to acquire comparable skills, given the opportunity and the funding. In such cases, alimony analysis must become more creative to achieve fairness, and an award of "rehabilitative" or "reimbursement" alimony, not terminable upon remarriage, may be appropriate.

Id. at 242, f. 4.

This approach to adequately compensating a non-student spouse through an award of spousal maintenance was reaffirmed by the Utah Court of Appeals in Rayburn v. Rayburn, 738 P.2d 238 (Utah App. 1987) where Judge Orme, again writing for the unanimous panel stated:

Recently this Court held that an advanced degree or professional license is not marital property subject to division upon divorce. However, an advanced degree often accompanies a disparity in earning potential that is appropriately considered as a factor in alimony analysis. We reaffirm our holding in Petersen and analyze the instant appeal under the same analysis employed in that case.

Id. at 240.

Following Petersen and Rayburn, the questions of valuation of a medical degree for property distribution purposes and the adequate compensation of a non-student spouse through a support award were presented to this Court in Gardner v. Gardner, 748 P.2d 1076 (Utah App. 1988). (A copy has been included in the

Addendum to this brief.) The case was decided without having to answer the question of whether a degree is a marital asset, but Justice Stewart, writing for the majority, discussed the great number of problems associated with attempting to place a value on educational achievements and referred at length to the reasons relied on by the Colorado Court in Graham for concluding that educational achievements are not property. He stated:

We agree that an educational or professional degree is difficult to value and that such valuation does not easily fit the common understanding of the character of property.

Id. at 1081.

The court went on to conclude that the proper remedy for Mrs. Gardner was to award her an adequate alimony award.

Similarly, in In re Marriage of Graham, supra, the Colorado Supreme Court concluded that, while a non-student spouse is not entitled to treat the degree as a marital asset, that spouse's contribution to that degree is to be considered by the trial court in determining the proper award of support and maintenance:

A spouse who provides financial support while the other spouse acquires an education is not without a remedy. Where there is marital property to be divided, such contribution to the education of the other spouse may be taken into consideration by the court. Here, we again note that no marital property has accumulated by the parties. Further, if maintenance is sought and need is demonstrated, the trial court may make an award based on all relevant factors. Certainly, among the relevant factors to be considered is the contribution of the spouse

seeking maintenance to the education of the other spouse from whom the maintenance is sought.

Id. at 78 (Citations and statutes omitted.)

The Graham decision was recently reconsidered and reaffirmed by the Colorado Supreme Court in In re Marriage of Olar, 747 P.2d 676 (Colo. 1987). (A copy of this case has been included in the Addendum to this brief.) In Olar, the husband had been a full-time student throughout the parties' 12-year marriage, with the exception of one year where he had worked full time. Mrs. Olar worked full time for the entire marriage, with the exception of a nine-week maternity leave. Mr. Olar's education was financed by veteran's benefits, tuition waivers, student loans, fellowships, graduate student stipends and an inheritance from his father. The only marital assets acquired by the parties were two motor vehicles, furniture and miscellaneous personal property, a mobile home and a savings account. At the time of the divorce, Mr. Olar had completed his doctoral dissertation and had only to present this work before his committee to obtain his doctoral degree in physiology and biophysics.

At trial, Mrs. Olar did not ask for a property distribution of Mr. Olar's degree, but did request an award of support. To qualify for such an award in Colorado, a spouse must establish the requirements of CRS Section 14-10-114(1)(a) and (b). These

sections provide that a court may award maintenance only if it finds that a spouse lacks sufficient property to provide for his "reasonable needs" and is unable to support himself through "appropriate employment." After analyzing the facts in the Olar case, the trial court denied Mrs. Olar's request for maintenance after finding she did not meet these threshold requirements. On initial appeal to the Colorado Court of Appeals, the trial court's decision was affirmed. (See, In re Marriage of Olar, 84 C.A. 0329 [Colo. App., Oct. 17, 1985, unpub.])

Thereafter, the Colorado Supreme Court granted certiorari to reconsider its decision in Graham v. Graham because the Court was concerned about the "harsh and often unfair outcome in a dissolution proceeding where one spouse has postponed his or her own career and educational goals to support and contribute to the career and educational goals of the other spouse." 747 P.2d at 678.

After reviewing the issue, the Court found that "the value of an educational degree is too dependent upon the attributes and future choices of its possessor to be fairly valued." Id. at 680. Therefore, it reaffirmed its holding in Graham that "an educational degree is not marital property." Id. The court went on, however, to state that the contribution of one spouse to the education of the other is a relevant factor to be considered in determining an award of maintenance:

In Graham we stated, a spouse who provides financial support while the other spouse acquires an education is not without a remedy. Here, it is the adequacy of the remedy with which we are concerned. The contribution of one spouse to the education of the other spouse may be taken into consideration when marital property is divided. This remedy is effective only if sufficient marital property has been accumulated by the parties during their marriage. In Graham, and the case at bar, the parties were divorced shortly after the husband acquired his degree. The situation in which the dissolution of marriage occurs before the benefits of the advanced degree can be realized, and where no material property is accumulated, requires us to look to another remedy for the inequity that results for the working spouse. Another option mentioned in Graham was an award of maintenance based on all relevant factors including the contribution of one spouse to the other spouse.

Id. at 680. The court then remanded the case for an award of maintenance on the basis that the threshold of reasonable need under the Colorado statute is more than the minimum amount needed to sustain life. In interpreting the second statutory requisite of "appropriate employment" of the non-student spouse, the court held that such employment must be suited to the individual and reflect that person's expectations and intentions as expressed during the marriage. Thus, Olar, supra, gives the Colorado trial courts broad discretion in fashioning an adequate remedy for a non-student spouse who has supported his/her partner in obtaining an educational degree. This approach is consistent with the well-founded doctrine in Utah that a trial court is afforded a

wide latitude of discretion in fashioning a fair, equitable and comprehensive remedy in divorce actions. See, e.g., Burnham v. Burnham, 716 P.2d 781 (Utah 1986); Jones v. Jones, 700 P.2d 1072, 1074 (Utah 1985); Argyle v. Argyle, 688 P.2d 468, 470 (Utah 1984); Higley v. Higley, 676 P.2d 379, 382 (Utah 1983); Dority v. Dority, 645 P.2d 56, 59 (Utah 1982); and English v. English, 565 P.2d 409, 410 (Utah 1977).

A very complete, informative and thorough analysis of the issue now before this Court is also found in the case of Archer v. Archer, 493 A.2d 1074 (Md. 1985). The facts of Archer are similar to the facts of this case. At the time of the parties' marriage, the husband had completed one year of medical school. The wife had completed two years of undergraduate work but discontinued her education in order to work full-time. After four years of marriage, two children were born. The husband completed three years of medical school, received his medical degree and license and completed a two-year residency. The U.S. Navy paid his tuition and gave him a monthly stipend during school. He worked summers while in medical school. In construing a statute related to dividing marital property, (a statute very similar to the Utah statute), the trial court concluded that the medical degree was not marital property under the act and denied the wife's claim for a monetary award. The trial court's decision was affirmed.

The Archer decision first analyzes the logic of Graham, supra, and gives an informative general summary of how other courts have dealt with this difficult issue.

. . . of the twenty-four jurisdictions which have considered the matter, courts in all but two jurisdictions have uniformly held that a professional degree or license is not marital property subject to equitable division. Virtually all of these courts, consistent with the rationale advanced by the Colorado Supreme Court in In re Marriage of Graham, supra, have held that an advanced degree or professional license lacks the traditional attributes of "property," being neither transferrable, assignable, devisable, nor subject to conveyance, sale, pledge or inheritance. Some courts, by way of an additional reason for concluding that a degree/license is not marital property, have held that such items are too speculative to value. Other courts have said that efforts to characterize spousal contributions as an investment or commercial enterprise deserving of recompense demean the concept of marriage. Still other courts have found that the future earning capacity of a degree or license-holding spouse is personal, a mere expectancy and a post-marital effort -- not divisible as "marital property." And some other courts, in declining to find that a graduate degree or professional license is marital property, express the view that such items are best considered when awarding alimony.

Id. at 1077-78. (Footnotes omitted.) In holding that the medical degree or license was not marital property within the meaning of the Maryland Act, the Archer court concluded:

. . . While, as earlier indicated, we have in some contexts construed the term "property" in a broad sense, there is nothing in the Maryland Act to suggest that the

General Assembly intended that a medical degree or license, earned during marriage, would constitute "marital property" subject to equitable distribution upon divorce by a monetary award. We therefore hold, in accordance with the majority view, that a professional degree or license does not possess any of the basic characteristics or property within the ambit of marital property under Section 8-201(3) of the Act. While pension rights, as in Deering, constitute a current asset which the individual has a contractual right to receive, such rights are plainly distinguishable from a mere expectancy of future enhanced income resulting from a professional degree. The latter is but an intellectual attainment; it is not a present property interest. It is personal to the holder; it cannot be sold, transferred, pledged or inherited. It does not have an assignable value nor does it represent a guarantee of receipt of a set monetary amount in the future, such as pension benefits. Quite simply, a degree/license does not have an exchange value on an open market. In re Marriage of Graham, supra, 574 P.2d at 77. At best, it represents a potential for increase in a person's earning capacity made possible by the degree and license in combination with innumerable other factors and conditions too uncertain and speculative to constitute "marital property" within the contemplation of the legislature. See also, Aufmuth v. Aufmuth, 89 Cal.App.3d 446, 152 Ca.Rptr. 668 (1979), overruled on other grounds, In re marriage of Lucas, 27 Cal.3d 808, 166 Ca.Rptr. 853, 614 P.2d 285 (1980); In re Marriage of Weinstein, 128 Ill.App.3d 234, 83 Ill.Dec. 425, 470 N.E.2d 551 (1984); Mahoney v. Mahoney, 91 N.J. 488, 453 A.2d 527 (1982). Moreover, as Dewitt v. Dewitt, 98 Wis.2d 44, 296 N.W.2d 761 (1980), makes clear, income earned after the marriage is dissolved as a result of the degree/license would in no event constitute "marital property" within the definition of that term in Section 8-201(e), since it would not have

in Section 8-201(e), since it would not have been acquired during the marriage.

Id. at 1079-80.

The Archer court then concluded, as did the Graham and Olar courts, supra, and Judge Page in this case, that the contributions of the supporting spouse could be considered in connection with her request for alimony.

Contrary to this position, the Utah Court of Appeals in Martinez reversed the trial court and created the doctrine of equitable restitution. In distinguishing equitable restitution from traditional maintenance and support, Judge Davidson stated:

[W]e hold that plaintiff is entitled to an award of 'equitable restitution' in addition to traditional alimony. We use the term equitable restitution to describe the award in order to establish a clear distinction between it and traditional alimony or any other form of spousal maintenance or support. The function of equitable restitution is to enable a spouse to share the newly obtained earning capacity of a former spouse who has achieved that capacity through the significant effort and sacrifices of the requesting spouse which were detrimental to that spouse's development. It is nothing more than an adequate sharing of the rewards of both parties' common efforts and expectations.

Martinez, 754 P.2d at 78. (Emphasis in original.)

While earlier in its opinion the Martinez court purported to follow the law as outlined in Petersen and Rayburn, the practical effect of equitable restitution is to create a property interest in a spouse's newly obtained earning capacity as a result of an

advanced educational degree. This result is contrary to Utah law. The attempt of the Martinez court to create a property interest in increased earning capacity runs afoul of the same problems inherent in the creation of a property interest in an advanced degree. First, the valuation and division of this interest will be as difficult and speculative as the valuation and division of a degree as a property interest. Second, just like an advanced degree, increased earning capacity cannot be bought, sold or devised. It is personal to its holder and its value is subject to the attributes, perseverance and career choices of its owner. Judge Jackson summarized the problems with equitable restitution in his well-reasoned dissent and stated:

By creating a divisible interest in Dr. Martinez's enhanced earning capacity, this court has awarded a non-terminable property interest in a medical degree which goes beyond the compensation approved in Petersen. The majority has not limited its award to Mrs. Martinez's contributions toward her husband's medical education costs; it has taken the further step of providing financial recompense for lost expectations. I would reject any compensation formula based on future earning capacity. The factors and variables involved in the valuation of an enhanced earning capacity are as speculative as those involved in an attempt to value an advanced degree; such speculation can only lead to inequity.

Provision for Mrs. Martinez's needs is best dealt with through a generous but fair distribution of property and award of alimony, not through the creation of a

distinctly new form of cleverly disguised marital property for which there is no precedent.

Id. at 82. (Footnotes omitted.)

The Utah Supreme Court has also recently addressed the issue of a party's future earning capacity being included in a property distribution in Olsen v. Olsen, 704 P.2d 564 (Utah 1985). In that case, the wife challenged a property distribution, claiming that she was entitled to a share of the present value of her husband's earning capacity or additional property in compensation for the award of Defendant's consulting business to him. This Court rejected that approach and concluded that the trial court's award of alimony was based upon the earning capacity of the husband and that it need not be considered in the property distribution. Id. at 567.

The impropriety of creating the doctrine of equitable restitution in addition to provision for spousal support is further emphasized by the factors outlined by the Martinez court to be used by a trial court in determining an award of equitable restitution. The court stated:

Factors to be analyzed in determining an award of equitable distribution include, but are not limited to: (1) the length of the marriage; (2) the financial contributions and personal development sacrifices made by the requesting spouse; (3) the duration of these contributions and sacrifices during marriage; (4) the resulting disparity in earning capacity between the requesting spouse and the spouse benefitted thereby; and (5) the

amount of property accumulated during the marriage. An award of equitable restitution will not terminate upon plaintiff's remarriage, and may be payable in lump sum or periodically over time depending on the circumstances of each case.

Id. at 78-79. (Footnotes omitted.)

A careful review of these factors shows that they are either already used by trial courts in determining alimony awards or they are factors that trial courts should be given discretion to consider in determining an overall family maintenance award. As a result, not only can the criteria listed above be dealt with through the proper award of support, by their nature they are better considered in a support determination.

That a spouse can be adequately compensated through a support award is especially true in this case. Judge Jackson recognized the inequity of the equitable restitution award under the specific facts of this case. He pointed out that Mrs. Martinez did not provide the financial capital that enabled Mr. Martinez to attend school and obtain his degree and that there was no evidence that she had deferred her own career or education. In addition, although the majority created equitable restitution for those situations where the spouse was on the threshold of increased earning capacity, Judge Jackson pointed out that Dr. Martinez was already earning \$100,000.00 per year and the parties had accumulated real and personal property from which an adequate compensatory award could have been made. To

the factual reasons for his dissent, Judge Jackson added several others:

On the facts presented in this case, there are additional reasons why I believe the majority's disposition of this appeal is misguided; (1) equity can be achieved under current alimony and property distribution statutes and case law; (2) an award of equitable restitution coupled with the majority's generous alimony and child support awards is double-dipping; and (3) an award of equitable restitution, in effect, treats the professional education as "property" subject to division upon dissolution of a marriage.

Id. at 80-81. Judge Jackson's approach to the property division and support awards in this case and his reasons therefor are consistent with Utah law that advanced educational degrees are not marital assets subject to the division in a divorce action. Instead, non-student supporting spouses should be compensated through a fair award of spousal support or maintenance, which award be based on the individual facts of each case.

The real question before this Court is not whether a medical degree is marital property, but whether the acquisition of skills and knowledge during a marriage, which in turn enhance the earning capability of one of the parties, is marital property. An affirmative answer to this question would necessarily have a devastating practical effect on Utah domestic relations cases. If the Martinez position is adopted, then its application cannot be limited only to professional degrees. It

must, likewise, play to masters degrees, bachelors degrees, associate degrees, technical qualifications and even a high school diploma, if they were acquired either wholly or partially during the course of the marriage. It could also then be argued that a degree from one institution, such as Harvard, is more valuable than a degree from another, such as Utah State. Likewise, the concept would have to apply not only to educational achievements but also to on-the-job training at a lower salary in anticipation of a higher paying position at a later date with a company.

Such an approach will necessarily "open Pandora's box" in divorce actions. It would require that expert testimony be presented in every divorce action if either party acquired any education or job training during the marriage. Not only would such testimony be highly speculative, but it would necessarily complicate even the simplest divorce actions. These are but just a few of the reasons why the vast majority of states have refused to adopt the concept that a degree is marital property.

The better approach is to do just what the trial court did in the present case: consider the Defendant's education in relation to the support award. The trial court did not err in concluding that the Defendant's medical degree was not an asset to be considered in a property distribution.

On the other hand, it was error for the Court of Appeals panel to create the doctrine of equitable restitution. Not only does the Court of Appeals create a property interest which is contrary to Utah law, but such an award is inequitable and unnecessary in light of the ability of a trial court to award support based on all the relevant factors of a case. That portion of the Court of Appeals opinion should be vacated.

POINT II

THE TRIAL COURT'S DECISION WAS A FAIR AND REASONABLE METHOD TO COMPENSATE THE PLAINTIFF FOR ANY EFFORT EXPENDED BY HER WHILE THE DEFENDANT WAS ATTENDING SCHOOL AND IT SHOULD HAVE BEEN AFFIRMED BY THE COURT OF APPEALS.

The trial court in this case properly exercised its discretion in fashioning a remedy which considered the individual facts of the case. An integral part of that remedy was an award of alimony to the Plaintiff which was intended to assist her in connection with her ongoing monthly financial needs and to reimburse her for the effort and monies she claimed she had expended during the period the Defendant was securing his education. In recognizing the assistance she provided (R. 205-206), the trial court ordered certain things not normally done in divorce actions.

First, it awarded Plaintiff \$400.00 per month alimony for a period of five years, with that award not to terminate on her remarriage if the same occurred within the first three years.

The Court of Appeals, without additional hearing, sua sponte increased that award to \$750.00 per month and made it permanent.

Second, while giving the husband a non-interest bearing line in the marital residence, it made the same payable upon the sale of the home, the wife's cohabitation, when the youngest child reached 18 or 21 years if still a student living at home, but not upon her remarriage.

Third, it awarded child support until each child reached the age of 18, or 21 years if the child was a full-time student and not married, when no evidence was presented to justify an award of child support past the age of 18.

Fourth, it abated the husband's child support obligation by only \$100.00 per month per child when the children were with the husband -- even if that were on a full-time basis.

Fifth, it required the husband to pay all transportation costs related to visitation.

Sixth, it required the husband to pay all of the student loans incurred in connection with securing his education.

Seventh, it gave the husband no credit for his inheritance from his mother which was received during the marriage.

Each of the seven items set forth above are actions not normally taken by a trial court in a divorce cases, and represent a conscientious effort by the trial court to fashion a remedy which would be fair to both parties, considering the fact that

the Defendant was the primary provider during the marriage (Tr. 53), while the Plaintiff worked part time for three years and contributed no more than \$200.00 per month to living expenses (Mrs. Martinez's Brief, Court of Appeals, p. 5); that the Defendant's education was paid for by his G. I. Bill benefits and his inheritance (Tr. 53); that while working and going to school, he was also able to acquire a substantial equity in a home (Tr. 57), furniture and furnishings; that the Plaintiff could secure her own education at no cost to her through her employment (Tr. 48); that the parties had been separated for three years prior to trial and that the Plaintiff had been receiving substantial support from the Defendant during that period; that the Defendant had completed his internship and a portion of his residency without any assistance, encouragement or companionship from his wife (Tr. 14, 57); and that Plaintiff's employer would pay the costs of her education if she chose to go to school (Tr. 48).

Under the circumstances of this case, the remedy fashioned by the trial court was fair and equitable. It was not arbitrary or capricious and, consequently, should be upheld. As this Court stated in Bader v. Bader, 18 Utah 2d 407, 424 P.2d 190 (1967):

It would lead to intolerable instability of judgments if this court should assume the prerogative and accept the responsibility of merely second guessing a trial judge who has done a conscientious job of attempting to make just and equitable allocation of the

property and income of the parties in regard to alimony and support monies as the trial judge appears to have done here. It is due to this fact, taking into consideration the nature of the trial judge's authority and duty, and his advantaged position, that in such matters he is allowed a comparatively wide latitude of discretion which will not be disturbed in the absence of clear abuse . . .

Id. at 151.

In Martinez, the Court of Appeals panel accepted some portions of the trial judge's decision, rejected others and created a new remedy never argued, urged, or even mentioned by Mrs. Martinez. What the Court of Appeals failed to recognize was that each aspect of the trial judge's ruling was interrelated with the other aspects in order to arrive at an overall fair and just decision to both parties.

Rather than analyzing the parties' entire financial situation and balancing all of the equities, as did the trial court, the Court of Appeals changed on a piecemeal basis certain portions of the trial court's decisions. Use of this approach is entirely incorrect inasmuch as in this case, as in most divorce cases, the support, property, and debt awards are necessarily interrelated. To readjust those awards as the Court of Appeals did also then requires a readjustment of other awards made by the trial court. That is to say, if the support awards were changed by the Court of Appeals, then in order to continue to be fair, the debt distribution may have to be reallocated. If the debt

distribution is reallocated, then the benefit of having the dependency exemptions may have to be reconsidered and so on, ad infinitum. To sanction this approach in connection with an appellate court's review necessarily goes against the well-established principle that appellate courts should not attempt to "second guess" a trial court's support and property awards (Bader, supra). In this case, the Court of Appeals' decision related to equitable restitution vis-a-vis the manner it dealt with the support awards does just that, and it is unfair. The reasoning of the trial court related to how Mrs. Martinez should be compensated for any effort expended by her while Defendant was attending school is well-documented in the very specific findings (see pages 9, 10 and 11, infra), and Judge Page's decision should be affirmed.

CONCLUSION

Under Utah law, a medical degree or, for that matter, any educational achievement or job training, obtained by a party during a marriage is not "property" as that term is used in Section 30-3-5, Utah Code Ann. (1953). Instead, if the education or training so obtained enhances or increases earning potential, that may be considered by the trial court in awarding support. The trial court in this case acted consistently with this approach, which mirrors the decisions of all but a very few states. The trial court properly and correctly fashioned an

equitable and adequate remedy for Mrs. Martinez under the specific facts of this case which reimburses her for any efforts she expended in connection with the Defendant's education.

On the other hand, the decision of the Court of Appeals in Martinez v. Martinez, supra, is contrary to these principles and contrary to Utah law, as set out in the Petersen, Rayburn and Gardner cases. An award of equitable restitution, as created by the Court of Appeals is, for all practical purposes, the same as treating a professional degree as a marital asset subject to division upon divorce. The determination of such an award is subject to the same difficulties, speculation and inequities as an award of an interest in a degree as marital property. The impropriety of such a remedy is especially evident under the facts of the Martinez case because the court began by awarding Mrs. Martinez an increased amount of permanent alimony based upon Dr. Martinez's increased earning capacity. It then also awarded her an amount of equitable restitution, a remedy expressly distinguished from traditional alimony or other spousal support and based on the increased earning capacity of a spouse as a result of that spouse's professional degree.

As a result, the Martinez decision is in conflict with previous decisions of the Court of Appeals and of this Court on an important question of state law. It represents a drastic

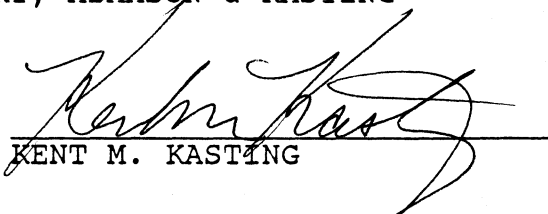
departure from this law and is a theory never raised by the Plaintiff in the court below. Simply and succinctly put, the Martinez decision is wrong.

Therefore, the Court of Appeals erred and that portion of its opinion which deals with the creation and application of the doctrine of equitable restitution should be vacated. The decision of the trial court related to support, property and debt distribution should be affirmed. The Defendant/Petitioner should be awarded his costs related to the proceedings he has been required to file in this Court and to correct the error of the Court of Appeals.

RESPECTFULLY SUBMITTED this 21st day of December, 1988.


DART, ADAMSON & KASTING

BY


KENT M. KASTING

GUSTIN, GREEN, STEGALL & LIAPIS

BY

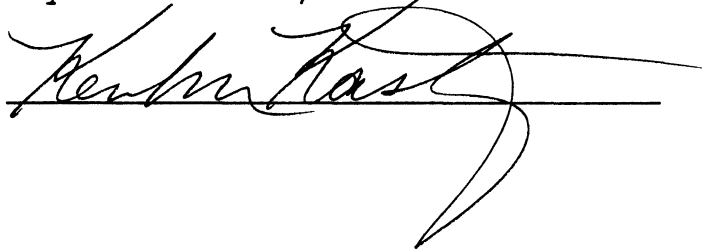

KIM M. LUHN

CERTIFICATE OF DELIVERY

I hereby certify that four true and correct copies of the above and foregoing BRIEF OF DEFENDANT/PETITIONER were duly hand delivered, addressed to:

Neil B. Crist, Esq.
Nelda Bishop, Esq.
HANSEN & CRIST
110 West Center
Bountiful, Utah 84010

DATED this 21 day of December, 1988.

A handwritten signature in dark ink, appearing to read "Neil B. Crist", is written over a horizontal line. The signature is stylized with a large, sweeping flourish extending from the end of the name.

ADDENDUM

TABLE OF CONTENTS TO ADDENDUM

| | |
|--|------|
| Trial Court's Findings of Fact, Conclusions of Law and Decree of Divorce | A-2 |
| <u>Martinez v. Martinez</u> , 754 P.2d 69 (Utah App. 1988) | A-16 |
| <u>Petersen v. Petersen</u> , 737 P.2d 237 (Utah App. 1987) | A-32 |
| <u>Rayburn v. Rayburn</u> , 738 P.2d 238 (Utah App. 1987) | A-40 |
| <u>Gardner v. Gardner</u> , 748 P.2d 1076 (Utah 1988) | A-45 |
| <u>In re Marriage of Olar</u> , 84 C.A. 0329 (Colo.App. Oct. 17, 1985 [unpub.]) | A-53 |
| <u>Archer v. Archer</u> , 493 A.2d 1074 (Md. June 12, 1985) | A-60 |

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DAVIS COUNTY, UTAH

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MICHAEL G. ALLISON, CLERK
2ND DISTRICT COURT

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NEIL B. CRIST #0759
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IN THE SECOND JUDICIAL DISTRICT COURT IN AND FOR
DAVIS COUNTY, STATE OF UTAH

| | | |
|--------------------|---|----------------------|
| KAREN C. MARTINEZ, |) | |
| |) | |
| Plaintiff, |) | FINDINGS OF FACT AND |
| |) | CONCLUSIONS OF LAW |
| vs. |) | |
| |) | |
| JESS M. MARTINEZ, |) | |
| |) | |
| Defendant. |) | Civil No. 34354 |

The above matter came on for trial on Friday, the 31st day of May, 1985, the Honorable Rodney S. Page, District Judge presiding. Plaintiff appeared in person and represented by counsel of record, Neil B. Crist, Esq. Defendant appeared in person and represented by counsel of record, Paul H. Liapis, Esq. The court heard testimony of each of the parties, and of two expert witnesses in support of Plaintiff's Complaint and Defendant's Counterclaim for Divorce. Defendant's objections to the Findings of Fact and Conclusions of Law were heard before the Court on Thursday, the 29th day August, 1985, again before the Honorable Rodney S. Page, District Judge. Both Plaintiff and Defendant appeared through counsel for that hearing. On the basis of that testimony, and the record before the court, the court being duly advised in the premises now makes and enters the following:

FILMED

FINDINGS OF FACT

1. Plaintiff is a resident of Davis County, State of Utah, and was such for a period in excess of three months prior to the filing of the Complaint in this matter.

2. Plaintiff and Defendant are wife and husband having been married in Salt Lake City, Salt Lake County, Utah on June 22, 1968.

3. The following three children have been born as issue of the marriage, and none other are expected:

BRENT P. MARTINEZ (d.o.b. October 1, 1970)

RYAN S. MARTINEZ (d.o.b. August 31, 1971)

HEATHER MARTINEZ (d.o.b. May 29, 1975)

4. During the course of the marriage Defendant treated Plaintiff cruelly causing her great mental suffering and distress by consorting with an adult female other than Plaintiff.

5. The parties acquired certain real property during the marriage, which real property is located at 745 West 2125 South, Woods Cross, Utah 84087 and is otherwise described as:

All of Lot 221, Sorrento Estates Subdivision
#2, Davis County, Utah.

6. During the course of the marriage the parties acquired certain personal property, which personal property has been allocated on an equitable basis prior to the hearing hereon; the court finds such division to be equal.

7. During the course of the marriage the parties acquired certain debts and obligations. Those debts and obligations should be allocated as follows:

A. Plaintiff should be awarded the following debts and obligations; all incurred after the separation of the parties:

- (1) First Interstate VISA, approximately \$706.73;
- (2) ZCMI, apprixmately \$537.00;
- (3) Granite Furniture, approximately \$96.00;
- (4) Levitz Furniture, approximately \$250.00
- (5) J.C. Penney's, approximately \$214.00;

(6) Mt. America Credit Union, approximately \$376.00; and

(7) Her attorney's fees (excluding award from Defendant), of approximately \$6,000.

B. The Defendant should be awarded the following debts and obligations:

(1) National Direct Student Loan, approximately \$10,000;

(2) Utah Higher Education Assistance Authority Loan, approximately \$5,739.04;

(3) Health Profession Student Loan, approximately \$3,230;

(4) Geisinger Credit Union (his moving expenses after separation of parties), approximately \$1,800;

(5) AVCO Financial Service, approximately \$1,200, (incurred after separation of parties);

(6) North Central Bank (incurred after separation of parties), approximately \$900;

(7) MASTERCARD (incurred after separation of parties), approximately \$800.00; and

(8) His attorney's fees of approximately \$2,500.

8. During the course of the marriage, the parties lived together as husband and wife for approximately 14 years, having separated during March, 1982, and having lived separate and apart since that time.

9. During the marriage, the parties jointly participated in the attainment of a Bachelor's Degree by Defendant. While achieving this degree, Defendant worked and supplied the majority of the income to the family, while Plaintiff attended to the child care and care of the home.

10. During the period 1977 through 1982, the parties experienced a particularly stressful period while Defendant was engaged in medical school. During that time Defendant did not work, and the family obligations were met by a series of student loans, a bequest from the estate of Defendant's mother and income

earned by Plaintiff during her employment. During the 14 years that the parties lived together, Plaintiff assisted extensively in Defendant's obtaining a college education, medical degree and internship. In addition, Plaintiff made substantial sacrifices in order to facilitate the completion of Defendant's medical schooling and internship.

11. The parties are both fit and proper parents to be awarded the care, custody and control of the parties' three minor children, but it is in the best interest of those children that custody be awarded to Plaintiff.

12. Defendant's gross income is \$100,000 per year as a result of his contract with Canonsburg Diversified Services, Inc. dba Canonsburg General Hospital, Canonsburg, Pennsylvania 15317. Defendant's annual expenses associated with that employment are approximately \$7,000, leaving a gross income before taxes of approximately \$93,000 per year or \$7,750 per month.

13. Plaintiff is presently employed with a gross income of approximately \$1,033 per month, and expects a 25% reduction in that salary during the next few months as a result of a voluntary transfer to a less stressful position within the company.

14. On the basis of Plaintiff's historical monthly expenditures of approximately \$2,050 per month, she is in need of financial assistance from Defendant by way of child support and should be awarded child support in the sum of \$300 per month per child. To assist the children in maintaining a standard of living more comparable to that enjoyed by their father, such child support should be ordered to continue through age 21 if the children are full-time students and not married.

15. Defendant has available through his employment health, accident and dental insurance which should be carried on the parties' children. Defendant should further be responsible for all medical expenses over and above that covered by the insurance, other than the deductible amounts associated with routine office calls and prescriptions.

16. Defendant presently has insurance on his life in the amount of \$110,000, that being Policy No. 130566 with National

Public Service for \$10,000 and a group policy with the American Medical Association for \$100,000, which insurance should be maintained with the parties' children as beneficiaries during their minority. However, in the event that Defendant should father additional children from a subsequent marriage, those children may be equally included as beneficiaries under such policy.

17. In light of the distance between Plaintiff's residence and Defendant's residence, Defendant should be awarded reasonable visitation with the children, to include up to eight weeks visitation during the summer months, and during the children's Christmas vacation from December 26 until the day prior to the commencement of school activities at the close of that vacation period. The children should spend Christmas Eve and Christmas Day with their mother each year. Defendant should be awarded other visitation as is feasible on 24-hour notice to Plaintiff.

18. As a result of the distance between the parties residences, there will be a substantial cost of transportation to facilitate Defendant's visitation. As a result, during the extended summer visitation, or during periods that a child or children live with Defendant, the child support provided herein should be reduced by the sum of \$100 per month per child for the actual time the children are living with Defendant. The Court further finds that there are on-going expenses which will be incurred by Plaintiff even during periods of time that the children are physically with Defendant.

19. Plaintiff should be awarded the exclusive use and occupancy of the parties' residence subject to a lien in favor of Defendant for the sum of \$17,528.00, payable upon the youngest child reaching the age of 18 years or the age of 21 years if she is still a student and living at home after attaining the age of 18 years, or upon the sale of the home, whichever occurs first. The lien in favor of Defendant is specifically ordered not to be payable on the remarriage of Plaintiff but shall be payable in the event that Plaintiff cohabitates with an adult male without the benefit of marriage.

20. There presently exists a large disparity between the parties' present and potential incomes.

21. The court finds that alimony is designed not only to meet the needs of Plaintiff in this case, and is not solely based upon her ability to support herself and Defendant's ability to contribute to that support, but also a means of repayment to Plaintiff for her years spent caring for the household, helping the husband in his educational pursuits and support of the family, and for her involvement through the extensive educational process utilized to obtain the medical training.

22. Plaintiff's income and resources being inadequate to meet her needs for support and maintenance, she should be awarded the sum of \$400 per month for a period of five years as and for alimony. Such alimony should not terminate in the event that she remarries within three years of the Decree of Divorce becoming final, but should terminate under the normal condition of remarriage if such takes place more than three years after the Decree herein becomes final. Cohabitation with an adult male shall terminate alimony, as provided by law at any time during the five year period.

23. The court further finds that the medical degree and training are not specifically a property right subject to distribution by this court under the current law of this state. Such degree and training are applicable only to the determination of alimony and child support. The court has considered the medical training and license to practice only as it impacts income and Defendant's present ability to pay appropriate alimony and child support. Such income will also be taken into account "in future years as it raises in stability (sic) the rate of child support". (T.T. Page 135, Line 10)

24. As a result of the substantial contribution by Defendant to the support and maintenance of the parties' children, it is fair and equitable that Defendant be awarded the two oldest children for tax deduction purposes, and that Plaintiff be directed to file the necessary documents in order to allow Defendant to claim them as deductions during each December

starting 1985. Plaintiff should be awarded the deductions for the youngest child.

25. Plaintiff's resources are inadequate to allow her to pay her attorney's fees incurred herein, a sum of \$7,800 plus the cost of the trial. As a result, Plaintiff should be awarded a judgment against Defendant for attorney's fees in the sum of \$2,500. However, Defendant has paid that sum prior to the execution of the Findings of Fact, Conclusions of Law and Decree of Divorce; therefore, no award of attorney's fees or costs should be made in the Decree.

26. The parties having been separated for a period of approximately three years, the Decree of Divorce herein should become final upon entry.

CONCLUSIONS OF LAW

A. Plaintiff should be awarded a Decree of Divorce from Defendant on the grounds of mental cruelty, with such Decree to become final upon entry.

B. The care, custody and control of the parties' minor children should be awarded to Plaintiff, subject to reasonable visitation as set forth in the Findings above.

C. In order to make the distribution of that property which qualifies for distribution by this court as equal as possible, Plaintiff should be awarded the real property set forth in Paragraph 5 of the Findings above subject to a lien in favor of Defendant for one-half of the present equity therein, that being for the sum of \$17,678. Such lien should be payable upon the youngest child reaching the age of 18 years, or upon that youngest child reaching the age of 21 years if she remains unmarried and a full-time student after the age of 18 years. Such lien should further be payable upon the sale of the home, or upon Plaintiff's cohabitation with an adult male without remarriage, but should specifically not be made payable upon Plaintiff's remarriage.

D. The personal property of the marriage has been divided equally between the parties, and such award should be confirmed by this court.

E. The medical degree and training acquired by Defendant during the marriage is not a property asset properly allocable and distributable by this court. As a result, the court has equally allocated the remaining property assets without consideration of this item. The court has considered the medical training and license to practice only as it impacts income and Defendant's present ability to pay appropriate alimony and child support. Such income will also be taken into account "in future years as it raises in stability (sic) the rate of child support". (T.T. Page 135, Line 10)

F. The debts and obligations of the marriage should be allocated as set forth in Paragraph 7 of the Findings above, such allocation being fair and equitable.

G. Plaintiff should be awarded the sum of \$300 per month per child as and for support of the minor children, with such support to be continued until age 21 if each child is a full-time student and not married after attaining the age of 18 years.

H. Defendant should be ordered to provide health, accident and dental insurance for the benefit of the parties' minor children, and to be responsible for any deductible expenses not covered by that insurance, with the exception of deductibles associated with routine office calls and prescriptions.

I. Defendant should be ordered to maintain in full force and effect the policies of life insurance presently existing upon his life, payable to the benefit of the parties' minor children. However, any subsequent children fathered by Defendant should be included on an equal basis under that policy.


J. As a result of the substantial cost of transportation incurred by Defendant, in the on-going expenses attributable to Plaintiff during the children's absences, the child support provided herein should be abated by the sum of \$100 per month per child for actual time that the children are living with Defendant.

K. Plaintiff should be awarded the sum of \$400 per month as and for alimony for a period of five years. Such alimony should not terminate in the event that she remarries within three years of the Decree of Divorce herein becoming final but should terminate under the normal condition of remarriage if that remarriage takes place more than three years after the Decree becomes final. Such alimony should terminate by law in the event that there is cohabitation during the alimony period.

L. No further award of attorney's fees should be made as a result of this action.

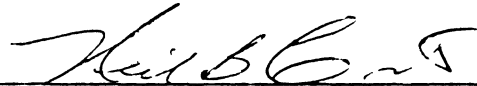
DATED this 7th day of ~~September~~ ^{October}, 1985.

BY THE COURT:

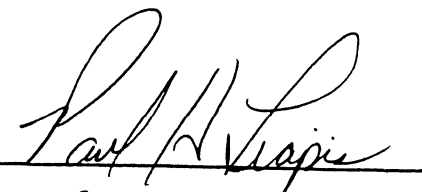


RODNEY S. PAGE
District Judge

I hereby certify that I mailed a true and correct copy of this third amended proposed Findings of Fact and Conclusions of Law to Paul H. Liapis, Attorney for Defendant, via first class mail, postage prepaid on this 30 day of ~~September~~ ^{August}, 1985.



NEIL B. CRIST
Attorney for Plaintiff



9-17-85

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DAVIS COUNTY, UTAH

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MICHAEL J. ALLEN, CLERK
2ND DISTRICT COURT

BY
DEPUTY CLERK

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Attorney for Plaintiff
110 West Center Street
Bountiful, Utah 84010
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IN THE SECOND JUDICIAL DISTRICT COURT IN AND FOR
DAVIS COUNTY, STATE OF UTAH

| | | |
|--------------------|---|-------------------|
| KAREN C. MARTINEZ, |) | |
| |) | |
| Plaintiff, |) | DECREE OF DIVORCE |
| |) | |
| vs. |) | |
| |) | |
| JESS M. MARTINEZ, |) | |
| |) | |
| Defendant. |) | Civil No. 34354 |

U-210F

The above matter came on for trial on Friday, the 31st day of May, 1985, the Honorable Rodney S. Page, District Judge presiding. Plaintiff appeared in person and represented by counsel of record, Neil B. Crist, Esq. Defendant appeared in person and represented by counsel of record, Paul H. Liapis, Esq. The court heard testimony of each of the parties, and of two expert witnesses in support of Plaintiff's Complaint and Defendant's Counterclaim for Divorce. In addition, the Court heard Defendant's objections to the Findings of Fact and Conclusions of Law on Thursday, the 29th day of August, 1985, with the Honorable Rodney S. Page, District Judge presiding. Plaintiff and Defendant appeared through counsel at that hearing. On the basis of the testimony, and the record before the court, the court having previously entered its Findings of Fact and Conclusions of Law, now makes and enters the following:

FILMED

DECREE OF DIVORCE

1. DIVORCE GRANTED: Plaintiff is awarded a Decree of Divorce from Defendant, thereby severing the bonds of matrimony previously existing between the parties. Such Decree will be final upon entry in the records of the court without the need for further action on the part of the parties.

2. CUSTODY: Plaintiff is awarded the care, custody and control of the following children born as issue of this marriage, subject to reasonable visitation retained by Defendant as set forth herein:

BRENT P. MARTINEZ (d.o.b. October 1, 1970)

RYAN S. MARTINEZ (d.o.b. August 31, 1971)

HEATHER MARTINEZ (d.o.b. May 29, 1975)

3. VISITATION: Defendant is awarded reasonable visitation with the children, to include up to eight weeks visitation during the summer months, and during the children's Christmas vacation from December 26 until the day prior to the commencement of school activities at the close of that vacation. In carrying out this visitation, the court orders that children spend Christmas Eve and Christmas Day with their mother each year. Defendant should be awarded other reasonable rights of visitation as is feasible so long as he provides not less than 24 hours advance notice to Plaintiff of his intention to exercise that visitation.

4. CHILD SUPPORT: Plaintiff is awarded from Defendant child support in the amount of \$300 per month per child. Such child support is specifically ordered to continue past the age of 18 years until each child reaches the age of 21 years so long as the child is a full-time student and not married.

5. CHILD SUPPORT ABATEMENT: During periods that the children live with Defendant for extended periods, the child support provided herein is ordered to be reduced by the sum of \$100 per month per child for the actual time that the children are in the primary care of Defendant.

6. TAX DEDUCTIONS: Defendant is awarded the parties' two oldest children as and for state and federal income tax deduction

purposes, and Plaintiff is awarded the parties' youngest child for such tax deduction purposes. Plaintiff is further ordered to file any necessary documents in order to allow Defendant to claim the two oldest children for each commencing 1985.

7. MEDICAL INSURANCE: Defendant is ordered to provide health, accident, medical and/or dental insurance on the parties' children and to be responsible for all medical expenses not covered by that insurance, other than deductible amounts associated with routine office calls and prescriptions.

8. LIFE INSURANCE: Defendant is ordered to maintain in full force and effect the policies insuring his life in the amount of \$110,000 payable to the parties' children as beneficiaries during their minority. In the event that Defendant fathers additional children in any subsequent marriage, those children may equally share as beneficiaries under such policies.

9. ALIMONY: Plaintiff is awarded alimony in the sum of \$400 per month for a period of five years after the Decree of Divorce herein is made final. Such alimony is ordered not to terminate in the event that she remarries with an adult male within three years of the Decree of Divorce becoming final, but such alimony is ordered to terminate under the normal conditions of remarriage if such takes place more than three years after the Decree herein becomes final. Cohabitation shall terminate alimony as per the statute at any time.

10. REAL PROPERTY: Plaintiff is awarded the exclusive use and occupancy of the real property acquired during the marriage, which property is located at 745 West 2125 South, Woods Cross, Utah 84087, and is otherwise more specifically described as:

All of Lot 221, Sorrento Estates Subdivision
#2, Davis County, Utah.

Such award is made subject to a lien in favor of Defendant for the sum of \$17,528, payable upon the occurrence of the first of the following conditions to take place.

A. The youngest child reaching the age of 18 years or the age of 21 years if he or she is still a student and living at home after attaining the age of 18 years;

B. Upon the sale of the home; and

C. Upon Plaintiff's cohabitation with an adult male which is not issue of the parties.

Defendant's lien is specifically not payable in the event of Plaintiff's remarriage.

11. PERSONAL PROPERTY: The personal property acquired during the marriage is awarded to that person having possession of the property as of the date of the hearing hereon.

12. DEBTS: The debts and obligations of the marriage are allocated as follows:

A. Plaintiff is awarded the following debts and obligations; all incurred after the separation of the parties:

- (1) First Interstate VISA, approximately \$706.73;
- (2) ZCMI, apprixmately \$537.00;
- (3) Granite Furniture, approximately \$96.00;
- (4) Levitz Furniture, approximately \$250.00
- (5) J.C. Penney's, approximately \$214.00;
- (6) Mt. America Credit Union, approximately \$376.00; and
- (7) Her attorney's fees (excluding award from Defendant), of approximately \$6,000.

B. The Defendant is awarded the following debts and obligations:

- (1) National Direct Student Loan, approximately \$10,000;
- (2) Utah Higher Education Assistance Authority Loan, approximately \$5,739.04;
- (3) Health Profession Student Loan, approximately \$3,230;
- (4) Geisinger Credit Union (his moving expenses after separation of parties), approximately \$1,800;
- (5) AVCO Financial Service, approximately \$1,200, (incurred after separation of parties);
- (6) North Central Bank (incurred after separation of parties), approximately \$900;

(7) MASTERCARD (incurred after separation of parties), approximately \$800.00; and

(8) His attorney's fees of approximately \$2,500. .

13. ATTORNEY'S FEES: No costs or attorney's fees are awarded beyond those previously paid by Defendant.

DATED this 7th day of ~~September~~ ^{October}, 1985.

BY THE COURT:

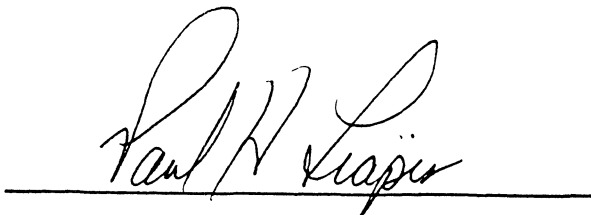


RODNEY S. PAGE
District Judge

I hereby certify that I mailed a true and correct copy of this third amended proposed Decree of Divorce to Paul H. Liapis, Attorney for Defendant, via first class mail, postage prepaid on this 30 day of ~~September~~ ^{August}, 1985. If no objection is received prior to September 14, 1985, I request that the same be signed and entered.



NEIL B. CRIST
Attorney for Plaintiff



9-17-85

**Karen C. MARTINEZ, Plaintiff
and Appellant,**

v.

**Jess M. MARTINEZ, Defendant
and Respondent.**

No. 860159-CA.

Court of Appeals of Utah.

April 19, 1988.

Wife appealed from order of the Second District Court, Rodney S. Page, J., which divorced parties, awarded custody, awarded child support and alimony, and divided property. The Court of Appeals, Davidson, J., held that: (1) federal income tax exemptions could not be awarded to husband where custody was awarded to wife; (2) awards of child support and alimony were inadequate; (3) husband's medical degree was not subject to valuation distribution; but (4) wife was entitled to equitable distribution to recognize her contributions and sacrifices while husband obtained medical degree.

Affirmed in part and reversed in part, and remanded.

Jackson, J., dissented and filed an opinion.

1. Husband and Wife ⇨279(1)

Prior to entry of divorce decree, father was entitled to exemptions for two children as stipulated by the parties in separation agreement in 1983. 26 U.S.C.A. § 152(e)(4)(B).

2. Divorce ⇨297

Although parties had stipulated in separation agreement in 1983 that father could

have federal income tax deductions for the two children, court could not award tax exemptions for the children to the father while awarding custody to the mother in 1985 divorce decree where mother's amended complaint in 1985 had put the distribution of tax exemptions at issue. 26 U.S.C.A. § 152(e)(4)(B).

3. Divorce ⇨227(2)

Trial court did not abuse its discretion in awarding wife only \$2,500 in attorney fees, even though she had asked for over \$7,800, where extensive fees were generated by interest and preparation of expert testimony offered to support valuation of husband's medical degree which was rejected by the lower court.

4. Divorce ⇨308

Award of child support in the amount of \$300 per child was inadequate to the extent that it was less than \$600 per month per child in view of father's annual income of \$100,000.

5. Divorce ⇨312.6(9)

Although trial court's findings of fact did not fully address child support factors, that was not reversible error where the totality of the factual evidence in the record made the need for child support clear.

6. Divorce ⇨247

Award of alimony in the amount of \$400 per month for a period of five years was inadequate to the extent that it was less than \$750 per month and to the extent that it was not continuing, in view of husband's income of \$100,000 per year.

7. Divorce ⇨252.3(1)

Medical degree is not subject to valuation and distribution in a divorce.

8. Divorce \S 252.3(1)

Where wife had provided some income and had provided care of children while husband obtained medical degree, wife was entitled to an award of "equitable restitution," in addition to traditional alimony, to allow her to share the newly obtained earning capacity of her husband, who had achieved that capacity through the significant efforts and sacrifices which the wife had made and which were detrimental to the wife's development.

See publication Words and Phrases for other judicial constructions and definitions.

9. Divorce \S 252.3(1)

Equitable restitution to spouse for sacrifices made while then spouse obtains education which leads to greatly increased income is not to be awarded in case where marriage has lasted for many years after the professional degree has been attained as, in such a case, sufficient assets will have been accumulated and appropriate distribution to the requesting spouse will enable that spouse to share in the economic benefits earned as a result of the professional degree.

10. Divorce \S 252.3(1)

Factors to be analyzed in determining an award of equitable restitution to spouse who has made significant efforts and sacrifices to enable other spouse to obtain professional degree are the length of the marriage, the financial contributions and personal development sacrifices made by the requesting spouse, the duration of those contributions and sacrifices during the marriage, resulting disparity in earning capacity between the requesting spouse and the spouse benefited thereby, and the amount of property accumulated during the marriage.

11. Divorce \S 252.3(1)

Award of equitable restitution to one spouse to recognize contributions and sacrifices made to enable the other spouse to obtain a professional degree will not terminate upon the requesting spouse's remarriage and may be payable in lump sum or periodically over time, depending on the circumstances of each case.

Neil C. Crist (argued), for Hansen, Crist & Spratley, Bountiful, for plaintiff and appellant.

Yasemin M. Salahor, Paul H. Liapis, Kent M. Kasting (argued), Salt Lake City, for defendant and respondent.

Before JACKSON, BILLINGS and DAVIDSON, JJ.

OPINION

DAVIDSON, Judge:

Plaintiff appeals from a decree of divorce entered by the Second District Court. We affirm in part, reverse in part, and remand.

FACTS

The parties were married on June 22, 1968; subsequently, three children were born. At the time of marriage, both plaintiff and defendant were high school graduates and defendant was serving as an enlisted man in the U.S. Army. After defendant's discharge from the service, he accepted employment at Hill Air Force Base, Utah where he worked as an instrument repair mechanic with an annual gross salary of approximately \$10,000.00. Defendant began his higher education in 1970. Defendant testified the parties discussed his pursuit of a degree and that plaintiff thought it was a "good idea" but that she "wasn't terribly in favor of it" because it would be time consuming. Plaintiff testified she was in favor of the decision because the family would "have a better future." Defendant completed his undergraduate program five and one-half years later. During this phase of his education, defendant supported the family on his wages and G.I. Bill benefits. Plaintiff gave birth to children in 1970, 1971, and 1975.

While an undergraduate, defendant decided to apply to medical school. The parties agree that defendant's application to medical school threatened their marriage. Plaintiff was concerned that defendant's lack of employment during four years

would be financially detrimental to the family and that medical school would severely limit defendant's ability to "spend much time" with the children and plaintiff. Seeing that defendant was adamant, plaintiff agreed to "stick by him" during the next four years believing that, as a result of their mutual sacrifices, the family would eventually enjoy a higher standard of living.

Defendant entered medical school in 1977 and graduated in 1981. Family support was derived from student loans, savings, the remainder of defendant's G.I. Bill entitlement, \$7,000.00 from defendant's mother's estate, and income from plaintiff's part-time employment.

Upon completion of medical school, defendant accepted an internship in Pennsylvania. Plaintiff reluctantly left Utah. The family's first residence in Pennsylvania was in an isolated location with no telephone and no playmates for the children. The family then rented a home in a larger town and plaintiff sought employment to supplement defendant's salary as an intern. Plaintiff testified that she found a position at a fast food restaurant but defendant did not want her to work there because it would be embarrassing. Because of the friction between the parties and defendant's admitted relationship with another woman, plaintiff requested they seek marital counseling but defendant refused. Because of plaintiff's lack of prospects for suitable employment in Pennsylvania and the marital discord, plaintiff and the children returned to the family home in Utah to wait for defendant to finish his medical training. Although plaintiff understood defendant intended to practice medicine in Utah, defendant completed his training and accepted employment in Pennsylvania.

Plaintiff filed a verified complaint for divorce on February 15, 1983. In a stipulation and separation agreement, signed by the parties and filed with the court on July 29, 1983, plaintiff agreed defendant could claim federal tax exemptions for two of the children while she retained the exemption for the third child. The settlement agreement also recognized the need to "make

appropriate adjustments" in the support agreement in the event of future changes in financial circumstances.

After plaintiff hired new counsel, she filed a verified amended complaint in November 1983, in which the distribution of the tax exemptions remained the same. On May 9, 1985, however, plaintiff filed a motion for leave to amend the complaint which was subsequently granted. This amendment listed defendant's salary as \$100,000.00 per annum and requested that the child support and alimony awards reflect the significant increase in defendant's income. Plaintiff requested attorney fees and costs which would reflect the current state of the litigation as opposed to that anticipated in 1983. Plaintiff also requested the trial court to strike the previously proposed distribution of federal tax exemptions for the children.

Trial to the court was held on May 31, 1985. The decree of divorce awarded custody of the children to plaintiff subject to reasonable visitation. Plaintiff received \$300.00 per month per child in child support subject to an abatement of \$100.00 per month per child in the event that a child should live with defendant for an extended period. The distribution of tax exemptions was as initially agreed in the stipulation and separation settlement. Alimony was awarded in the amount of \$400.00 per month for a period of five years being nonterminable for a period of three years even if plaintiff remarried. Plaintiff was awarded attorney fees in the amount of \$2,500.00. Plaintiff was also awarded the home subject to a mortgage and an equitable lien in favor of defendant for the sum of \$17,528.00 payable upon the occurrence of enumerated, future contingencies. The award of the home to plaintiff necessitated that she continue to make monthly mortgage payments of \$309.00.

Plaintiff presents the following issues for review: (1) did the award to defendant of the two tax exemptions violate federal law; (2) were the awards of attorney fees, child support, and alimony so inadequate as to constitute an abuse of discretion; and (3)

is defendant's medical degree marital property subject to division?

DISTRIBUTION OF INCOME TAX EXEMPTIONS

Plaintiff contends the distribution of state and federal income tax exemptions for two of the children to defendant violates the Supremacy Clause of the U.S. Constitution in light of the 1984 Tax Reform Act and its effect on 26 U.S.C. § 152(e) (1988).¹

Subsection 152(e)(1) describes the normal situation where a custodial parent claims the tax exemption for a child. An exception is provided in subsection 152(e)(4)(A). The noncustodial parent may claim the exemption when there is a qualified pre-1985 instrument between the parents which states that the noncustodial parent shall be entitled to the exemption for the child and that parent provides at least \$600.00 yearly for the child's support. The definition of a qualified pre-1985 instrument is stated in subsection 152(e)(4)(B) as:

For purposes of this paragraph, the term "qualified pre-1985 instrument" means any decree of divorce or separate maintenance or written agreement—

- (i) which is executed before January 1, 1985,
- (ii) which on such date contains the provision described in subparagraph (A)(i), and
- (iii) which is not modified on or after such date in a modification which expressly provides that this paragraph shall not apply to such decree or agreement.

[1] The parties stipulated to the distribution of the tax exemptions for the children in a separation agreement filed with the court in 1983. The distribution was incorporated in the verified amended complaint also filed that year. Subparagraphs (i) and (ii) of subsection 152(e)(4)(B) are satisfied by the 1983 filings. There was no written modification prior to January 1, 1985, which expressly revoked the distribu-

tion of tax exemptions during the period the stipulation and separation agreement was in effect. Therefore, defendant was entitled to the two exemptions as stipulated prior to the entry of the decree of divorce.

[2] However, plaintiff's amended complaint in 1985 put the distribution of tax exemptions at issue in the divorce proceeding. The provisions of the separation agreement were no longer effective. Plaintiff requested the tax exemptions for all three children but the trial court's order did not honor that request. This result is contrary to the general provisions of section 152(e). Any argument that the stipulation and separation agreement qualifies as a pre-1985 instrument, where plaintiff willingly relinquishes her right to the exemptions under federal law, neglects plaintiff's rejection of its terms in the *post-divorce* period. By amending her complaint, plaintiff modified and affirmatively rejected the pre-divorce distribution. Plaintiff is entitled to the tax exemptions for all of the children in view of the award of custody to her and the failure of defendant to establish any exception to the general rule stated above.

AWARD OF ATTORNEY FEES

[3] Plaintiff argues the trial court abused its discretion in awarding attorney fees of only \$2,500.00 when she asked for \$7,871.00. Plaintiff clearly demonstrated a need for assistance. The court recognized that need by making the award. However, the court considered a written statement of attorney fees as a basis for the award. Extensive fees were generated by interest and preparation of the expert testimony offered to support the valuation of the medical degree. That argument was rejected by the lower court. We find no abuse of discretion in the award.

Because defendant did not cross appeal on this issue, we do not consider whether there was sufficient evidence presented to the trial court to justify any award of attorney

1. The decree of divorce utilizes the term "deduction" and the United States Code utilizes "exemption" when referring to the individual al-

lowance subtracted from income when computing tax owed.

ney fees. *Newmeyer v. Newmeyer*, 745 P.2d 1276 (Utah 1987).

AWARD OF CHILD SUPPORT

[4] Utah Code Ann. §§ 78-45-3,-4 (1987) establish the obligation of both parents to support their children and "[a] child's right to that support is paramount." *Woodward v. Woodward*, 709 P.2d 393, 394 (Utah 1985). The Utah Supreme Court continued "The trial court may fashion such equitable orders in relation to the children and their support as is reasonable and necessary, considering not only the needs of the children, but also the ability of the parent to pay." *Id.* Plaintiff contends the award of \$300.00 per month per child was so inordinately low that it constituted an abuse of discretion by the trial court. We agree.

The trial court found defendant's gross income was \$100,000.00 per annum or \$8,333.00 per month, at the time of the divorce, while it determined plaintiff's gross income was \$1,033.00 per month.² The court found that plaintiff had monthly expenditures of \$2,050.00 and was in need of financial assistance from defendant to assist the children "in maintaining a standard of living more comparable to that enjoyed by their father."

Assuming the three children spend the majority of the year with plaintiff, her gross monthly income, including awarded child support and alimony, is \$2,333.00. After taxes have been deducted from the portions of income subject to taxation, plaintiff's net monthly income approximates her meager monthly expenses leaving no leeway for emergencies, presently necessary replacement expenditures, or any amenities of life. Under such grim

economic reality, the children who reside with their mother will not enjoy a standard of living remotely comparable to that of their father.

The award established by the trial court cannot be justified when applying the factors listed in Utah Code Ann. § 78-45-7(2) (1987).³ We find plaintiff and her children are left in a precariously balanced financial existence while defendant is relatively affluent. Plaintiff and the children are in great need of assistance. The defendant has no responsibility for the support of anyone other than plaintiff, the children, and himself.

At the present time the courts of this state do not have uniform guidelines to employ in determining an award of child support.⁴ Many other jurisdictions, however, have established child support guidelines or schedules, based upon current economic data as to the cost of rearing children, to be used by trial courts. Although we do not use the numbers or approaches in fashioning the award in this case, a general comparison illustrates the inadequacy of the award. Because these formulas are based upon adjusted incomes, we cannot directly compare the numbers. Nevertheless, it is clear that under each, the support would be much higher. For example, in Colorado, an income shares guideline state, the award would be approximately \$1,535.00. Under Wisconsin's Child Support Guidelines, which were recently adopted by our neighboring states of Idaho and Nevada, where only the noncustodial parent's income is considered and where 29% of gross income is the presumptive award, the child support for the three children would be \$2,320.00.

2. The lower court also found that plaintiff expected a 25% reduction in her salary because of a voluntary transfer to a less stressful position within her employment.

3. Section 78-45-7(2) lists the following factors to be considered in awarding prospective support:

(a) the standard of living and situation of the parties;
(b) the relative wealth and income of the parties;

(c) the ability of the obligor to earn;
(d) the ability of the obligee to earn;
(e) the need of the obligee;
(f) the age of the parties;
(g) the responsibility of the obligor for the support of others.

4. This Court notes, however, that a Task Force established by the Judicial Council is presently investigating the propriety of adopting Uniform Child Support Guidelines for Utah based upon current economic data.

[5] Under the economic circumstances of this case, the award of child support is inequitable and must be modified. The dissent argues the case must be remanded to determine the children's need and the ability of each party to pay child support. We note the findings of fact do not fully address the child support factors. However, we believe this not to be reversible error because the totality of the factual evidence in the record is "clear, uncontroverted, and capable of supporting only a finding in favor of the judgment" of the need for child support. *Acton v. Deliran*, 737 P.2d 996, 999 (Utah 1987); *Marchant v. Marchant*, 743 P.2d 199, 202 (Utah App.1987). The record is also replete with the financial needs of the children and the relative abilities of plaintiff and defendant to meet those needs. Nothing could be gained by a remand for this purpose except a delay of the increased award. Based upon the above reasoning, we award the sum of \$600.00 per month per child, support to continue to age 21 if the child is a full time student and not married.⁵ On remand, the trial court shall enter its order for child support in accordance with Utah Code Ann. § 30-3-5.1 (1987).

AWARD OF ALIMONY

[6] The standard of review relating to alimony requires that we not disturb the trial court's award unless "such a serious inequity has resulted as to manifest a clear abuse of discretion." *English v. English*, 565 P.2d 409, 410 (Utah 1977). The Utah Supreme Court in that often quoted case states that "the most important function of alimony is to provide support for the wife as nearly as possible at the standard of living she enjoyed during marriage, and to prevent the wife from becoming a public charge." *Id.* at 411. The Court continued that a trial court should consider "the financial conditions and needs of the wife, the ability of the wife to produce a suffi-

cient income for herself; and the ability of the husband to provide support." *Id.* at 411-12.

In *Jones v. Jones*, 700 P.2d 1072 (Utah 1985), the Court conducted an extensive analysis of these three factors. Although the trial judge carefully considered the factors outlined in *Jones*, because plaintiff and the children were living in an artificially depressed standard of living, the award of only \$400.00 per month of terminable alimony is inadequate. We refuse to penalize plaintiff for trying to live within her means and failing to show higher necessary expenses.⁶

An application of one of the *English* standards could justify the award made in this case. Plaintiff endured a poor standard of living during the marriage. She had little money to spend then so she should have little now. That result will preserve "the standard of living she enjoyed during marriage." But such a result is unfair. A divorce court is a court of equity. It is not equitable to preserve the status of limited income for one party and affluence for the other when the one sacrificed to help the other achieve such affluence. When the totality of the *English* standards are applied the award is clearly inadequate.

The court below also abused its discretion in limiting the award of alimony to a period of five years; being nonterminable by reason of remarriage for three years. In *Olson v. Olson*, 704 P.2d 564 (Utah 1985), the Utah Supreme Court analyzed a similar fact situation wherein the plaintiff wife was a high school graduate and had spent the majority of the marriage bearing and rearing the parties' six children. Defendant husband was a well paid consultant who provided his services to governmental agencies on a contract basis. While affirming the award of alimony in the amount of \$1,600.00 per month, the Court modified the award by striking its two-year

5. The award to age 21 was made by the trial court pursuant to Utah Code Ann. § 15-2-1 (1986).

6. A review of plaintiff's expenses shows them to be extremely low and based upon what she

actually spent rather than estimates of what she needed to sustain herself and her children at a reasonable standard of living based upon the total family income.

limitation and making the alimony permanent subject to future changed circumstances. In support of its modification, the Court pointed to the wife's limited education, her lack of work experience, and that she had "no reasonable expectation of obtaining employment two years hence that will enable her to support herself at a standard of living even approaching that which she had during the marriage." *Id.* at 567. See also *Paffel v. Paffel*, 732 P.2d 96, 103 (Utah 1986).

For the reasons stated previously and based upon the facts in the record, we hold that plaintiff is entitled to an award of alimony on a continuing basis and we award permanent alimony in the sum of \$750.00 per month subject to the provisions of Utah Code Ann. § 30-3-5 (1987).

THE MEDICAL DEGREE AND AWARD OF EQUITABLE RESTITUTION

[7] We next must determine whether defendant's medical degree is marital property subject to division. In the recent case of *Gardner v. Gardner*, 748 P.2d 1076 (Utah 1988), the Utah Supreme Court discussed this problem and noted that there is authority from other jurisdictions on both sides of the issue. However, this Court, in *Petersen v. Petersen*, 737 P.2d 237, 239-42 (Utah App.1987) and *Rayburn v. Rayburn*, 738 P.2d 238, 240 (Utah App.1987), analyzed the issue and held that a medical degree is not marital property subject to division in a divorce decree. We agree with the Utah Supreme Court "that an educational or professional degree is difficult to value and that such a valuation does not easily fit the common understanding of the character of property." *Gardner*, 748 P.2d at 1081. The Court in *Gardner* was not required to address the issue because there was significant other property accumulated during the marriage resulting

from the increased earning capacity afforded by the medical degree and the numerous years the Gardners enjoyed the standard of living afforded by the medical degree. That is not the case here. The Court noted, "The cases which have refused to hold that professional degrees and practice constitute marital property subject to valuation and distribution have nonetheless assessed and divided the value of the degree or practice on the basis of other legal and equitable remedies." *Id.* at 1080-81. The Court described the common fact pattern applicable to this acknowledgment of the degree's equitable worth as a situation where "the husband is supported throughout a long graduate or professional program by the working wife, and the couple is divorced soon after graduation. In such cases, there are few marital assets to distribute, and the courts have considered other ways of compensating the spouse." *Id.* at 1081. This is essentially the situation presented here. While this marriage has continued for many years the only assets are the home and the enhanced earning capacity of defendant. The earning capacity must be recognized in fashioning those "legal and equitable remedies" necessary to assist plaintiff to readjust her life. The valuation and distribution of the medical degree in this case is not a viable alternative. Valuation would be speculative in the extreme, and distribution ignores the fact that the degree is personal to defendant.⁷ We prefer to follow the majority rule, upheld in *Petersen* and *Rayburn*, that a medical degree is not subject to valuation and distribution in a divorce. However, this case is a striking example of a highly paid professional disposing of his wife with a minimum amount of support just as that professional is reaching a level of income for which both the professional and his wife have striven. This prevents the wife

7. It is argued that estimating the value of a medical degree is no more speculative than measuring damages in a wrongful death case. However, in wrongful death, the measurement begins at death and is subject to no future variables introduced by the decedent. Here, we must guess at the future course of defendant's career. Will he continue to practice in the same

specialty in the same locale? A future decision or happenstance could totally change or even terminate the value of the medical degree. Can defendant then return to court to change the valuation and distribution based upon the more certain circumstances? Could plaintiff prevent defendant from making decisions which could impact the value of the degree?

from enjoying the benefit of *her labor and sacrifice* in support of her husband's goals. See generally L. Weitzman, *The Divorce Revolution*, ch. 5, 124-35 (1985).

From the time of the marriage in 1968 until their separation in 1982, the parties enjoyed few of the material pleasures of life. The court found that "During the 14 years that the parties lived together, plaintiff assisted extensively in Defendant's obtaining a college education, medical degree and internship. In addition, plaintiff made substantial sacrifices in order to facilitate the completion of Defendant's medical schooling and internship."⁸ Plaintiff accepted the sacrifices necessary to support defendant's aspirations in anticipation of future benefits. The trial record shows the following exchange:

Q. Okay. Was there any discussion of future benefits that would be obtained through this?

A. Yes. He [defendant] told me that if I would sacrifice, and if I would see it through, that someday he would make it up to me and we would have material items that we had gone without. And his hours would be flexible and he would have more time to spend with himself and the children. If we would just be patient.

Defendant offered no rebuttal to the exchange.

This Court in *Petersen*, 737 P.2d at 242, foresaw the situation now at issue. Writing for the Court, Judge Orme recognized that an occasion might arise whereby one spouse was reaching a high level of income just at the time of divorce rather than the more frequent situation in which the parties had enjoyed the benefits of the husband's medical education for a number of years. Judge Orme wrote:

In cases like the instant one, life patterns have largely been set, the earning potential of both parties can be predicted with some reliability, and the contribu-

tions and sacrifices of the one spouse in enabling the other to attain a degree have been compensated by many years of the comfortable lifestyle which the degree permitted. Traditional alimony analysis works nicely to assure equity in such cases.

In another kind of recurring case, typified by *Graham* [*In re Marriage of Graham*, 194 Colo. 429, 574 P.2d 75 (1978)], where divorce occurs shortly after the degree is obtained, traditional alimony analysis would often work hardship because, while both spouses have modest incomes at the time of divorce, the one is on the [threshold] of a significant increase in earnings. Moreover, the spouse who sacrificed so the other could attain a degree is precluded from enjoying the anticipated dividends the degree will ordinarily provide.... In such cases, alimony analysis must become more creative to achieve fairness, and an award of "rehabilitative" or "reimbursement" alimony, not terminable upon remarriage, may be appropriate. See, e.g., *Haugan v. Haugan*, 117 Wis.2d 200, 343 N.W.2d 796 (1984); *Mahoney v. Mahoney*, 91 N.J. 488, 453 A.2d 527 (1982).

Id. at n. 4. This is the situation where our analysis "must become more creative to achieve fairness." *Id.* Equity demands a recognition of the sacrifices and contributions made by plaintiff in support of defendant's medical education. The defendant has been enriched by plaintiff's efforts and, therefore, plaintiff has earned an award of some permanent financial benefit, in her own right, that will allow her to share in the economic benefits achieved through their joint efforts. The modified award of traditional alimony merely maintains plaintiff on a plane modestly above that experienced by the parties during the marriage. Even this modest award may be lost through the happening of some future circumstance.⁹ The dissent would restrict

8. We must wonder whether defendant could have or would have entered and completed medical school had plaintiff obtained a divorce earlier. Defendant likely would have been obligated to pay alimony and child support. He would probably not have had the benefit of the

family home and surely would not have had the benefit of plaintiff's part-time work.

9. Traditional alimony forces the recipient to make future choices with the understanding that such choices may result in the loss of ali-

plaintiff to an award of traditional alimony based upon defendant's newly acquired level of income. Because there has been little property accumulated and because the income was acquired after separation, plaintiff is entitled to a more permanent remedy.

This issue has engendered much case law. Many courts have held that a professional degree is not marital property subject to distribution but nevertheless believe some remedy must be created for the spouse who supported the attainment of that degree. A threshold factor is the meaning of "support" when the term is applied to the efforts of the non-professional spouse. Must "support" equate to direct financial assistance provided through full time employment while the student spouse devotes his or her full time efforts to course work? Is "support" rendered by a spouse whose full time activities are devoted to providing a home environment for the student spouse and family? Here, plaintiff bore the children, was the principal in providing child care and maintaining the domestic setting, and was also employed part-time for several years while defendant attended medical school. To hold that plaintiff's only value is the income she generates ignores the value of her contributions in every other aspect of family life. The logical conclusion is that motherhood and nurturing of children is valueless; that preserving and maintaining a home is worthless; that the functions of mother, homemaker, and helpmate contribute nothing of value to a family. We refuse to so limit our definition of support. Certainly, our Supreme Court in analyzing traditional property distributions has never limited a wife to recovering only what she monetarily contributed to the marriage. *Huck v. Huck*, 734 P.2d 417 (Utah 1986). We hold in accordance with the court's finding that

mony. See Utah Code Ann. §§ 30-3-5(5) and (6) (1987). No one should be forced into making such choices, particularly when the other party, who enjoys his position through the joint efforts of both parties, is under no similar restrictions on behavior. We note what the Oklahoma Supreme Court wrote in *Hubbard v. Hubbard*, 603 P.2d 747 (Okla.1979), when responding to the argument that the wife's recovery

plaintiff contributed to and supported defendant's educational achievements.

The case law remedies in this situation establish a spectrum, from those narrowly focusing on financial support provided to the professional spouse, while he or she was a student, to those which consider the totality of the non-professional spouse's efforts in the family venture to obtain economic stability through education. For example, in *Hubbard*, 603 P.2d at 747, the wife was allowed to recover from her physician husband contributions to his direct support, school and professional training expenses, plus reasonable interest and adjustments for inflation.

A case recognizing more than strict financial contributions is *Saint-Pierre v. Saint-Pierre*, 357 N.W.2d 250 (S.D.1984), in which the Supreme Court of South Dakota held, "in a proper case," the trial court should consider "all relevant factors" in awarding "reimbursement or rehabilitative alimony." These included "the amount of the supporting spouse's contributions, his or her foregone opportunities to enhance or improve professional or vocational skills, and the duration of the marriage following completion of the nonsupporting spouse's professional education." *Id.* at 262.

In *Washburn v. Washburn*, 101 Wash.2d 168, 677 P.2d 152, 159 (Wash.1984), the Supreme Court of Washington listed and analyzed several factors the trial court must consider "in determining the proper amount of compensation for the supporting spouse." These include the supporting spouse's contributions for direct educational costs, no more than one-half what the couple would have earned had "the efforts of the student spouse not been directed towards his or her studies," "[a]ny educational or career opportunities which the supporting spouse gave up in order to ob-

from her physician husband, whom she helped through medical school, be limited to alimony for support and maintenance. The per curiam decision reasoned "To do so would force her to forego remarriage and perhaps even be celibate for many years simply to realize a return on her investments and sacrifices of the past twelve years." *Id.* at 752 (footnote omitted).

tain sufficiently lucrative employment, or to move to the city where the student spouse wished to attend school[,]” and “[t]he future earning prospects of each spouse, including the earning potential of the student spouse with the professional degree.”

Wisconsin statutes allow a trial court to grant an order requiring maintenance payments to either party after considering several factors. Among these are:

- (4) The educational level of each party at the time of marriage and at the time the action is commenced.
- (5) The earning capacity of the party seeking maintenance, including educational background, training, employment skills, work experience, length of absence from the job market, custodial responsibilities for children and the time and expense necessary to acquire sufficient education or training to enable the party to find appropriate employment.
- (6) The feasibility that the party seeking maintenance can become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage, and, if so, the length of time necessary to achieve this goal.

....

- (8) Any mutual agreement made by the parties before or during the marriage, according to the terms of which one party has made financial or service contributions to the other with the expectation of reciprocation or other compensation in the future, where such repayment has not been made, or any mutual agreement made by the parties before or during the marriage concerning any arrangement for the financial support of the parties.

10. We emphasize the specific nature of the facts presented in this case and stress that equitable restitution would not be awarded in the more frequent case where the marriage lasted for many years after the professional degree had been granted. There, sufficient assets would have been accumulated and an appropriate distribution to the requesting spouse would enable

- (9) The contribution by one party to the education, training or increased earning power of the other.

Wis.Stat. § 767.26 (1982), *See also Haugan v. Haugan*, 117 Wis.2d 200, 343 N.W.2d 796, 800-01 n. 4 (Wis.1984).

[8, 9] Clearly, some jurisdictions which require courts to examine and value the contributions to a marriage partner's development. This appears to be the fair and equitable approach. Therefore, we hold that plaintiff is entitled to an award of "equitable restitution" in addition to traditional alimony. We use the term equitable restitution to describe the award in order to establish a clear distinction between it and traditional alimony or any other form of spousal maintenance or support. The function of equitable restitution is to enable a spouse to share the *newly obtained* earning capacity of a former spouse who has achieved that capacity through the significant efforts and sacrifices of the requesting spouse which were detrimental to that spouse's development. It is nothing more than an equitable sharing of the rewards of both parties' common efforts and expectations.¹⁰

[10, 11] Factors to be analyzed in determining an award of equitable restitution include, but are not limited to: (1) the length of the marriage; (2) the financial contributions and personal development sacrifices made by the requesting spouse; (3) the duration of these contributions and sacrifices during the marriage; (4) the resulting disparity in earning capacity between the requesting spouse and the spouse benefited thereby; and (5) the amount of property accumulated during the marriage.¹¹ An award of equitable restitution will not terminate upon plaintiff's remarriage, and may be payable in lump

that spouse to share in the economic benefits earned as a result of the degree.

11. Because this case establishes a new form of spousal award, we hesitate to state that the enumerated factors in determining equitable restitution are all inclusive as of the writing of this opinion. *See Biswell v. Duncan*, 742 P.2d 80, 86 n. 5 (Utah App.1987).

sum or periodically over time depending on the circumstances of each case.¹²

CONCLUSION

The judgment of the trial court is affirmed in part and reversed in part. The case is remanded to the trial court for the purpose of taking any further evidence that may be necessary to determine the amount of equitable restitution to be awarded to plaintiff and its manner of payment and for entry of judgment pursuant to this opinion. Costs against defendant.

BILLINGS, J., concurs.

JACKSON, Judge (dissenting):

I respectfully and loyally dissent.

Loyal to the majority, but not to their opinion, I flag their decision as being at the forefront of judicial activism. I regret that I could not dissuade my colleagues from breaking new ground with the invention of "equitable restitution." The opinion manufactures a divorce remedy that is (1) outside our statutory scheme;¹ (2) without precedent in the pronouncements of the Utah Supreme Court; (3) not requested by the appellant;² (4) forced on the trial courts for further development; (5) not needed to do justice to the parties in this case and may, in fact, work inequity.

EQUITABLE RESTITUTION OR SUPPORT

In *Petersen v. Petersen*, 737 P.2d 237 (Utah App.1987), this court held that an advanced degree is not marital property

12. For example, in following the Utah Supreme Court's admonishment against unnecessarily tying a couple together after divorce as stated in *Gardner*, 748 P.2d at 1079, defendant's lien on the family home might be extinguished and the amount credited against the overall award of equitable restitution. We recognize that this would probably be only a fraction of the total amount of equitable restitution awarded.

1. The majority acknowledges the existence of our divorce statutes in remanding the child support and alimony issues. The majority states: (a) "On remand, the trial court shall enter its order for child support in accordance with Utah Code Ann. § 30-3-5.1 (1987)," i.e., raise the total amount of child support from \$900 to \$1,800 per month; (b) "[W]e award permanent alimo-

subject to division upon divorce, even where this achievement has been made possible through the assistance of the other spouse. We have, nonetheless, acknowledged that there may be situations where equity demands an extraordinary award of nonterminable rehabilitative or reimbursement alimony in order to compensate a spouse who "endure[s] substantial financial sacrifices or defer[s] her own education to help" the other spouse in obtaining an advanced degree. *Rayburn v. Rayburn*, 738 P.2d 238, 241 (Utah App.1987). This might occur where: (a) the parties mutually endeavor to increase one spouse's earning capacity, but at the time of trial the spouse who has benefitted from the parties' endeavors is merely on the threshold of a substantial increase in earnings, *Petersen*, 737 P.2d at 242 n. 4; or (b) there is insufficient marital property from which to make a compensatory award to the contributing spouse. See *Gardner v. Gardner*, 748 P.2d 1076, 1081 (Utah 1988). In such cases, the spouse who has made substantial financial sacrifices and contributions to increase the earning capacity of the other spouse is entitled to recompense for those contributions that are beyond the duty of support normally associated with marriage, less any benefits received. See, e.g., *Roberto v. Brown*, 107 Wis.2d 17, 318 N.W.2d 358 (1982); *Mahoney v. Mahoney*, 91 N.J. 488, 453 A.2d 527 (1982).

Decisions from other jurisdictions involving compensation of the spouse who has contributed to the attainment of an ad-

ny in the sum of \$750 per month subject to the provisions of Utah Code Ann. § 30-3-5 (1987)," i.e., increase alimony from the \$400 awarded by the trial court. However, no statute is cited as the basis for equitable restitution. Our divorce statutes and case law authorize only the distribution of property and an award of support for the benefit of the spouse and children. Utah Code Ann. §§ 30-3-1 to -10.6 (1987).

2. Mrs. Martinez argued both at trial and on appeal that a professional degree is a property interest subject to division upon divorce. Since equitable restitution was not a part of Utah law until this majority opinion was crafted, the trial was not conducted and the evidence was not presented under that theory.

vanced degree have generally involved four factors:

[F]irst, they share the loss of the husband's foregone earnings during the period of investment; second, the wife provides the financial capital to enable her husband to forego those earnings; third, she may forego opportunities to further the development of her own earning capacity; fourth, and most significantly, they both expect to gain a return on the full costs of the investment through continuation of the marriage. Thus, the working spouse predicates her sacrifice of income and personal educational advancement on the expectation of future returns to her from sharing in her husband's enhanced earning capacity.

Krauskopf, *Recompense for Financing Spouse's Education: Legal Protection for the Marital Investor in Human Capital*, 28 Kan.L.Rev. 379, 380 (1980).

The extraordinary award fashioned by the majority in this case is inappropriate for several reasons. First, Mrs. Martinez did not provide the financial capital that enabled her husband to attain his college and advanced degree. Instead, Dr. Martinez provided the bulk of the family's financial support, in addition to paying for his education. This is not the classic "working spouse/student spouse" situation necessitating an extraordinary award. See, e.g., *Hubbard v. Hubbard*, 603 P.2d 747 (Okla.1979); *Haugan v. Haugan*, 117 Wis.2d 200, 206, 343 N.W.2d 796, 799-800 (1984); *Roberto*, 318 N.W.2d 358.

Second, no evidence was presented that Mrs. Martinez deferred her own career or education in order to advance the education of her husband. Both parties had only high school educations at the time of marriage. Mrs. Martinez testified at trial that she wanted to continue her own education someday but had not yet begun doing so, even though her employer would pay three-fourths of her school costs and would allow her to continue working.

While Mrs. Martinez raised the children and performed the household responsibilities, Dr. Martinez provided the family's primary financial support in the form of his

inheritance monies, funds from student loans (which the trial court required him to repay), and proceeds from his G.I. Bill. Mrs. Martinez worked part-time during three of the seventeen years of their marriage. Her nominal total earnings of approximately \$2,300 were applied to family living expenses. During the marriage, the family took modest vacations, purchased two homes, furniture and furnishings, and two automobiles. Equity simply does not demand an extraordinary remedy in this case because no extraordinary injustice is present.

Even if Mrs. Martinez had made substantial financial contributions or educational sacrifices in order to further her husband's education and career, there are other reasons why the creation of a new hybrid award of equitable restitution is not warranted in this case. Unlike the hypothetical case contemplated by this court in *Petersen*, 737 P.2d at 242 n. 4, in which the spouse with an advanced degree is only on the threshold of reaping an enhanced income at the time of the parties' divorce, Dr. Martinez was already earning a gross annual income of \$100,000. He is not merely at the threshold of significant earnings; he is already standing in the parlor. In addition, the parties here accumulated real and personal property from which a compensatory property award could be made: \$34,561 equity in a home; three vehicles worth \$3,995; an IRA account valued at \$2,000; stocks of unknown value; and household furnishings valued at \$6,500. The presence of both substantial earnings and accumulated property at the time of the divorce provides an adequate basis for rendering an extraordinary remedy, if Mrs. Martinez is entitled to recompense.

On the facts presented in this case, there are additional reasons why I believe the majority's disposition of this appeal is misguided: (1) equity can be achieved under current alimony and property distribution statutes and case law; (2) an award of equitable restitution coupled with the majority's generous alimony and child support awards is double-dipping; and (3) an award of equitable restitution, in effect, treats the

professional education as "property" subject to division upon dissolution of a marriage.

First, in fashioning an award of alimony, the trial court must consider the financial condition and needs of the recipient spouse,³ the ability of that spouse to be self-supporting, and the ability of the other spouse to pay. *Paffel v. Paffel*, 732 P.2d 96, 100-01 (Utah 1986); *Jones v. Jones*, 700 P.2d 1072, 1075 (Utah 1985).

Dr. and Mrs. Martinez were married for approximately seventeen years. The trial court found that Dr. Martinez incurs expenses associated with his employment of approximately \$7,000 per year, leaving approximately \$93,000 annually or \$7,750 per month. Mrs. Martinez earned approximately \$1,033 per month and estimated that she required \$2,050 per month to meet the expenses for herself and the three children. Under the temporary support order, she had been receiving \$1,100 per month in child support. She sought additional monies to make up the difference between her net earnings and expenses and to provide her with the means to make major house repairs. In the event that a professional degree was not viewed as a marital asset, she sought an alimony award not subject to termination upon remarriage.

The trial court stated that it considered the large disparity between the parties' respective earning abilities and the fact that the wife's resources were inadequate to meet her needs. However, I agree with Mrs. Martinez that the trial court failed to apply these factors correctly in that the award of \$400 per month alimony, nonter-

minable for three years and continuing for a period of five years, is so low as to constitute a clear and prejudicial abuse of discretion. Mrs. Martinez earns \$1,033 gross income per month. The alimony awarded by the trial court, plus her net monthly earnings of \$846, provides her with approximately \$1,246 with which to meet her monthly expenses, excluding sums awarded for child support. In contrast, Dr. Martinez enjoys approximately \$7,750 gross monthly income. Considering the disparate earning capacities, the trial court's alimony award was insufficient and inequitable in that it failed to provide the parties with a comparable standard of living.

Second, based on Dr. Martinez's earnings at the time of trial, the majority has increased total child support from \$900 to \$1,800 and increased the duration and amount of alimony to a permanent award of \$750 per month. An award of equitable restitution on top of the already generous awards of alimony and child support fashioned by the majority is duplicative and not necessary to achieve equity.

Finally, an advanced degree is the memorialization of an individual's "attainment of the skill, qualification and educational background which is the prerequisite of the enhanced earning capacity." *Wehrkamp v. Wehrkamp*, 357 N.W.2d 264, 266 (S.D. 1984); cf. *Petersen*, 737 P.2d at 240 (quoting *In re Marriage of Graham*, 194 Colo. 429, 574 P.2d 75 (1978) (en banc)). The value of an advanced degree lies in the potential for increased earnings made possible by the degree and by other factors

3. In determining the "need" of the recipient nonstudent spouse, the trial court is not limited to considering only the low living expenses incurred during the time that the other spouse studied to obtain an advanced degree. The Utah Supreme Court recently stated in *Gardner*, a case also involving an advanced degree, that alimony should "equalize the parties' respective standards of living and maintain them at a level as close as possible to the standard of living enjoyed during the marriage." *Gardner*, 748 P.2d at 1081; accord *Boyle v. Boyle*, 735 P.2d 669, 671 (Utah App. 1987); *Petersen*, 737 P.2d at 239; *Olson v. Olson*, 704 P.2d 564, 566 (Utah 1985); *Higley v. Higley*, 676 P.2d 379, 381 (Utah 1983). Although *Gardner* involved a marriage

in which the parties enjoyed a high standard of living for many years prior to the divorce, the language of *Gardner* was clearly aimed at preventing the divorced spouse of a high income earner from suffering a major decline in standard of living following a divorce. This language should not be construed as prohibiting a trial court from making an award that raises the recipient spouse's standard of living from what it was during the marriage where, as here, the student spouse experiences a major increase in earnings just prior to the marriage's termination. In other words, the "need" of the recipient spouse in this situation is not necessarily what he or she managed to live on during the lean school years.

and conditions of employment. If the advanced degree itself does not fall within the classification of marital "property" subject to distribution upon divorce, then neither should an individual's enhanced earning capacity. *Hodge v. Hodge*, 337 Pa.Super.Ct. 151, 486 A.2d 951 (1984); *Wehrkamp*, 357 N.W.2d at 266; *Stern v. Stern*, 66 N.J. 340, 331 A.2d 257 (1975).

The majority declares that:

The function of equitable restitution is to enable a spouse to share the *newly obtained* earning capacity of a former spouse who has achieved that capacity through the significant efforts and sacrifices of the requesting spouse which were detrimental to that spouse's development. It is nothing more than an equitable sharing of the rewards of both parties' common efforts and expectations.

By creating a divisible interest in Dr. Martinez's enhanced earning capacity, this court has awarded a nonterminable property interest in a medical degree which goes beyond the compensation approved in *Peterson*. The majority has not limited its award to Mrs. Martinez's contributions toward her husband's medical education costs; it has taken the further step of providing financial recompense for lost expectations. I would reject any compensation formula based on future earning capacity. The factors and variables involved in the valuation of an enhanced earning capacity are as speculative as those involved in an attempt to value an advanced degree; such speculation can only lead to inequity.

Provision for Mrs. Martinez's needs is best dealt with through a generous but fair distribution of property and award of ali-

mony,⁴ not through the creation of a distinctly new form of cleverly disguised marital property for which there is no precedent.

CHILD SUPPORT

Both husband and wife have a duty to support their children. Utah Code Ann. §§ 78-45-3, -4 (1987). "Child support awards should approximate actual need; and, when possible, assure the children a standard of living comparable to that which they would have experienced if no divorce had occurred." *Peterson v. Peterson*, 748 P.2d 593, 596 (Utah App.1988).

The trial court found that Dr. Martinez earned approximately \$7,750 gross income per month. Dr. Martinez testified that his earnings were established under a two-year employment contract, that he was in the 50% tax bracket, and that he had no tax shelter. The trial court also found that Mrs. Martinez earned approximately \$1,033 gross income per month. Mrs. Martinez testified to net monthly earnings of \$846 plus nominal royalties from an oil well. She anticipated a reduction in her earnings as a result of her voluntary cutback in working hours. Mrs. Martinez calculated monthly living expenses for herself and the three children at \$2,050. This was the only evidence of the dollar amount of the children's monthly need for support. The majority has elected to disregard that evidence because they think the figure was too low. Having rejected the only evidence of the children's need, the majority makes its own independent estimate.

Using their own estimate of need and the parties' gross monthly incomes, the majority has awarded \$600 per month per child for a total of \$1,800.⁵ Their action fails to

4. Unlike the majority's award of equitable restitution, an alimony award can be modified, in appropriate circumstances, under the court's exercise of continuing jurisdiction. Utah Code Ann. § 30-3-5(3) (1987). This is particularly important in the situation presented here, where Dr. Martinez is working under a contract of limited duration.

5. The majority opinion interchanges the terms "adjusted gross income" and "gross income" in comparing the amount of child support award-

ed by the trial court with an award calculated under guidelines from Colorado and Wisconsin, even though the terms have markedly different meanings. Although the majority disclaims reliance on the child support guidelines from other jurisdictions, they do, in fact, rely upon the potentially greater amounts available in other jurisdictions in order to justify an award of \$600 per month per child.

The problem with this analysis is that the guidelines adopted by other jurisdictions are irrelevant for purposes of an award in Utah.

account for the effects on each party of: (1) tax rate changes under the 1986 Tax Reform Act;⁶ (2) their award of the tax exemptions for all the children to Mrs. Martinez; (3) the disposition of the home mortgage debt as discussed below; (4) their increase of alimony from \$400 to \$750 per month; and (5) their equitable restitution award in an amount to be determined by the trial court.

I would remand this case on the child support issue for the taking of further evidence and a current determination of the children's need and the ability of both parents to pay child support, to be considered with the other appropriate adjustments in the parties' incomes and liabilities.

HOME MORTGAGE

The parties stipulated at trial that their jointly-acquired home had a current market value of \$63,000 and an equity of \$34,561. The stipulated figures reveal the existence of a home mortgage obligation in the sum of \$28,439. However, neither the trial court nor counsel identified this sizeable debt in the distribution of debts and property. Nor do the trial court's written Findings of Fact specify who must assume the \$28,439 mortgage obligation and make the payments. The record reveals that Mrs. Martinez had been making a \$309 monthly mortgage payment and the court stated that each party was to assume and dis-

charge those debts that they have been paying.

Paragraph 19 of the written Findings of Fact states that the "[p]laintiff [Mrs. Martinez] should be awarded the exclusive use and occupancy of the parties' residence subject to a lien in favor of Defendant for the sum of \$17,528.00 . . ." The Decree of Divorce reiterates this language and awards plaintiff "exclusive use and occupancy," subject to a lien in defendant's favor. The court's oral ruling was: "[t]he Court will award to the the [sic] Plaintiff the home of the parties, subject to a lien for defendant's share of the equity in the amount of one-half of the net equity."

The court's allocation of the parties' financial obligations includes no reference to \$28,439 of mortgage debt. Mrs. Martinez was required to pay specified debts and obligations totalling \$8,179.73. The \$28,439 was not specified and does not appear in the record. Dr. Martinez was required to pay specified debts and obligations totalling \$26,169.04. If Mrs. Martinez must assume and pay the house mortgage, her post-divorce debt responsibility is \$36,618.73, \$10,449.69 more than his.

Conclusion of Law C provides that, "[i]n order to make the distribution . . . [of marital property] as equal as possible, Plaintiff should be awarded the real property . . . subject to a lien in favor of Defendant for one-half of the present equity therein, that being for the sum of \$17,678." Although

Child support guidelines utilize different approaches to allocate economic responsibility for children of divorced parents depending upon varying public policy. *See generally* Cassetty, "Emerging Issues in Child Support Policy and Practice," in *The Parental Child Support Obligation: Research, Practice and Policy* 3 (J. Cassetty ed. 1983).

As the majority opinion demonstrates, the recommended amount of child support under other jurisdictions' guidelines may radically differ because of differences in the underlying policy goals adopted by a given state. The guidelines of some states, such as Wisconsin, do not adjust for the income of the custodial parent. This is obviously inconsistent with Utah's adoption of a public policy which holds both parents responsible for the support of their children. For these reasons, whether the support guidelines in other states would afford a higher level of support should not be a factor in making an equitable award in Utah.

6. The Tax Reform Act of 1986 will have a significant impact on Dr. Martinez's disposable income, assuming ongoing gross income in the \$100,000 range. He testified at trial that he had to set aside one-half of his income to pay taxes. For 1988 and later tax years, there are two basic tax rates for individuals, 15% and 28%. In addition, the law effectively creates a third rate of 33% on income above certain levels. Thus, portions of Dr. Martinez's income will be taxed at 15%, 28%, and 33% rather than all at 50%. Moreover, Utah income tax laws have changed in the interim. Counsel in divorce actions *would be well advised to provide the trial court* with complete information regarding the tax implications of the property distribution, alimony, child support and dependency exemption arrangements being proposed. The combined disposable income available to the severed family can often be increased by prudent tax planning during a divorce.

the stated objective is equality of distribution, the requirement that Mrs. Martinez assume and pay the mortgage would burden her by an additional \$14,219.50 (½ of \$28,439), despite the parties' widely disparate disposable income and the fact that Mrs. Martinez must support herself and the children on less than \$2,200 per month. Since the court failed to specifically identify the home mortgage, the court also failed to include the amount of \$28,439 in the equity calculation. Thus Mrs. Martinez became personally responsible to pay the major debt of the parties.

The trial court's inclusion of the home mortgage in Mrs. Martinez's debt burden as part of the property and debt distribution is an abuse of discretion, even without looking at the gross disparity of income. The home mortgage matter alone justifies a remand.

CONCLUSION

The majority has fixed the amount of alimony and child support to be paid. This action deprives the trial court, on remand, of any flexibility to adjust the debts, property, alimony, and support awards and to fashion an overall award package that harmonizes all the variables. The trial court's discretion will be so restricted that an equitable outcome will be impossible. This case should instead be remanded for retrial on the alimony, child support and property distribution issues.



**David A. MAXWELL, Plaintiff
and Appellant,**

v.

**Angeline B. MAXWELL, Defendant
and Respondent.**

No. 860267-CA.

Court of Appeals of Utah.

May 6, 1988.

Former wife began proceeding for alimony and property distribution of former

husband's military retirement. The Third District Court, Tooele County, John A. Rokich, J., awarded former wife alimony and divided former husband's military retirement fund and appeal was taken. The Court of Appeals, Bench, J., held that: (1) former husband's special appearance in proceeding was ineffective, and (2) failure of trial court to make specific findings regarding agreement to waive alimony and in support of distribution of military retirement benefits required remand.

Vacated and remanded.

1. Divorce ⇄202

Trial court had jurisdiction over wife's claims for alimony and property distribution of former husband's military retirement notwithstanding former husband's entry of special appearance attacking state court's jurisdiction and claiming that Japanese divorce had settled all matters between parties; former husband's special appearance was ineffective as when former husband made special appearance he submitted relevant documents expressly by his general appearance, he asked for affirmative relief, thus waving special appearance, and trial court maintained continuing jurisdiction over former husband.

2. Husband and Wife ⇄281

Trial court may refuse to enforce property settlement agreement upon specific finding as to why agreement should not be followed.

3. Divorce ⇄287

Failure of trial court to articulate specific reasons for disregarding former wife's waiver of alimony or monetary claims signed in Japan required remand.

4. Divorce ⇄287

Failure of trial court to make finding as to actual number of years former husband served in military, a finding that was necessary to determine amount of retirement that was subject to distribution, required remand.

Gary V. PETERSEN, Plaintiff
and Appellant,

v.

Julie A. PETERSEN, Defendant
and Respondent.

No. 860007-CA.

Court of Appeals of Utah.

May 18, 1987.

Parties' marriage was dissolved by the Second District Court, Weber County, Calvin Gould, J., and husband appealed from court's division of marital property. The Court of Appeals, Orme, J., held that: (1) medical degree that husband earned during marriage while wife was principal wage earner did not constitute "property" subject to division in connection with parties' divorce, but (2) award of \$1,000 per month to wife, to compensate her for her "share" in husband's advanced degree, could be sustained by recharacterizing it as provision for additional alimony.

Affirmed and remanded with directions.

1. Divorce ⇨184(4)

Generally, trial court is permitted considerable discretion in adjusting financial and property interests of parties to divorce action, and its determinations are entitled to presumption of validity.

2. Divorce ⇨252.3(1)

Medical degree that husband earned while wife was principal wage earner was not "property" subject to division in connection with parties' divorce.

See publication Words and Phrases for other judicial constructions and definitions.

3. Divorce ⇨252.3(1)

Advanced degree is or confers intangible right which cannot properly be characterized as "property," subject to division between spouses in connection with their divorce; declining to follow *Daniels v. Daniels*, 20 Ohio Op.2d 458, 185 N.E.2d 773.

4. Divorce ⇨237

Traditional alimony analysis is appropriate and adequate method for making adjustments between spouses, one of whom has helped finance the other's advanced education, where divorce does not take place until several years after second spouse has earned his/her degree.

5. Divorce ⇨247

"Rehabilitative" or "reimbursement" alimony not terminable upon remarriage may be appropriate, to compensate one spouse for sacrifice of helping to finance other spouse's advanced degree, where divorce takes place shortly after degree is obtained, before first spouse has had chance to enjoy comfortable life-style which degree will permit.

6. Divorce ⇨240(2)

Award of \$1,000 per month to doctor's wife, to compensate wife for her "share" in husband's medical degree, could be sustained by recharacterizing not as property settlement but as provision for additional alimony, to extent such additional alimony was warranted under circumstances.

7. Divorce ⇨237

Criteria considered in determining reasonable award of support must include financial conditions and needs of spouse in need of support, ability of that spouse to produce sufficient income for his or her own support, and ability of other spouse to provide support.

8. Divorce ⇨240(2)

Alimony of \$2,000 per month was not unreasonable, where wife had substantially financed husband's medical education, subsequently became accustomed to comfortable life style that medical degree made possible, and enjoyed much different earning potential than that of husband, to whom all of income-producing assets had been awarded.

Paul M. Belnap, Strong & Hanni, Salt Lake City, for plaintiff and appellant.

Pete N. Vlahos, Vlahos & Sharp, Ogden, for plaintiff and appellant.

Before ORME, JACKSON and
BENCH, JJ.

OPINION

ORME, Judge:

The appellant seeks a reversal or readjustment of the property division and alimony awarded to his former wife upon their divorce. His challenge focuses on a \$120,000 property settlement given to his ex-wife to reflect her interest in his medical degree. We affirm the trial court's basic disposition, but require amendment of the decree insofar as the \$120,000 award is concerned.

FACTUAL BACKGROUND

The parties were married in September 1963 when they were both entering their senior year of college. Both graduated with Bachelor's degrees. Dr. Petersen continued his education and obtained a Master's degree, while Mrs. Petersen worked as an elementary school teacher to help finance her husband's education. After receiving his Master's degree, Dr. Petersen entered medical school. During medical school, Dr. Petersen earned approximately \$1,000 per year in income. The couple also took out a student loan and received some money from Mrs. Petersen's parents. While her husband was in medical school, Mrs. Petersen worked one year on a full time basis and three years part time.

When Dr. Petersen began his internship, Mrs. Petersen stopped working to stay at home with their child. During the next fifteen years, Mrs. Petersen was not employed outside the home and her teaching certification expired.

By the time of their divorce, the parties had been married twenty years and had six children under the age of 18. The decree gave Mrs. Petersen custody of the six minor children, the family residence subject to the first mortgage, most of the family furniture, and two automobiles. She was awarded \$300 per month per child as child support, \$1,000 per month alimony, and the cash property settlement of \$120,000, which Dr. Petersen was to pay in install-

ments of \$1,000 per month without interest.

Under the decree, Dr. Petersen received his professional corporation, the total interest in his pension and profit sharing plan, two condominiums, a boat, an undivided one-seventh interest in a cabin near Bear Lake, and other rental property. He also was given the right to claim all six children as dependents for income tax purposes.

The trial court explained the \$120,000 cash settlement as follows:

The Court believes that this case is classic, in that defendant is entitled to a property award reflecting an ownership interest of the defendant in plaintiff's medical degree. It is abundantly clear that defendant helped plaintiff earn that degree during their marriage, and that plaintiff's ability to earn is based upon that degree. Further, that following the earning of the degree and the entry into the medical practice, by mutual agreement, defendant undertook the raising and nurturing of the children as her responsibility to the marital partnership, while plaintiff practiced medicine. It is difficult to find in the evidence presented any system for the measurement of the value of the degree, and the Court must therefore deal with the case mostly upon an alimony basis. To deal with the case fully upon an alimony basis is not fair to the defendant, inasmuch as any effort to restructure her life by seeking to better her employment opportunities or to remarry will operate against her alimony rights. Defendant is therefore awarded \$1,000 per month permanent alimony and a lump sum property award in respect to the medical degree in the amount of \$120,000, payable in installments of \$1,000 per month from the date of the decree.

On appeal, Dr. Petersen argues that the division of marital property was inequitable, particularly the \$120,000 property settlement given to his wife. Dr. Petersen argues that it was error to characterize "his" medical degree as marital property and require him to cash out Mrs. Peter-

sen's interest therein over a 10-year period.

STANDARD OF REVIEW AND PRELIMINARY CONSIDERATIONS

[1] Generally, the trial court is permitted considerable discretion in adjusting the financial and property interests of the parties to a divorce action, and its determinations are entitled to a presumption of validity. *E.g., Burnham v. Burnham*, 716 P.2d 781, 782 (Utah 1986). And although appellate courts may weigh the evidence and substitute their judgment for that of the trial court in divorce actions, as the Supreme Court stated in *Turner v. Turner*, 349 P.2d 6 (Utah 1982), "this court will not do so lightly and merely because its judgment may differ from that of the trial judge. A trial court's apportionment of property will not be disturbed unless it works such a manifest injustice or inequity as to indicate a clear abuse of discretion." 349 P.2d at 8.

In the present case, the trial court appropriately attempted to equalize the parties' respective standards of living. See *Olson v. Olson*, 704 P.2d 564, 566 (Utah 1985). Dr. Petersen was found capable of earning \$100,000 per year while Mrs. Petersen's ability to obtain recertification and secure a teaching contract was found to be speculative at best. Even if she succeeded, she would earn only one-fourth to one-fifth of what Dr. Petersen would earn annually. The trial court spoke of the difficulty of measuring the value of Dr. Petersen's degree. The court chose to balance the inequalities between the parties partly with the alimony award. However, the trial court did not want Mrs. Petersen to lose all of her entitlement upon remarriage, so the trial court provided for an additional \$120,-

000 as a property award, payable in \$1,000 monthly installments. Characterization of these payments as a property award created the main issue for appeal.

DEGREES AS PROPERTY

[2] The question of whether an advanced degree is a property interest subject to division upon divorce is one of first impression at the appellate level in Utah.¹ However, the majority of jurisdictions that have considered the issue have held that advanced degrees or professional licenses are not property. *Wisner v. Wisner*, 129 Ariz. 333, 631 P.2d 115, 122 (Ariz.App.1981) (husband's medical license and board certificate are not property subject to division, but education is a factor to be considered in arriving at equitable property division, maintenance, and child support); *In re Marriage of Aufmuth*, 89 Cal.App.3d 446, 152 Cal.Rptr. 668, 677 (1979) (legal education not a property right); *In re Marriage of Graham*, 194 Colo. 429, 574 P.2d 75, 77 (1978) (MBA degree not marital property subject to division); *In re Marriage of Hortsman*, 263 N.W.2d 885, 891 (Iowa 1978) (law degree is not a distributable asset upon divorce; future earnings are); *Olah v. Olah*, 135 Mich.App. 404, 354 N.W.2d 359, 361 (Mich.App.1984) (medical degree not property or marital asset); *Mahoney v. Mahoney*, 91 N.J. 488, 453 A.2d 527, 536 (1982) (courts may not make any permanent distribution of the value of professional degrees and licenses, whether based on estimated worth or cost); *Ruben v. Ruben*, 123 N.H. 358, 461 A.2d 733, 735 (1983) (graduate degree acquired by one spouse during the marriage is not an asset subject to division upon divorce); *Muckleroy v. Muckleroy*, 84 N.M. 14, 498 P.2d 1357, 1358 (1972) (medical license is not

1. In *Dogu v. Dogu*, 652 P.2d 1308 (Utah 1982), the Utah Supreme Court dealt with the valuation of a professional corporation. In *Dogu*, the husband was awarded his professional corporation, and his wife was awarded property to offset its value. 652 P.2d at 1309. Although the proper characterization of a medical degree, as in the present case, and the valuation of a professional medical corporation, as in *Dogu*, may involve related questions, the legal issues regarding the two are distinct.

In *Tremayne v. Tremayne*, 116 Utah 483, 211 P.2d 452 (1949), the Supreme Court upheld the trial court's property division and award of alimony to the wife, referring to the wife's working to help her husband through school; the fact that, with the divorce, the wife was deprived of the benefits of his increased earnings; and the discrepancy in their earning capacities. *Tremayne* does not address the issue of whether an advanced degree or license is marital property.

community property); *Hubbard v. Hubbard*, 603 P.2d 747, 750-51 (Okla. 1979) (medical license not property but wife entitled to compensation for her investment).²

These cases and others are consistent with our understanding of what "property" is and what an educational degree is. Property can be bought, sold, and devised. Bona fide degrees cannot be bought; they are earned. They cannot be sold; they are personal to the named recipient. Upon the death of the named recipient, the certificate commemorating award of the degree might be passed along and treasured as a family heirloom, but the recipient may not, on the strength of that degree, practice law or medicine. In this case, the court awarded the parties' home to Mrs. Peterson. But it might have awarded the home to Dr. Petersen or it might have ordered the home sold and the net proceeds divided. The court had no such alternatives with the medical degree, precisely because the degree is not property. Consideration of some of the cases cited above and others supports our fundamental conclusion and demonstrates the range of related problems.

In *Muckleroy v. Muckleroy*, 84 N.M. 14, 498 P.2d 1357 (1972), it had been argued that the husband's education was the product of the joint labor and industry of both parties, so that after their marriage it was community property. The New Mexico Supreme Court rejected this argument and concluded:

A medical license is only a permit issued by the controlling authority of the State, authorizing the individual licensee to engage in the practice of medicine. The medical license may be used and enjoyed by the licensee as a means of earning a livelihood, but it is not community property because it cannot be the subject of joint ownership.

84 N.M. at 15, 498 P.2d at 1358.

The same issue arose as to an M.B.A. degree earned by the husband in *In re*

Marriage of Graham, 194 Colo. 429, 574 P.2d 75 (1978). Again, the concept of an advanced degree being property was rejected:

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

194 Colo. at 432, 574 P.2d at 77.

The wife in *Graham* had worked full time throughout the couple's six-year marriage, and had contributed 70 percent of the family income in addition to most of the household work while her husband was acquiring his degree. The trial court found that the degree was jointly owned property and had determined that the future earning value of the M.B.A. degree to Mr. Graham was \$82,836.00. Mrs. Graham was awarded \$33,134.00 of that amount. On appeal, the state supreme court affirmed the reversal of the trial court by the court of appeals. 574 P.2d at 76. The fact that the decision left Mrs. Graham with nothing to show for her six years of labor prompted a three judge dissent which strongly urged that the husband's increased earning power represented by the degree should be considered marital property, where there was no accumulated property and the spouse

2. The question of whether an advanced degree or professional license is marital property subject to division upon divorce has attracted considerable attention from legal scholars. For one of the better reasoned discussions, see Note,

Property Distribution in Domestic Relations Law: A Proposal for Excluding Educational Degrees and Professional Licenses from the Marital Estate, 11 Hofstra L.Rev. 1327 (1983).

who subsidized the degree was ineligible for maintenance.³ 574 P.2d at 78-79.

The equitable concerns addressed in the *Graham* dissent are reflected in the few cases that have found an advanced degree or professional license to be marital property.

In *Daniels v. Daniels*, 185 N.E.2d 773 (Ohio 1961), the court held that the right to practice medicine was in the nature of a franchise and constituted property which the trial court had a right to consider in making an award of alimony. In *Daniels*, the parties to the action were married while students at a university. During the time of their marriage the wife received her degree in business administration and the husband received a degree in medicine one year later. Each contributed toward his or her own maintenance and education, the balance in financial support for the family coming from the wife's father, who contributed sizable sums to the marriage. At the time of their divorce, neither party had much in the way of tangible assets. The court awarded \$24,000 in lump sum alimony, but did not actually divide the value of the medical degree. 185 N.E.2d at 776.

Recently, in *O'Brien v. O'Brien*, 66 N.Y.2d 576, 489 N.E.2d 712, 498 N.Y.S.2d 743 (1985), the New York Court of Appeals affirmed the trial court's holding that a license to practice medicine acquired during the marriage is marital property subject to division. In *O'Brien*, the wife was held entitled to a 40 percent interest in her husband's medical license. The wife had contributed approximately 76 percent of the couples' total income while the husband obtained his license. The breakdown of the marriage occurred shortly after the husband completed his schooling, and the only tangible asset existing after their nine-year marriage was the husband's medical license.

The New York court distinguished its analysis in *O'Brien* from that of other jurisdictions which have found a license or advanced degree not to be marital property. As the *O'Brien* court explained:

3. In *Graham*, the wife did not request alimony because a Colorado statute, Colo.Rev.Stat. § 14-10-114 (1973), restricted the court's power to

Plaintiff does not contend that his license is excluded from distribution because it is separate property; rather, he claims that it is not property at all but represents a personal attainment in acquiring knowledge. He rests his argument on decisions in similar cases from other jurisdictions and on his view that a license does not satisfy common-law concepts of property. Neither contention is controlling because decisions in other States rely principally on their own statutes, and the legislative history underlying them, and because the New York Legislature deliberately went beyond traditional property concepts when it formulated the Equitable Distribution Law.

66 N.Y.2d at 583, 489 N.E.2d at 715, 498 N.Y.S.2d at 746. New York's highest court acknowledged in *O'Brien* that their statute creates a new species of property previously unknown at common law or under prior statutes. 66 N.Y.2d at 586, 489 N.E.2d at 719, 498 N.Y.S.2d at 748. Critical portions of the New York Equitable Distribution Law provide that in making an equitable distribution of marital property, the court shall consider the efforts one spouse made to the other spouse's career or career potential and the difficulty of evaluating an interest in a profession. 66 N.Y.2d at 584, 489 N.E.2d at 715-16, 498 N.Y.S.2d at 746-47. Thus, the analysis in *O'Brien*, although illustrative of the equitable concerns for the working spouse who supports the other through an advanced degree, 66 N.Y.2d at 585-88, 489 N.E.2d at 716-18, 498 N.Y.S.2d at 746-48, is limited in application because of the pivotal role of the unusual and expansive distribution statute enacted in New York.

[3-5] We agree with the majority opinion in *Graham* that an advanced degree is or confers an intangible right which, because of its character, cannot properly be characterized as property subject to division between the spouses. No special statute, as in New York, permits us to treat the degree as though it were property. On

award maintenance to cases where the spouse seeking it was unable to support himself or herself. 574 P.2d at 79.

the other hand, criteria for an award of support in Utah are not so rigid as in Colorado, preventing the harsh result of *Graham*. ~~In this state, traditional alimony analysis is the appropriate and adequate method for making adjustments between the parties in cases of this type.⁴~~

AWARD IN THIS CASE

[6] As indicated, the trial court was in error when it awarded Mrs. Petersen the \$120,000 cash settlement to reflect her share of the value of her husband's medical degree. Nonetheless, the court's basic disposition was fair and can be sustained if the \$1,000 monthly payments which Dr. Petersen was to make in satisfaction of that obligation are recharacterized as additional alimony, a result which is readily supported by the trial court's findings.

In reviewing the court's findings, we find ample evidence to affirm the property division aside from the \$120,000 cash settlement. As the Supreme Court stated in *Fletcher v. Fletcher*, 615 P.2d 1218 (Utah 1980), "[t]here is no fixed formula upon which to determine a division of properties, it is a prerogative of the court to make whatever disposition of property as it deems fair, equitable, and necessary for the protection and welfare of the parties." 615 P.2d at 1222. Although Dr. Petersen was awarded a smaller percentage of the marital assets, he received all but one of the income producing assets: his professional corporation, his pension and profit sharing plan, two condominiums, and other business interests. The parties were to share evenly in a \$10,000 investment corpo-

ration. We find the basic property division equitable.

[7] As for the cash settlement payable in monthly installments of \$1,000, it is properly affirmed as alimony, making Mrs. Petersen's entire alimony award \$2,000 per month. Criteria considered in determining a reasonable award of support must include the financial conditions and needs of the spouse in need of support, the ability of that spouse to produce sufficient income for his or her own support, and the ability of the other spouse to provide support. *Jones v. Jones*, 700 P.2d 1072, 1075 (Utah 1985).

[8] In this case, then, the first factor to be considered is the financial condition and needs of Mrs. Petersen. For over ten years, Mrs. Petersen and her family enjoyed a very comfortable lifestyle. She now must make mortgage payments on the home and pay for the ordinary expenses of food, clothing and transportation. Other than the one-half interest in the investment corporation, Mrs. Petersen was awarded none of the income-producing assets. She has no outside income.

The second factor to be considered is Mrs. Petersen's ability to produce a sufficient income for herself. Although Mrs. Petersen is a college graduate with a Bachelor's degree and is trained as a school teacher, she is not currently certified. She would require additional training to become certified and, even if certified, her ability to produce income would be one-fourth to one-fifth of what Dr. Petersen's income has provided the family. The trial court found

4. In cases like the instant one, life patterns have largely been set, the earning potential of both parties can be predicted with some reliability, and the contributions and sacrifices of the one spouse in enabling the other to attain a degree have been compensated by many years of the comfortable lifestyle which the degree permitted. Traditional alimony analysis works nicely to assure equity in such cases.

In another kind of recurring case, typified by *Graham*, where divorce occurs shortly after the degree is obtained, traditional alimony analysis would often work hardship because, while both spouses have modest incomes at the time of divorce, the one is on the threshold of a significant increase in earnings. Moreover, the

spouse who sacrificed so the other could attain a degree is precluded from enjoying the anticipated dividends the degree will ordinarily provide. Nonetheless, such a spouse is typically not remote in time from his or her previous education and is otherwise better able to adjust and to acquire comparable skills, given the opportunity and the funding. In such cases, alimony analysis must become more creative to achieve fairness, and an award of "rehabilitative" or "reimbursement" alimony, not terminable upon remarriage, may be appropriate. See, e.g., *Haugan v. Haugan*, 117 Wis.2d 200, 343 N.W.2d 796 (1984); *Mahoney v. Mahoney*, 91 N.J. 488, 453 A.2d 527 (1982).

that the chance of her being able to secure a teaching contract was "speculative." During most of the marriage, Mrs. Petersen was not employed outside the home. She stopped working, primarily at the urging of her husband, and devoted her time to raising their six children. It is unreasonable to assume that she will be able immediately to enter the job market and support herself in the style in which she had been living before the divorce. See *Jones v. Jones*, 700 P.2d 1072, 1075 (Utah 1985).

The final factor to be considered is the ability of Dr. Petersen to provide support. This is the proper realm in which to consider advanced degrees or professional licenses. An advanced degree is ordinarily an indicator of potential future earnings. In addition, the attainment of a degree by one spouse often results in a disparity of income that is likely to last for a great time, particularly in cases like the present one. Dr. Petersen has a history of earning more than \$100,000 a year and Mrs. Petersen has not worked for the past fifteen. But it is the discrepancy in their earning power which is the basis for alimony, not the discrepancy in their educations. There is no logical reason, for example, for treating differently a self-trained artist without formal education who earns and will earn \$100,000 a year and a doctor with a medical degree who earns and will earn \$100,000 a year. Other things being equal, if such an artist divorces his or her spouse, he or she should pay alimony comparable to that paid by such a doctor. Whether a spouse's ability

to provide support is the result of an advanced degree or professional license is irrelevant to the analysis. The key is the spouse's *ability*.

In *Savage v. Savage*, 658 P.2d 1201 (Utah 1983), the Supreme Court explained:

Where a marriage is of long duration and the earning capacity of one spouse greatly exceeds that of the other, as here, it is appropriate to order alimony and child support at a level which will insure that the supported spouse and children may maintain a standard of living not unduly disproportionate to that which they would have enjoyed had the marriage continued.

658 P.2d at 1205. See *Jeppson v. Jeppson*, 684 P.2d 69 (Utah 1984).

In *Savage*, the parties had enjoyed a high standard of living during the marriage and the court upheld an award of \$2,000 per month alimony and child support of \$500 per month per child. 658 P.2d at 1205. In *Yelderman v. Yelderman*, 669 P.2d 406 (Utah 1983), the Supreme Court upheld an alimony award of \$2,500 per month as not excessive. 669 P.2d at 409. We agree that \$2,000 per month alimony to Mrs. Petersen is sufficient to help her maintain a standard of living not unduly disproportionate to that which she would have enjoyed if the marriage had continued.⁵

Accordingly, this case is remanded to District Court to amend the decree to provide that Mrs. Petersen receive \$2,000 per month alimony and, correspondingly, to delete the \$120,000 cash award. The decree

5. It is clear the court viewed the payments to Mrs. Petersen, both those it specifically called alimony and the additional \$1,000 monthly payments, as appropriate for her support. It utilized the "property" label in characterizing some of the monthly total as a means to preclude termination of the payments to Mrs. Petersen upon her remarriage. Although the court provided that the \$1,000 per month payments not called alimony would terminate in ten years, nothing in the court's findings establishes any particular significance to that point in time. We accordingly see no basis, now that the entire monthly payment is properly characterized as alimony, to require that half of the \$2,000 monthly total automatically and arbitrarily terminate at the end of ten years. Cf. *Olson v. Olson*, 704 P.2d 564, 567 (Utah 1985) (court

modified divorce decree to delete provision that alimony would terminate after two years where monthly amount was reasonable but two-year limit was not). Of course, it would be proper for the district court to readjust the amount of alimony awarded to Mrs. Petersen if at any point in time there develops a material change of circumstances, such as Mrs. Petersen securing gainful employment or if Dr. Petersen's salary drops dramatically through no fault of his own. See, e.g., *Naylor v. Naylor*, 700 P.2d 707, 710 (Utah 1985); *Haslam v. Haslam*, 657 P.2d 757, 758 (Utah 1982). The district court retains continuing jurisdiction in divorce actions to amend alimony. Utah Code Ann. § 30-3-5 (1986). In addition, the alimony awarded to Mrs. Petersen automatically terminates under certain circumstances. *Id.*

is otherwise affirmed. Each party shall bear his or her own costs of appeal.

BENCH and JACKSON, JJ., concur.



Dawn W. HORNE, Plaintiff
and Respondent,

v.

W. Reid HORNE, Defendant
and Appellant.

No. 860060—CA.

Court of Appeals of Utah.

May 18, 1987.

The 3rd District Court, Salt Lake County, Kenneth Rigtrup, J., entered nunc pro tunc order distributing property incident to previously granted divorce. Ex-husband appealed. The Court of Appeals, Billings, J., held that: (1) statute committing broad discretion to trial courts in granting nunc pro tunc orders in domestic relations matters was not limited in scope to cases involving marital status of the parties; (2) statute eliminated the common-law requirement of previously made final order; and (3) good cause did not exist for entry of the order nunc pro tunc.

Reversed and remanded.

1. Courts ⇐114

The court has the power to act nunc pro tunc—to do act upon one date and make it effective as of prior date; the common-law power of nunc pro tunc allows the court to correct errors or supply omissions to permit the record to accurately reflect that which in fact took place. U.C.A.1953, 30-4a-1.

2. Statutes ⇐189

In construing legislative enactments, the reviewing court assumes that each

term in the statute was used advisedly, and thus, interprets and applies the statute according to its literal wording unless it is unreasonably confused or inoperable.

3. Divorce ⇐254(1)

Statute committing broad discretion to trial courts in granting nunc pro tunc orders in domestic relations was not limited in scope to cases involving marital status of the parties, but could also apply to property division problems; by its wording, the statute applies to any and all matters relating to divorce proceedings. U.C.A.1953, 30-4a-1.

4. Statutes ⇐222, 239

Statutes are not to be construed as effecting any change in the common law beyond that which is clearly indicated; however, where statute is in derogation of the common law, and is also remedial in nature, the remedial application should be construed so as to give effect to its purpose.

5. Divorce ⇐162

Statute committing broad discretion to trial courts in granting nunc pro tunc orders in domestic relations matters eliminated the common-law nunc pro tunc requirement of previously made final order; literal reading of statute indicated legislative intent to change standard for entry of nunc pro tunc orders in domestic proceedings from requiring previously made final order as delineated by common law to requiring finding of "good cause," and legislative history indicated that statute was remedial in nature; *Preece v. Preece*, 682 P.2d 298 (Utah), superseded by statute. U.C.A.1953, 30-4a-1.

6. Divorce ⇐254(1)

"Good cause" did not exist to enter nunc pro tunc order distributing property incident to previously granted divorce; agreement between parties expressly stated that property was to be transferred to equalize the marital assets in order to insure that the transfer of property would not be taxable event, and in entering order prior to effective date of the Tax Reform Act of 1984 and without the essential and

ry intent is clearly revealed in the words he wrote. Since every required statutory element was expressed in his handwriting, no sound purpose or policy was served by invalidating Fitzgerald's holographic will. *See Estate of Black*, 30 Cal.3d 880, 889, 641 P.2d 754, 759, 181 Cal.Rptr. 222, 227 (1982). The will with two dates is facially ambiguous about whether it was executed before or on the same date as the single-dated will. However, the terms of the twice-dated will do not conflict with the other will's terms. These consistent provisions must be considered valid. Utah Code Ann. § 75-2-503 (1978).

The holographic wills should have been admitted to probate. The order of the trial court appointing Kenneth Fitzgerald as the personal representative of decedent is vacated, and the case is remanded for proceedings consistent with this decision. No costs are awarded.

BILLINGS and GARFF, JJ., concur.



Catherine RAYBURN, Plaintiff
and Respondent,

v.

Robert L. RAYBURN, Defendant
and Appellant.

No. 860022-CA.

Court of Appeals of Utah.

May 29, 1987.

Action was brought for divorce. The Third Judicial District Court, Salt Lake County, Dean E. Conder, J., entered divorce decree, and husband appealed. The Court of Appeals, Orme, J., held that: (1) installment payments to account for husband's medical degree could not be sustained as property settlement, but payments could be properly affirmed as tempo-

rary alimony, and (2) award to wife of one-half interest in husband's retirement fund was not abuse of discretion.

Affirmed as modified.

1. Divorce ⇐237, 252.3(1)

Advanced degree or professional license is not marital property subject to division upon divorce, but an advanced degree often accompanies disparity in earning potential that is appropriately considered as factor in alimony analysis.

2. Divorce ⇐247, 252.3(1)

Cash settlement of \$45,000, payable in monthly installments of \$750, could not be sustained as property settlement, in that value represented compensation for husband's professional degree, but payments could be properly affirmed as temporary alimony, given wife's needs and husband's ability to provide support.

3. Divorce ⇐247

Award to wife of one-half interest in present value of husband's retirement fund, payable over five years with interest, was not abuse of discretion, in that fund was asset accumulated during marriage, and especially where court permitted payments to be treated as "alimony" for tax purposes.

Gaylen S. Young, Jr., Salt Lake City, for defendant and appellant.

B.L. Dart, Salt Lake City, for plaintiff and respondent.

Before ORME, BENCH and JACKSON, JJ.

OPINION

ORME, Judge:

In this divorce action, defendant Robert L. Rayburn appeals the valuation and distribution of a retirement plan and an award of a \$45,000 property settlement to offset his medical degree. We affirm the trial court's basic disposition, but require amendment of the decree insofar as the \$45,000 award is concerned.

FACTUAL BACKGROUND

Plaintiff Catherine Rayburn and Dr. Rayburn were married in Florida on June 20, 1972. Earlier that same day, Dr. Rayburn had obtained his medical degree from the University of Florida. At the time, Mrs. Rayburn had a masters degree in zoology and was employed as a research associate at the University of Florida. The couple moved to Houston, Texas where Dr. Rayburn completed a one year internship at Baylor University. Dr. Rayburn earned \$8,000 to \$9,000 during the internship. Mrs. Rayburn also worked during that year, earning approximately \$7,200. The couple returned to Florida where Dr. Rayburn completed a three-year residency, earning approximately \$11,000 to \$13,500 per year. Mrs. Rayburn worked for a short time in Florida, but upon the birth of their first child, she stopped working full-time and worked only occasionally, and on a part-time basis, throughout the rest of the marriage.

After the residency, the family moved to San Antonio, where Dr. Rayburn completed two years of military service. During the five-year period of the internship, the residency, and his military service, Dr. Rayburn acted as the primary financial provider for the family. Mrs. Rayburn stayed at home, for the most part, to raise their eventual three children.

After military service, the family moved to Salt Lake City where Dr. Rayburn joined the staff of the Primary Children's Medical Center as a pediatric-anesthesiologist. In October 1982, Mrs. Rayburn filed for a divorce.

Trial was held on July 18 and 19, 1983. At the time of trial, Dr. Rayburn was earning approximately \$125,000 a year. After the two day trial, the court issued a memorandum decision. In the decision, the court determined to award custody of the three minor children, ages 9, 5, and 2, to Mrs. Rayburn and to order Dr. Rayburn to pay child support in the amount of \$400 per child per month. Apparently overlooking the exact sequence of events on the Rayburns' wedding day, the court found the husband's medical degree to be a marital

asset and ordered Dr. Rayburn to pay Mrs. Rayburn \$45,000, payable at \$750 a month, as her share of the asset and to "maintain her lifestyle for a period of adjustment." The decision would have awarded Dr. Rayburn all of his retirement fund.

About two weeks later, the court issued a supplemental decision in which the court altered its earlier decision on the retirement plan. The court, "in order to make a more equitable division of property," ordered Dr. Rayburn to pay one-half the net present value of the retirement plan, \$56,850, to Mrs. Rayburn in five annual installments of \$11,370 plus interest. The court entered Findings of Fact, Conclusions of Law, and a decree on September 15, 1983. The decree expressly awarded no alimony and set December 15, 1983, as the effective date of the divorce.

Dr. Rayburn promptly filed a motion for relief from judgment or for a new trial. Dr. Rayburn claimed the trial court failed to consider the drastic tax consequences of placing a present value on the retirement plan and awarding half of that to his wife. The court took Dr. Rayburn's motion under advisement. On December 9, 1983, the court issued another memorandum decision. This decision provided for amendment of the decree in such terms as would permit the five retirement plan payments to be treated as alimony for tax purposes. The court entered a second set of findings, conclusions, and decree on February 28, 1984. The second decree again awarded no alimony as such, made the embellishment for tax purposes, and set February 28 as the effective date of the divorce. Dr. Rayburn retained new counsel, who filed a motion for relief from the new judgment or a new trial. The court denied the motion and Dr. Rayburn appealed.

On appeal, Dr. Rayburn claims the court erroneously placed a high value on the retirement plan without considering the tax consequences. Dr. Rayburn also claims the court erred in finding the medical degree to be a marital asset and placing a value on it without any supporting evidence.

RECORD ON APPEAL

Dr. Rayburn ordered a transcript on appeal of only 30 pages, representing a tiny fraction of the testimony offered at trial. Under Rule 11(e)(2) of the Rules of the Utah Court of Appeals and the predecessor Utah Rules of Appellate Procedure, "If the appellant intends to urge on appeal that a finding or conclusion is unsupported by or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion." Since the transcript provided by the appellant is insufficient to allow a review of the evidence to determine the propriety of the findings, this court accepts the trial court's Findings of Fact as true¹ and only evaluates the legal correctness of the two disputed dispositions.² As indicated, the disputes concern the \$45,000 property settlement reflecting Mrs. Rayburn's "share" of her husband's medical degree and the payments for Mrs. Rayburn's one-half interest in the present value of the doctor's retirement plan.³

THE MEDICAL DEGREE

[1] Recently this court held that an advanced degree or professional license is not marital property subject to division upon

divorce. *Petersen v. Petersen*, 737 P.2d 237 (Utah App.1987). However, an advanced degree often accompanies a disparity in earning potential that is appropriately considered as a factor in alimony analysis. *See id.*, 243. We reaffirm our holding in *Petersen* and analyze the instant appeal under the same analysis employed in that case.

[2] The cash settlement of \$45,000 payable in monthly installments of \$750 cannot be sustained under *Petersen* as a property settlement, but payments of \$750 per month for a five-year period are properly affirmed as alimony.⁴ Criteria considered in determining a reasonable award of support must include the financial conditions and needs of the spouse in need of support, the ability of that spouse to produce sufficient income for his or her own support, and the ability of the other spouse to provide support. *Jones v. Jones*, 700 P.2d 1072, 1075 (Utah 1985). *See Paffel v. Paffel*, 732 P.2d 96, 100-101 (Utah 1986) (failure to consider these three factors constitutes an abuse of discretion). Although characterizing the monthly payments as a property settlement, the trial court ex-

1. *See Sawyers v. Sawyers*, 558 P.2d 607, 608 (Utah 1976) ("Appellate review of factual matters can be meaningful, orderly, and intelligent only in juxtaposition to a record by which lower courts' ruling and decisions on disputes can be measured."). In *Sawyers*, the Supreme Court presumed the findings of the trial court to have been supported by admissible, competent, substantial evidence. *Id. See Mitchell v. Mitchell*, 527 P.2d 1359, 1360-61 (Utah 1974).

2. At oral argument, Dr. Rayburn advised he did not really intend to question the findings in view of the evidence, only the propriety of the disposition in view of the findings.

3. On appeal, Dr. Rayburn also argues that the trial court erred in filing two separate Findings of Fact and Conclusions of Law and two separate decrees with different effective dates. In this regard he relies heavily on the failure of the second batch of documents to employ the term "amended," contending confusion will result about which decree controls. The second set of findings, conclusions, and decree was of course prompted by Dr. Rayburn's motion for relief from judgment. Although not expressly labeled as "amended," the second set of findings con-

clusions, and decree clearly supercedes the first set and are the direct subject of this appeal.

4. The trial court quite clearly viewed those payments as necessary for support but utilized the property settlement label as a means to preclude their termination should Mrs. Rayburn remarry. While it is true that with alimony the receiving spouse may lose some of his or her award through certain changed circumstances, like remarriage, Utah Code Ann. § 30-3-5 (1986), it is noted that with installments on a property award, the receiving spouse might lose some of the award if the paying spouse obtained a discharge in bankruptcy. By contrast, an alimony obligation would survive bankruptcy. 11 U.S.C.A. § 523(a)(5) (West Supp.1987). Characterization of required future payments as in satisfaction of a marital property disposition, rather than as alimony, is not always in the best interest of the receiving spouse. *Cf. Beckmann v. Beckmann*, 685 P.2d 1045, 1050 (Utah 1984) (The fact that an instrument is labeled "property settlement agreement" does not necessarily determine whether debt is dischargeable. Court will look at underlying nature of the debt, including whether spouse would be inadequately supported without the "settlement agreement").

pressly found factors that readily meet the criteria listed in *Jones*.

As for Mrs. Rayburn's need for support and her ability to produce sufficient income, the trial court found that Mrs. Rayburn was presently unemployed, but that she had been employed and was well-educated, having acquired bachelor's and master's degrees. However, with minor children residing at home and not yet in school, Mrs. Rayburn was reluctant to return immediately to the full-time workforce. In addition, the court accepted Mrs. Rayburn's testimony that in order to bring her employment skills to a satisfactory level, she needed to return to school and obtain further education "to complement her current education."⁵ As for Dr. Rayburn's ability to provide support, the trial court found that Dr. Rayburn was well-educated, having obtained an M.D. degree, and that he had a successful practice as a pediatric-anesthesiologist, earning a projected \$125,000 for 1983.

In its first memorandum decision, the trial court characterized the monthly payments for Mrs. Rayburn as necessary "to maintain her life style for a period of adjustment." The 5-year period corresponded to the amount of time it would take for Mrs. Rayburn to complete her additional education on a part-time basis and until the parties' youngest child was in school all day.⁶

We acknowledge that there will be situations where an award of non-terminable rehabilitative or reimbursement alimony would be appropriate. See *Petersen v. Petersen*, 737 P.2d at 242 n. 4. However, this is not such a case. Dr. Rayburn acquired

This additional education was apparently in the field of computer science. No doubt computerization has mushroomed in importance in zoology, as in nearly every area of scientific endeavor, during the decade Mrs. Rayburn was unemployed. Computer literacy would greatly enhance Mrs. Rayburn's ability to obtain suitable employment.

This rational basis for limiting the payments to a five-year period of adjustment distinguishes the case from *Petersen*, where we declined to implement a ten-year cap on alimony otherwise payable where there was no articulated basis for automatically diminishing the award upon the

his medical degree before the parties were married. Although Mrs. Rayburn worked periodically during the marriage, she did not endure substantial financial sacrifices or defer her own education to help him obtain the degree. In addition, Mrs. Rayburn shared the financial rewards permitted by her husband's advanced degree for several years. Those rewards also resulted in the accumulation of considerable real and personal property during their marriage, which was equitably divided upon their divorce. The award of temporary alimony, at \$750 per month for a maximum of five years,⁷ adequately meets Mrs. Rayburn's support needs and is readily sustainable under the criteria outlined in *Jones*.

THE RETIREMENT PLAN

[3] Dr. Rayburn's retirement fund was one of the valuable assets accumulated during the marriage and was of course subject to equitable division upon divorce *Woodward v. Woodward*, 656 P.2d 431, 433 (Utah 1982). See *Engiert v. Engiert*, 570 P.2d 1274, 1276 (Utah 1978). We accept the trial court's finding that the retirement fund's present value was \$113,700. In its second memorandum decision, the trial court explained that it had considered several ways to distribute the wife's share of the retirement fund and found fixing a sum equal to one-half of the present value and distributing that to Mrs. Rayburn as a cash award to be the most equitable. By requiring Mrs. Rayburn's share in the retirement fund to be cashed out following divorce, the court avoided leaving the parties in a "financial entanglement that would continue for approximately twenty or thirty years and would probably result in further

clapse of ten years. See *Petersen v. Petersen*, 737 P.2d at 243 n. 5. See also *Olson v. Olson*, 704 P.2d 564, 567 (Utah 1985).

7. The alimony obligation could terminate earlier under certain circumstances. Utah Code Ann. § 30-3-5 (1986). In addition, the district court has "continuing jurisdiction" to change the alimony award "as is reasonable and necessary," *id.* (3), provided there develops a substantial change in the parties' circumstances. See, e.g., *Naylor v. Naylor*, 700 P.2d 707, 710 (Utah 1985).

court hearings and cause future animosity between the parties."

However, the court went on to explain that "to require the defendant to pay the full sum at one time would have been an extra burden." By allowing Dr. Rayburn to make five annual payments, the court left him the option of paying his obligation out of current income or on some other basis, rather than having to liquidate the fund or sell other assets. The court additionally softened the impact by ultimately allowing the payments to be characterized in such terms as would permit them to be treated as "alimony" for tax purposes.⁸

There is admittedly some potential for confusion because of the measures taken by the trial court to massage the tax treatment of the payments to Mrs. Rayburn. However, these measures were the trial court's response to Dr. Rayburn's very own argument that the payments worked a financial hardship on him. The trial court allowed the payments to be considered "alimony" for tax purposes in order to give Dr. Rayburn the tax break of the alimony deduction while at the same time permitting Mrs. Rayburn to be cashed out within a few years. On appellate review, the trial court's apportionment of property will not be disturbed unless it works such a manifest injustice or inequity as to indicate a clear abuse of discretion. *E.g., Turner v. Turner*, 649 P.2d 6, 8 (Utah 1982). We find no abuse of discretion in the court's awarding Mrs. Rayburn a one-half interest in the retirement fund, payable over five years with interest. On the contrary, and especially with the refinements which were made to address Dr. Rayburn's concerns about taxes, the trial court's approach was clearly fair and equitable.

Accordingly, this case is remanded to the district court to amend the decree to provide that Mrs. Rayburn receive \$750 per month alimony for five years and, corre-

spondingly, to delete the \$45,000 cash award. The decree is otherwise affirmed. Each party shall bear his or her own costs of appeal.

BENCH and JACKSON, JJ., concur.



SCIENTIFIC ACADEMY OF HAIR DESIGN, INC., a Utah corporation, dba Mediterranean Hair Academy, Plaintiff and Appellant,

v.

Robert O. BOWEN, in his official capacity as director of the Division of Registration within the Department of Business Regulation, a Department of the Government of the State of Utah, Defendant and Respondent.

No. 860035-CA.

Court of Appeals of Utah.

June 8, 1987.

Administrative suspension of license to operate a cosmetology/barbering school was affirmed by order of the District Court, Third Judicial District, Salt Lake County, James S. Sawaya, J., and school appealed. The Court of Appeals, Billings, J., held that: (1) the Court of Appeals had jurisdiction to hear the appeal, but (2) the findings in support of the suspension were not contrary to a clear preponderance of the evidence, even assuming such standard rather than the "arbitrary and capricious" standard was applicable.

Affirmed.

8. The trial court did not stop here in tailoring the provision to make it as painless to Dr. Rayburn as possible under the circumstances. The court stated in its Conclusions of Law: "In the event that the payments under this paragraph do not qualify as 'alimony' for tax purposes, this would constitute a change of circumstances en-

titling the defendant to come back before the Court and obtain a modification reducing this payment to the extent of the income tax which he is required to pay because of an inability to take a deduction of these payments as 'alimony'."

a somewhat similar instruction was harmless error. Furthermore, the property stolen was not fungible property which defendant might have legitimately possessed. Rather, the checks were identified as property belonging to others were shown to have been forged and would not legitimately have been in his possession under any circumstances.

Affirmed.

HALL, C.J., concurs.

DURHAM, Justice (concurring separately):

I concur in the majority opinion, but write separately to emphasize the obligation of defense counsel to notify judges who have ruled on pretrial suppression issues that defendants' objections to challenged evidence are reserved and not withdrawn, thus alerting those judges to the possibility that trial evidence may affect the validity of earlier rulings. I agree that in this case there was an extensive hearing on defendant's motion to suppress, and it is quite clear from the record that defense counsel did not intend to waive any related evidentiary objections at trial. In fact, several ambiguous references during trial to a "prior motion" may have referred to defendant's pretrial motion to suppress. It is important, however, that trial judges be given the opportunity to review pretrial suppression rulings when and if there is any likelihood that they were erroneous. When the pretrial judge is also the trial judge, unlike the circumstance in *State v. Lesley*, 672 P.2d 79, 82 (Utah 1983), this is easily accomplished by indicating on the record, either at the end of the pretrial hearing or at the trial outside the presence of the jury, that there is a continuing objection to the evidence challenged in the motion to suppress.

HOWE, and ZIMMERMAN, JJ.,
concur in the concurring opinion of
DURHAM, J.

Betty M. GARDNER, Plaintiff
and Appellant,

v.

William James GARDNER, Defendant,
and Respondent.

No. 19246.

Supreme Court of Utah.

Jan. 4, 1988.

Divorce decree was entered by the Second District Court, Weber County, Ronald O. Hyde, J., and wife appealed. The Supreme Court, Stewart, Associate C.J., held that: (1) trial court was required to value husband's retirement account; (2) wife was entitled to findings in support of denial of her request for portion of husband's medical assets; (3) regardless of whether evaluation and distribution of a professional degree or professional practice is ever appropriate, it was inappropriate in the present case where marriage was of long duration and present earnings and business assets provided a more accurate measure of the true worth of wife's investment in husband's degree; and (4) alimony award was insufficient and inequitable.

Reversed and remanded.

Howe, J., filed opinion concurring and dissenting.

1. Divorce \S 286(5)

Though the Supreme Court may modify decisions of trial court, trial court's apportionment of marital property will not be disturbed unless it is clearly unjust or a clear abuse of discretion.

2. Divorce \S 252.3(4)

Marital property includes pension fund or insurance, but dividing retirement or pension funds is not necessarily consistent with principles of equitable distribution in



payout begins should be employed only in rare instances.

3. Divorce ⇨252.3(4)

Trial court, in apportioning marital property upon divorce, was required to at least consider the value of the husband's retirement account, and alternatives available for taking that value into account would include requiring husband to pay half of net present value to wife in annual installments, or reapportioning property distribution to offset that value.

4. Divorce ⇨253(4)

Wife was entitled to finding in support of denial of her request for a portion of the assets of husband's medical assets, and it was error to refuse to place present value thereon on the ground that the assets were "futuristic."

5. Divorce ⇨252.3(1)

Goodwill is properly subject to equitable distribution upon divorce.

6. Divorce ⇨252.3(1)

Regardless of whether professional degree and professional practice may in appropriate cases constitute marital property subject to evaluation and distribution upon divorce, wife's request for property interest in husband's medical degree was inappropriate where the marriage was of long duration and present earnings and business assets provided a more accurate measure of the true worth of the wife's investment in her husband's degree.

7. Divorce ⇨237

Alimony award should, after marriage of long duration and to the extent possible, equalize the parties' respective standards of living and maintain them at a level as close as possible to the standard of living enjoyed during the marriage.

8. Divorce ⇨240(2)

Alimony award of \$1,200 per month until husband's retirement and \$600 per month thereafter was an abuse of discretion where husband was a physician with earnings of \$6,000 per month, wife had not been employed for 30 years, husband had substantial retirement assets, and wife

would qualify for social security payments only as an "ex-wife married over 20 years."

9. Divorce ⇨225

There was no error in divorce case in failing to award attorney fees to wife, where portion of property award was for purpose of assisting wife to pay attorney and no showing was made in trial as to the nature and amount of fees.

Pete N. Vlahos, Ogden, for plaintiff and appellant.

C. Gerald Parker, Ogden, for defendant and respondent.

STEWART, Associate Chief Justice:

Plaintiff Betty Gardner appeals from a decree awarding alimony and attorney fees in a divorce action she brought against her former husband, William Gardner. We reverse and remand for further consideration.

Mr. and Mrs. Gardner were married at Steels Tavern, Virginia, on April 17, 1950. No children were born to them, but the couple adopted two children who are now both adults. Early in the marriage, Mrs. Gardner worked full-time as a secretary while Mr. Gardner completed his medical training. Mr. Gardner also worked various jobs, and his parents provided support in the form of medical school tuition. Mrs. Gardner has not worked since 1958, when Mr. Gardner completed his medical training. Mr. Gardner is now employed as a general surgeon, earning \$6,000 per month.

While married, Mr. and Mrs. Gardner acquired substantial real and personal property. Their major asset was a farm, including a home and equipment located near Eden, Utah, worth between \$246,000 and \$280,000. Other assets included Mr. Gardner's medical assets and retirement funds with an uncertain valuation of between \$73,000 and \$177,000; a contract for the sale of stock in the Ogden Clinic Investment Company; a certificate of deposit; household furniture, furnishings and fixtures; boats and automobiles; sporting equipment; and two horses and associated equipment. At the time of divorce, the

couple's only outstanding debts were a first mortgage on the family home and a loan for the purchase of one automobile.

The trial court ordered that the farm, home, and equipment be sold and the proceeds be divided equally. Until the farm was sold, Mrs. Gardner was entitled to its use, although she had to pay the mortgage, taxes, and insurance. The court also ordered that the motor vehicles and boats be sold and the proceeds divided equally, with the exception of one personal automobile for each party. The household furnishings and other items of personal property were divided roughly equally, according to personal need. Mr. Gardner was awarded his medical and business assets, including retirement funds, except Mrs. Gardner was awarded one-third of the proceeds from the sale of the Old Ogden Clinic building to pay her attorney fees. They were to share equally a money market certificate. The court granted Mrs. Gardner \$1,200 per month alimony, to be reduced to \$600 per month following Mr. Gardner's retirement. Mrs. Gardner was also to have a claim for \$50,000 against Mr. Gardner's estate in the event that he predeceased her.

Mrs. Gardner asks this Court to reverse the judgment of the lower court. She cites *Woodward v. Woodward*, 656 P.2d 431 (Utah 1982), for the proposition that she has a spousal right to an equitable distribution of Mr. Gardner's retirement funds. She also asserts a property interest in his medical degree and business and claims that the alimony award was insufficient. Finally, she asks this Court for an award of attorney fees.

[1] In a divorce proceeding, the trial court should make a distribution of property and income so that the parties may readjust their lives to their new circumstances as well as possible. *Turner v. Turner*, 649 P.2d 6 (Utah 1982); *MacDonald v. MacDonald*, 120 Utah 573, 236 P.2d 1066 (1951). Although this Court may modify decisions of the trial court, its apportionment of marital property will not be disturbed unless it is clearly unjust or a clear abuse of discretion. *Turner*, 649 P.2d at 8.

The trial court awarded Mr. Gardner his retirement account and medical assets without placing a present value on any of those assets. The trial court called those types of assets "futuristic" and indicated that their value would be utilized in retirement. The court did not attempt to resolve the differing valuations of the assets and provided little explanation for the award to Mr. Gardner.

Recently, in *Acton v. Deliran*, 737 P.2d 996, 999 (Utah 1987), we noted:

Failure of the trial court to make findings on all material issues is reversible error unless the facts in the record are "clear, uncontroverted, and capable of supporting only a finding in favor of the judgment." *Kinkella v. Baugh*, 660 P.2d 233, 236 (Utah 1983). ... The findings of fact must show that the court's judgment or decree "follows logically from, and is supported by, the evidence." *Smith v. Smith*, 726 P.2d 423, 426 (Utah 1986). The findings "should be sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached." *Rucker [v. Dalton]*, 598 P.2d [1336] at 1338 [Utah 1979]. See also *Mountain States Legal Foundation v. Public Service Commission*, 636 P.2d 1047, 1051 (Utah 1981).

The trial court's statement in its findings that the retirement account and Mr. Gardner's medical assets are "futuristic" was apparently intended to mean that they could not be given a present value or should not for other reasons be taken into account. That, however, does not follow from the evidence presented at trial, nor is it supported by our cases. Regardless of how remote the full value of an asset is, it still has present value. The testimony adduced at trial devoted to differing valuations by the parties merited more precise findings.

[2] In *Woodward v. Woodward*, 656 P.2d at 432, we recognized that retirement benefits, whether vested or not, are a form of deferred compensation which a court should at least consider when dividing marital assets. A right to deferred compensa-

tion acquired during marriage, or that portion of one's right to deferred compensation acquired during marriage, should not be entirely ignored in dividing assets, irrespective of when the vested funds are payable. Thus, marital property "encompasses all of the assets of every nature possessed by the parties, whenever obtained and from whatever source derived; and this includes any such pension fund or insurance." *Englert v. Englert*, 576 P.2d 1274 (Utah 1978).

However, an award of a part of a spouse's retirement funds may create significant problems. In some instances, marital assets are sparse, income is low, and an award of an equitable share of retirement assets might work a substantial hardship. Courts have, however, awarded the value of the assets on a periodic payment plan and, in some instances, have provided for payments when payout begins. This alternative should be employed only in rare instances. In *Woodward*, the Court stated

Long term and deferred sharing of financial interests are obviously too susceptible to continued strife and hostility, circumstances which our courts traditionally strive to avoid to the greatest extent possible.

[W]here other assets for equitable distribution are inadequate or lacking altogether, or where no present value can be established and the parties are unable to reach agreement, resort must be had to a form of deferred distribution based upon fixed percentages

656 P.2d at 433 (quoting *Kikkert v. Kikkert*, 177 N.J. Super 471, 478, 427 A.2d 76, 79-80 (1981)).

Obviously, dividing retirement or pension funds is not necessarily consistent with principles of equitable distribution in all cases. The purpose of divorce is to end marriage and allow the parties to make as much of a clean break from each other as is reasonably possible. An award of deferred compensation which ties a couple together long after divorce can frustrate that objective.

[3] Nevertheless, the division of retirement funds between two persons can be

accomplished when necessary. For example, in *Rayburn v. Rayburn*, 738 P.2d 238 (Utah App 1987), a physician was required to pay one-half the net present value of his retirement plan, \$56,850, to his former wife in five annual installments. The court awarded present value of the share to be paid within five years to avoid "leaving the parties in a 'financial entanglement that would continue for approximately twenty or thirty years and would probably result in further court hearings and cause future animosity between the parties.'" *Id.* at 241-42. *Rayburn* provides a possible alternative for dealing with the value of the retirement account in this case. Because of the sizeable assets in this case, another alternative would be reapportionment of the property distribution to offset the value of the retirement account.

In any event, it will be necessary on remand to determine the value of the retirement account. The account has a present value of between \$73,000 and \$177,000, and the Court should at least consider the value of the account in making the property distribution.

Another alternative for the apportionment of property lies in the trial court's discretion to award the entire value of a solely owned professional corporation to the husband. *Dogu v. Dogu*, 652 P.2d 1308 (Utah 1982). In *Dogu*, the earning power of the corporation resulted entirely from Dr. Dogu's continuing ability to work; however, there were questions as to his ability to do so. The trial court awarded the wife savings certificates, bank accounts, and stock to offset the present liquid assets of the corporation (accounts receivable and bank accounts). The trial court did not attempt to value the future earnings potential of the corporation, presumably because of questions regarding the ability of Dr. Dogu to continue to generate income for the corporation.

[4,5] The Ogden Clinic, of which Mr. Gardner is a member, is a well-entrenched institution, whose twenty-three members have banded together in a business organization. It is not likely to be highly susceptible to earnings interruptions because

of the ill health of one of its members. The Ogden Clinic is not entirely valueless. Mr. Gardner's share, using his own figures, is worth at least \$3,826 (partnership \$3,726, corporation \$100). Mrs. Gardner's accountants value the business much higher. Neither gave consideration to the good will inherent in the professional clinic.¹ Mrs. Gardner was entitled to findings in support of the denial of her request for a portion of those assets. Instead, the trial court disposed of the medical assets in the same sentence in which it disposed of the retirement account.

The medical assets at issue here were not included in the retirement account, but the trial court seems to have assumed that they were one and the same. In any event, no findings of fact were made as to the value of the medical assets. The award to Mr. Gardner of his retirement funds and medical assets may be proper and equitable. However, we cannot adequately review the trial court's determinations on the basis of the sparse findings before us. Accordingly, we reverse and remand for a valuation of the medical assets and retirement accounts and reconsideration of the distribution of the marital property on the basis of those findings.

In addition, Mrs. Gardner asserts an equitable and legal property interest in the medical degree of her former spouse. Whether professional degrees and professional practice constitute marital property subject to valuation and distribution upon the dissolution of a marriage has been the subject of much debate in recent years, especially in the wake of decisions where such a valuation has been made. See, e.g., *Inman v. Inman*, 648 S.W.2d 847 (Ky. 1982); *Mahoney v. Mahoney*, 91 N.J. 488,

453 A.2d 527 (1982); *O'Brien v. O'Brien*, 66 N.Y.2d 576, 498 N.Y.S.2d 743, 489 N.D.2d 712 (1985). It has similarly been the subject of discussion in our Court of Appeals. See *Rayburn v. Rayburn*, 738 P.2d 238 (Utah App.1987); *Petersen v. Petersen*, 737 P.2d 237 (Utah App.1987).

One authority has argued that educational achievements are susceptible to valuation,² but there is judicial authority for the proposition that the value of an education does not fall within the common understanding of the concept of property:

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

In re Marriage of Graham, 194 Colo. 429, 432, 574 P.2d 75, 77 (1978). See also *Mahoney*, 91 N.J. 488 at 496, 453 A.2d 527 at 531.

The cases which have refused to hold that professional degrees and practice constitute marital property subject to valuation and distribution have nonetheless assessed and divided the value of the degree

1. A marriage may be analogized to a partnership. Upon dissolution of the marital "partnership," an equitable distribution should be based on consideration of all assets, not just those that survive the trip to the bottom of the balance sheet. Where appropriate, value may be given to that "something in business which gives reasonable expectancy of preference in the race of competition," commonly known as good will. *Jackson v. Caldwell*, 18 Utah 2d 81, 85, 415 P.2d 667, 670 (1966).

The ability of a business to generate income from its continued patronage is commonly re-

ferred to as good will. Good will is properly subject to equitable distribution upon divorce. See, e.g., *Dugan v. Dugan*, 92 N.J. 423, 457 A.2d 1 (1983); *Matter of Marriage of Fleege*, 91 Wash.2d 324, 588 P.2d 1136 (1979). But see *The Treatment of Good Will in Divorce Proceedings*, 18 Fam.L.Q. 213 (1984).

2. See Fitzpatrick & Doucette, *Can the Economic Value of an Education Really Be Measured?*, 21 J.Fam.L. 51 (1983).

GARDNER v. GARDNER

Cite as 748 P.2d 1076 (Utah 1988)

Utah 1081

or practice on the basis of other legal and equitable remedies. These cases follow a common fact pattern. Typically, the husband is supported throughout a long graduate or professional program by the working wife, and the couple is divorced soon after graduation. In such cases, there are few marital assets to distribute, and the courts have considered other ways of compensating the spouse. In a limited number of cases, the courts focus on the educational degree or professional practice. See generally *In re Marriage of Horstmann*, 263 N.W.2d 885 (Iowa 1978); *Mahoney*, 91 N.J. 488, 453 A.2d 527; *Inman*, 648 S.W.2d 847; *O'Brien*, 66 N.Y.2d 576, 498 N.Y.S.2d 743, 489 N.E.2d 712; and *Hubbard v. Hubbard*, 603 P.2d 747 (Okla.1979), for various theories of valuation.

[6] We agree that an educational or professional degree is difficult to value and that such a valuation does not easily fit the common understanding of the character of property. However, at least in the present instance, we need not reach the question of whether such a valuation may ever take place. Sufficient assets distinguish this case from others in which equity and fairness required another solution. Where, as here, the marriage is of long duration, present earnings and business assets provide a more accurate measure of the true worth of the wife's investment in her husband's degree. The home, farm, automobiles, and other assets of approximately \$500,000 allow for a divisible award between the Gardners. In a sense, Mrs. Gardner has realized benefits from the medical degree in the form of a greater property settlement and higher alimony. We find Mrs. Gardner's request for a property interest in Mr. Gardner's medical degree inappropriate under these facts and affirm the findings of the trial court in this regard.

[7,8] Mrs. Gardner also claims the trial court's award of alimony was insufficient and inequitable. We agree. An alimony award should, after a marriage such as this and to the extent possible, equalize the parties' respective standards of living and maintain them at a level as close as possi-

ble to that standard of living enjoyed during the marriage. *Jones v. Jones*, 700 P.2d 1072, 1075 (Utah 1985); *Higley v. Higley*, 676 P.2d 379, 381 (Utah 1983). In *Jones*, we enumerated three factors important in fixing an alimony award: (1) the financial conditions and needs of the wife; (2) the ability of the wife to produce sufficient income for herself; and (3) the ability of the husband to provide support. *Jones*, 700 P.2d at 1075. See also *English v. English*, 565 P.2d 409, 412 (Utah 1977).

Mrs. Gardner has not been gainfully employed since 1958. Though testimony indicated that she was skilled as an executive secretary, it will be difficult for her to regain these skills and become reemployed after a thirty-year absence. Mr. Gardner, by contrast, retains his career as a physician with earnings of \$6,000 per month. The trial court awarded Mrs. Gardner \$1,200 per month as alimony, to be reduced to \$600 per month following Mr. Gardner's retirement. The court provided no explanation of the basis for the preretirement award and stated that the reduction in alimony following Mr. Gardner's retirement reflected a drop in his earning potential, Mrs. Gardner's eligibility for social security, and the fact that the house would be sold, providing Mrs. Gardner with liquid assets. We think that this award was an abuse of discretion.

Mrs. Gardner executed an affidavit prior to trial listing her monthly expenses at \$1,700 per month. The trial court apparently relied on testimony at the hearing and on a prior affidavit which set her monthly needs at \$1,200. Mrs. Gardner is not employed and has little prospect of being reemployed. Viewing her future earning potential and current monthly expenses, however arrived at, against that of Mr. Gardner's, we think it is clear that the award is insufficient to equalize the parties' standards of living.

Similarly, the trial court's award of \$600 monthly alimony following Mr. Gardner's retirement is also unreasonably low. Mr. Gardner has substantial retirement assets. Should Mr. Gardner reach retirement age, these assets will have increased substan-

tially. Mrs. Gardner, however, has no pension and will qualify for social security payments only as an "ex-wife married over 20 years." She will not qualify for regular social security benefits until she has worked another thirty-nine quarters. Because the likelihood of her providing for her own retirement is small, we find that the trial court's award is insufficient to equalize the parties' standards of living following Mr. Gardner's retirement.

We reverse and remand for further proceedings in light of the above and in light of the factors enumerated in *Jones*, 700 P.2d at 1075. On remand, the trial court must evaluate the wife's ability to support herself based on findings and conclusions under the standards stated in *Acton v. Deliran*, 737 P.2d 996. It is not clear from the record before us that Mrs. Gardner will be able to meet her monthly needs either before or after Mr. Gardner's retirement, and this is the focus of our concern. Our review of the record therefore indicates that the alimony award may have to be increased. However, explicit findings based on the factors in *Jones* are needed to support that conclusion.

[9] Finally, Mrs. Gardner asks this Court to make an award of attorney fees. The trial court made no specific award of attorney fees. However, in its findings of fact and conclusions of law, the trial court made clear that an award of a one-third interest in the Old Ogden Clinic building account and the division of the money market certificate was for the purpose of assisting the wife to pay her attorney. Mr. Gardner correctly notes that a request for attorney fees must be accompanied by evidence at trial as to the nature and amount of such fees. See *Warren v. Warren*, 655 P.2d 684, 688 (Utah 1982). No such showing was made at trial, and the findings do not support Mrs. Gardner's request. Insofar as we have approved the property settlement of the lower court, the award of attorney fees made part of that settlement is affirmed.

HALL, C.J., and DURHAM and ZIMMERMAN, JJ., concur.

HOWE, Justice (concurring and dissenting).

I concur in the majority opinion except that part dealing with alimony. As to that part, I dissent for the following reasons:

First, in reversing and remanding for a valuation of the medical and retirement assets and a redistribution of marital property on the basis of those findings, Mrs. Gardner's financial position will undoubtedly improve and her income increase. This increase will have a direct bearing on the amount of alimony which she should be awarded. It is premature for us to now hold that the \$1,200 per month or the \$600 per month awarded by the trial court is inadequate. It may well be that after the redistribution of property is made, the amounts awarded will be entirely fair and could even be excessive. This is especially true as to \$600 alimony after Mr. Gardner's retirement. Any amount of his retirement awarded to her on remand decreases her need for alimony and his ability to pay it. The trial judge recognized this reality when he wrote in his memorandum decision:

Upon his retirement, the alimony shall reduce to \$600 per month. The reasons for this reduction are: by the time of retirement, the home should be sold and the plaintiff should have liquid assets; defendant's income will materially decrease; plaintiff will also receive some social security benefits. It is my intent in awarding to the defendant his medical assets and retirement assets that alimony shall be paid therefrom and that the plaintiff shall have a claim thereon as against the defendant's estate if he should predecease her. This claim shall be in the amount of \$50,000.

Second, the \$1,700-per-month alimony requested by Mrs. Gardner was based on her affidavit which listed her monthly needs at that amount, but based on her assumption that the court would allow her to continue to live on the twenty-one-acre country estate of the parties on which is a six-bedroom home with garages for four cars, a barn, and other outbuildings. Consequently, in arriving at her \$1,700-per-month request, she included the monthly mortgage

GARDNER v. GARDNER

Cite as 748 P.2d 1076 (Utah 1988)

Utah 1083

payment, the property taxes, insurance premiums on that property, monthly utilities on that property, and amounts for the care of the farm animals and for farm, garden, and house maintenance and repairs. However, the trial court did not award her the country estate or allow her to permanently stay there, but ordered that the parties sell the property as soon as possible. The majority opinion does not assail this determination. The sale of the property ordered by the court necessarily eliminated many of the monthly expenses which formed a basis for the \$1,700 alimony request. The trial court, therefore, acted properly in excluding those items of expense in determining a reasonable amount of monthly alimony and presumably included instead the cost of Mrs. Gardner's living in smaller and less expensive quarters. On cross-examination, Mrs. Gardner admitted that her cost of living would be less if she did not live on the estate. Thus, the \$1,200 awarded by the trial court was clearly within the range of the evidence before the court. The majority does not claim that \$1,200 was "clearly erroneous" as rule 52, Utah Rules of Civil Procedure, requires us to conclude before we may upset findings of fact by the trial court.

We have always accorded trial courts considerable latitude in fixing alimony. Yet here, the majority sweeps aside the trial court's judgment because it is only one-fifth of Mr. Gardner's monthly income and is insufficient to "equalize the parties' standard of living." Insofar as this writer knows, reasonable and fair alimony has never been expressed as a percentage of the husband's monthly income. This is a new concept, completely foreign to the test recognized in *Jones v. Jones*, 700 P.2d 1072 (Utah 1985), for determining an alimony award. Since the monthly income of divorced husbands is not all the same, the monthly needs and financial conditions of divorced wives vary widely, and debts and other factors have to be considered, percentages should not be employed or relied on.

Finally, I strongly dissent from the repeated references in the majority opinion that alimony is to "equalize" the financial

position of the parties after their divorce. Again, this concept is contrary to the three factors to be considered which we enumerated in *Jones v. Jones*, *supra*: (1) the financial condition and needs of the wife, (2) the ability of the wife to produce a sufficient income for herself, and (3) the ability of the husband to provide support. We have said that the wife is entitled to enjoy as near as possible the same standard of living she enjoyed during the marriage and she should be prevented from becoming a public charge. *English v. English*, 565 P.2d 409, 411 (Utah 1977). But this is not the same as "equalizing" their incomes. The instant case is a good example. Mr. Gardner is a highly skilled surgeon earning \$6,000 per month. Mrs. Gardner was not employed at the time of the divorce. She thought she could maintain the standard of living to which she had become accustomed if she received \$1,700 per month alimony. If their financial positions after divorce are to be equal, she presumably should have \$2,000 per month alimony. I do not think the majority intends that result.

The object of divorce is to set the parties free of each other after an equitable division of property is made and, if needed, an award of alimony is made which will enable both parties to maintain as near as possible the standard of living they enjoyed during the marriage. The parties then go their separate ways and attempt to rebuild their lives. But because of the disparity in their earning ability, the wife here, who has training as a secretary but has not been employed for thirty-three years, will never earn as much as her husband-surgeon. Our cases do not suggest that the divorce decree should attempt to cure this disparity by "equalizing" their future incomes.



The judgment of the trial court is reversed and the case is remanded.



**In re the MARRIAGE OF Sally K.
OLAR, Petitioner,**

and

Terry T. Olar, Respondent.

No. 85SC487.

**Supreme Court of Colorado,
En Banc.**

Dec. 21, 1987.

Wife brought dissolution of marriage action. The trial court failed to award wife maintenance. The Court of Appeals affirmed. Certiorari was granted. The Supreme Court, Volland, J., held that: (1) educational degree did not constitute marital property subject to division upon dissolution, and (2) in determining maintenance, trial court should have considered any unfairness which resulted when wife sacrificed her own educational goals to support her spouse through school.

Affirmed in part, and reversed and remanded in part with directions.

1. Divorce ⇐252.3(1)

An educational degree is not "marital property" subject to division upon dissolution of marriage.

See publication Words and Phrases for other judicial constructions and definitions.

2. Divorce ⇐252.3(1)

Contribution of one spouse to education of other spouse may be taken into consideration when marital property is divided upon dissolution of marriage.

3. Divorce ⇐237

Maintenance is available only if property is insufficient to provide for financial needs of spouse. C.R.S. 14-10-114.

4. Divorce ⇐237

Determination of what constitutes "appropriate employment," for purposes of

statute requiring that spouse seeking maintenance be unable to support himself through appropriate employment, requires that party's economic circumstances and reasonable expectations established during marriage be considered. C.R.S. 14-10-114(1)(b).

5. Divorce ⇐237

In determining maintenance wife was entitled to, trial court should have considered unfairness which may have resulted when wife sacrificed her own educational goals to support her spouse through school. C.R.S. 14-10-114.

Fischer, Howard & Francis, Steven G. Francis, Fort Collins, for petitioner.

Terry T. Olar, pro se.

Robert T. Hinds, Jr. & Associates, P.C., Linda Daley, Littleton, Colorado Women's Bar Ass'n, Linda Christenson, Denver, for amici curiae Colorado Bar Ass'n and Colorado Women's Bar Ass'n.

VOLLACK, Justice.

The issue presented in this case is whether an educational degree constitutes marital property subject to division upon dissolution of marriage, overruling *Graham v. Graham*, 194 Colo. 429, 574 P.2d 75 (1978), or in the alternative, if an educational degree is not marital property, whether the wife was entitled to maintenance under the facts of this case, including the contributions made by the wife towards her husband's education. The court of appeals held that the trial court did not abuse its discretion by not awarding the wife maintenance, because she failed to meet the threshold requirements of need set forth in section 14-10-114(1)(a) and (b), 6B C.R.S. (1987). *In re Marriage of Olar*, No. 84CA0323 (Colo.App. Oct. 17, 1985) (not selected for publication). We affirm in part, reverse in part and remand the case for further proceedings.

I.

The petitioner, Sally K. Olar (wife), and the respondent, Terry T. Olar (husband),

were married on September 5, 1970, and separated on June 26, 1982. When the couple separated, the wife was unaware that she was pregnant with the couple's only child. By the time that the decree of dissolution was entered on December 23, 1983, the child born of the marriage was eleven months old, and the wife was an unemployed, full-time student living with her parents in Munster, Indiana. The husband was living in Copeland, Texas, earning a gross salary of \$35,000 per year as a laboratory manager.

At the time of their marriage, the wife had graduated from high school and the husband was in his first year of undergraduate studies. During the twelve-year marriage, with the exception of one year in which he worked full-time, the husband was a full-time student, acquiring undergraduate and graduate degrees. For the seven years prior to their separation in June of 1982, the Olars resided in Fort Collins, Colorado, where the husband attended Colorado State University (C.S.U.). At the time of the permanent orders hearing on December 15, 1983, the husband had completed his doctoral dissertation and was only required to present his work before a dissertation committee to obtain the doctoral degree in physiology and biophysics. Throughout the marriage, the wife worked full-time, and at the time of separation she was a bookkeeper with a gross income of \$1,200 per month. The wife continued her employment until June 15, 1983, with the exception of nine weeks maternity leave, until she moved to Indiana to commence her full-time studies. She moved in with her parents who provided her and the child room and board with an agreed upon value of \$400 per month, which the parents advanced her as a loan to be paid back when possible.

The husband's actual educational costs were financed by a combination of veteran's benefits for his past military service, tuition waivers, student loans, fellowships, and graduate student stipends. In the late 1970's, the husband also received in excess of \$8,000 as an inheritance from his father and this sum was co-mingled with the assets of the parties, some of it going for a

down-payment on a mobile home in which the couple lived until their separation. Throughout their marriage, the parties acquired little in the way of marital assets. According to the wife, during the years 1979 to 1982 her income totaled \$47,398 and the husband's income totaled \$26,628. The marital property consisted of two motor vehicles, furniture and miscellaneous property, a mobile home worth approximately \$10,000, and at the time of dissolution, a savings account containing \$1,100. Both parties had debts from credit cards and the husband had student loan debts of approximately \$5,400.

The wife filed for dissolution of the marriage in January of 1983 in Larimer County District Court. At the dissolution hearing, the wife claimed that she was entitled to maintenance which would represent compensation for her working full-time throughout the marriage to assist in providing almost a complete doctoral education for her husband. The wife claimed that she had an agreement with her husband whereby he would support her during her efforts to achieve a college education for herself after his education was completed. She had an expert testify as to the value of a college education for her, comparing what she could expect to earn as a high school graduate and a college graduate. The wife did not specifically argue that the husband's graduate degrees were marital property and did not offer testimony on the potential worth of his degrees if discounted to present value, or the amount that she contributed to his education.

The husband claimed that there was no formal agreement between the parties that he would finance her education. He argued that his education was not marital property under Colorado law, and that the wife was not entitled to maintenance because she was capable of supporting herself. The custody of the minor child was not at issue and was awarded to the wife subject to reasonable and liberal visitation rights for the husband.

The trial court held that the wife was not eligible for maintenance because she failed to establish the threshold of need neces-

sary to justify such an award under section 14-10-114, 6B C.R.S. (1987). The court found that the wife was capable of supporting herself and although she had a young minor child to care for, nothing suggested that the child required her mother's full-time presence at home. The trial court ordered the husband to pay to the wife \$350 per month as child support. As to the marital property, the court ordered that the proceeds of the sale of the mobile home, totalling \$4,914.60, and the savings account of \$1,100 should be combined, and the wife should receive the sum of \$5,000, with the balance going to the husband. The court noted that this was not an equal distribution, but stated that this award was in keeping with dictum contained in *Graham v. Graham*, 194 Colo. 429, 574 P.2d 75 (1978),¹ and would go towards assisting the wife in continuing her education while working part-time. The court specifically held that the education of the husband was not marital property, and for this reason, found that the student loans of the husband, likewise, were not marital obligations, and ordered that the husband assume those debts without contribution from the wife.

The wife appealed the judgment to the court of appeals, claiming that the trial court erred in denying her maintenance because she failed to satisfy a threshold requirement of need. The court of appeals affirmed the trial court, stating that "[a] trial court may use an award of maintenance as a tool to balance equities and compensate a spouse whose work has enabled the other spouse to obtain an education, so long as the spouse seeking maintenance meets the statutory threshold requirements of need set forth in § 14-10-114(1)(a) and (b), C.R.S." The court of appeals held the trial court did not abuse its discretion in finding that the wife failed to establish the requisite need.

II.

We granted certiorari to reconsider our decision in *Graham v. Graham*, 194 Colo.

429, 574 P.2d 75 (1978), which held that an educational degree is not marital property. This reconsideration is based upon the recognition of the harsh and often unfair outcome in a dissolution proceeding where one spouse has postponed his or her own career and educational goals to support and contribute to the career and educational goals of the other spouse. The pursuit of advanced educational degrees and professional training often results in a deferral of earning capacity by the spouse who receives that educational degree or advanced training at the expense of the current standard of living of the couple. When a couple collectively works towards the attainment of an advanced educational degree or career goal, there is an expectation of a higher standard of living in the future. If a dissolution of the marriage occurs just as the graduate degree is attained, or the career goal achieved, or just subsequent to the attainment of the goal, the spouse that contributed to and supported the other spouse has his or her expectations of the higher standard of living frustrated, and as a result of the collective sacrifice and deferral of acquiring other possessions, is left in a position where there is little marital property to divide. The contributions to the other spouse's education or career goals are often made at the expense of the supporting spouse's own education or career goal. The supporting spouse is left without the resources to recover from the years of deferring the acquisition of property and security. It is with the recognition of this potential for injustice that we examine the status of an educational degree in the context of the dissolution of a marriage.

In considering the status of an educational degree in the dissolution of a marriage, we do not work on a clean slate. In *Graham v. Graham*, 194 Colo. 429, 574 P.2d 75 (1978), we held that an educational degree is not marital property within the meaning of section 14-10-113(2), 6B C.R.S. (1987), which states that "[f]or purposes of this

when dividing marital property. 194 Colo. at 433, 574 P.2d at 78.

1. In *Graham*, we stated that the contribution of a spouse to the education of the other spouse could be taken into consideration by the court

Cite as 747 P.2d 676 (Colo. 1987)

article only, 'marital property' means all property acquired by either spouse subsequent to the marriage except:"

- (a) Property acquired by gift, bequest, devise, or descent;
- (b) Property acquired in exchange for property acquired prior to the marriage or in exchange for property acquired by gift, bequest, devise, or descent;
- (c) Property acquired by a spouse after a decree of legal separation; and
- (d) Property excluded by valid agreement of the parties.

In applying this definition to an educational degree, we have stated:

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.

Graham, 194 Colo. at 432, 574 P.2d at 77.

Our position in *Graham* is followed by the majority of jurisdictions to address this issue. *E.g.*, *Nelson v. Nelson*, 736 P.2d 1145 (Alaska 1987); *Wisner v. Wisner*, 129 Ariz. 333, 631 P.2d 115 (App.1981); *In re Marriage of Sullivan*, 134 Cal.App.3d 634, 184 Cal.Rptr. 796 (1982); *vacated*, 37 Cal. 3d 762, 209 Cal.Rptr. 354, 691 P.2d 1020 (1984) (statute amended to provide for the community to be reimbursed for community contributions to education of a party); *Hughes v. Hughes*, 438 So.2d 146 (Fla.App. 1983); *In re Marriage of Weinstein*, 128 Ill.App.3d 234, 83 Ill.Dec. 425, 470 N.E.2d 551 (1984); *Archer v. Archer*, 303 Md. 347, 493 A.2d 1074 (1985); *Drapek v. Drapek*, 399 Mass. 240, 503 N.E.2d 946 (1987); *Ru-*

ben v. Ruben, 123 N.H. 358, 461 A.2d 733 (1983); *Mahoney v. Mahoney*, 91 N.J. 488, 453 A.2d 527 (1982); *Hodge v. Hodge*, 513 Pa. 264, 520 A.2d 15 (1986); *Wehrkamp v. Wehrkamp*, 357 N.W.2d 264 (S.D.1984); *Petersen v. Petersen*, 737 P.2d 237 (Utah App.1987). *Contra*, *O'Brien v. O'Brien*, 66 N.Y.2d 576, 498 N.Y.S.2d 743, 489 N.E. 2d 712 (1985).²

The doctrine of stare decisis imposes upon us a duty to exercise extreme care in overruling settled law. *Creacy v. Industrial Comm'n*, 148 Colo. 429, 366 P.2d 384 (1961). On the other hand, "[a] rule directed to the disposition of property in a dissolution proceeding can only be as sound as the economic reality which it attempts to service." *In re Marriage of Grubb*, 745 P.2d 661, 664 (Colo.1987). In *Grubb*, we reconsidered the status of pension plans as marital property and found that our prior case law, which rejected the concept of pension plans as marital property, did not adequately account for the true nature of retirement plans. We recognized that retirement benefits were a form of deferred compensation for consideration for past services performed by an employee and constituted part of the compensation earned by the employee. *Id.* at 664. Educational degrees are very different in nature from pension plans. While a pension plan is difficult to place a value upon, it is possible. We find that the value of an educational degree is too dependent upon the attributes and future choices of its possessor to be fairly valued.

[1] Other courts have noted the difference between professional licenses or degrees and vested but unmaturing pension plans. The Maryland Court of Appeals noted that while pension rights constitute a current asset which the individual has a contractual right to receive, the future en-

2. The *O'Brien* decision is based on portions of the New York Equitable Distribution Law which provides that a court consider the efforts one spouse has made to the other spouse's career. See N.Y.Dom.Rel.Law § 236(B)(5) (McKinney 19__). The analysis in *O'Brien* is illustrative of the equitable concerns of the working spouse who contributes to the other spouse's career, however, it has a limited application beyond New York.

One commentator also argues that a spouse's professional degree and license should be considered a career asset to be divided, and provides a clear picture of the surprising injustice which resulted from the institution of the no-fault divorce law in the United States. L. Weitzman, *The Divorce Revolution* 124-29 (1985).

hanced income resulting from a professional degree is a "mere expectancy." *Archer v. Archer*, 493 A.2d at 1079, citing *Deering v. Deering*, 292 Md. 115, 437 A.2d 883 (1981) (case holding a vested but unmatured pension right is marital property). The New Jersey Supreme Court stated that "[a] professional license or degree represents the opportunity to obtain an amount of money only upon the occurrence of highly uncertain future events. By contrast, the vested but unmatured pension at issue in *Kikkert [v. Kikkert]*, 88 N.J. 4, 438 A.2d 317 (N.J.1981)], entitled the owner to a definite amount of money at a certain future date." *Mahoney*, 453 A.2d at 531. The *Mahoney* court further stated that "[v]aluing a professional degree in the hands of any particular individual at the start of his or her career would involve a gamut of calculations that reduces to little more than guesswork." *Id.* at 532. We agree with this analysis, and therefore reaffirm our holding in *Graham*, holding that an educational degree is not marital property.

[2] In *Graham* we stated, "[a] spouse who provides financial support while the other spouse acquires an education is not without a remedy." 194 Colo. at 433, 574 P.2d at 78. Here, it is the adequacy of the remedy with which we are concerned. The contribution of one spouse to the education of the other spouse may be taken into consideration when marital property is divided. *Id.*, citing *Greer v. Greer*, 32 Colo. App. 196, 510 P.2d 905 (1973). This remedy is effective only if sufficient marital property has been accumulated by the parties during their marriage. In *Graham*, and the case at bar, the parties were divorced shortly after the husband acquired his degree. The situation in which the dissolution of marriage occurs before the benefits of the advanced degree can be realized, and where no marital property is accumulated, requires us to look to another remedy for the inequity that results for the working spouse. Another option mentioned in *Graham* was an award of maintenance as a need is demonstrated. The trial court could make an award of maintenance based on all relevant factors including the contri-

bution of one spouse to the education of the other spouse. *Id.* For this remedy, we look to section 14-10-114, 6B C.R.S. (1987), which sets forth the standards for awarding maintenance.

III.

[3] Under Colorado's maintenance statute, maintenance is available only if property is insufficient to provide for the financial needs of the spouse. *In re Marriage of Jones*, 627 P.2d 248 (Colo.1981). In this case, the accumulated marital property was insufficient to fairly compensate the wife for her contributions and expectations in the husband's educational degree. However, the trial court determined that the wife was not entitled to maintenance because she was capable of supporting herself, and therefore failed to establish "the threshold necessary to justify an award of maintenance." In our view, the trial court's holding does not adequately address the unfairness which results when one spouse sacrifices his or her own educational goals to support his or her spouse. Such an interpretation is not required by section 14-10-114, 6B C.R.S. (1987). Subsection (1) provides that a court may grant maintenance to either spouse if it finds that the spouse seeking maintenance:

- (a) Lacks sufficient property, including marital property apportioned to him, to provide for his reasonable needs; and
- (b) Is unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.

Once the court deems it just to award a spouse maintenance, the court considers all relevant factors including: the financial resources of the party seeking maintenance; the time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment and that party's future earning capacity; the standard of living established during the marriage; the duration of the marriage; the age and condition of the spouse seeking maintenance; and the abili-

ty of the spouse paying maintenance to meet his or her needs. § 14-10-114(2), 6B C.R.S. (1987). In consideration of whether to award maintenance, the trial court applies a two-part test evidenced by the statute. First, the trial court must determine whether a spouse is entitled to maintenance under section 14-10-114(1). Second, the trial court determines the amount of maintenance to be awarded once entitlement has been established. In setting the amount of maintenance, the trial court considers various factors including the standard of living established during the marriage.

As interpreted by the trial court, the threshold of need required by section 14-10-114(1), evidenced by the requirement that the spouse seeking maintenance have insufficient property to provide for his "reasonable needs" and be "unable to support himself through appropriate employment," is a high threshold requiring a spouse to establish that he or she lacks the minimum resources to sustain human life. The phrases "reasonable needs" and "appropriate employment" need not be viewed so narrowly.

In *Graham*, we stated that one of the remedies available to the working spouse, where no marital property was accumulated, is an award of maintenance if "a need is demonstrated." 194 Colo. at 433, 574 P.2d at 78. In *In re the Marriage of McVey*, 641 P.2d 300, 301 (Colo.App.1981), the court of appeals stated that "a trial court may use an award of maintenance as a tool to balance equities and compensate a spouse whose work has enabled the other spouse to obtain an education; however, this tool is available for use only where the spouse seeking maintenance meets the statutory threshold requirements of need." (Emphasis added). This "threshold of need" was not defined in *McVey*, but appears to have incorporated the concept of the minimum

requirements to sustain life. This interpretation does not give sufficient weight to the word "reasonable" contained in the phrase "reasonable needs."³ The determination of what a spouse's "reasonable needs" are, is dependent upon the particular facts and circumstances of the parties' marriage. See *Moss v. Moss*, 190 Colo. 491, 549 P.2d 404 (1976) (in the award of alimony, each case depends on its own particular facts and circumstances and an award of alimony in gross is not unacceptable per se).

[4] The second factor to be considered in deciding whether a spouse is entitled to maintenance is whether the spouse is able to find "appropriate employment" for his or her support. § 14-10-114(1)(b). In the interest of fairness, the determination of what constitutes "appropriate employment" under subsection (b) requires that the party's economic circumstances and reasonable expectations established during the marriage be considered. In *In re Marriage of Angerman*, 44 Colo.App. 298, 612 P.2d 1166 (1980), the court of appeals affirmed the award of maintenance to the wife in the sum of \$200 per month while the wife was matriculating in a master's degree program for music. The trial court found that the parties had intended that "appropriate employment" for the wife meant a career in opera or in the teaching of music, and that the wife's employment as a keypunch operator was only a temporary position "dictated by the financial needs of the husband's education." *Id.* 612 P.2d at 1167.

[5] The word "appropriate" is defined as "specially suitable" or "proper." Webster's Third New International Dictionary 106 (1969). The word "appropriate" limits the otherwise harsh results of denying a spouse maintenance if any kind of employment is attainable. The employment must be suited to the individual, including that

3. The Utah Court of Appeals noted the rigidity of the interpretation of the "reasonable needs" requirement of section 14-10-114, noting that in cases such as *Graham*, "where divorce occurs shortly after the degree is obtained, traditional alimony analysis would often work hardship because, while both spouses have modest incomes at the time of divorce, the one is on the threshold of a significant increase in earnings.

Moreover, the spouse who sacrificed so the other could attain a degree is precluded from enjoying the anticipated dividends the degree will ordinarily provide.... In such cases, alimony analysis must become more creative to achieve fairness, and an award of 'rehabilitative' or 'reimbursement' alimony, not terminable upon remarriage, may be appropriate." *Petersen v. Petersen*, 737 P.2d at 242 n. 4.

individual's expectations and intentions as expressed during the marriage. The consideration of the parties' reasonable expectations and intentions gives full meaning to the phrase "appropriate employment." Any statement or intimation to the contrary in our prior decision in *Graham* and contained in the court of appeals' decision of *McVey* is hereby expressly disapproved. We think it appropriate for the trial court to reconsider the award of maintenance.⁴

Accordingly, we affirm the court of appeals' holding that an educational degree was not marital property, but reverse the judgment and remand the case to the court of appeals with directions to return the case to the district court for further proceedings as to the issue of maintenance.



Richard J. QUICKER,
Complainant-Appellant,

v.

COLORADO CIVIL RIGHTS COMMISSION and American V. Mueller, Division of American Hospital Supply Corporation, Respondents-Appellees.

No. 86CA1070.

Colorado Court of Appeals,
Div. II.

July 9, 1987.

Employee filed complaint with the Colorado Civil Rights Commission alleging discrimination by his employer in connection with his discharge. The complaint was dismissed by the Commission, and employee appealed. The Court of Appeals, Sternberg, J., held that: (1) six-month limitations period applicable to civil rights claims began to run on date employee was notified of discharge, not subsequent date of his actual separation; (2) running of limitations period would be equitably tolled by employer's failure to give employee proper notice of his rights under civil rights laws; and (3) allegations concerning employer's discriminatory refusal to transfer employee to another job also tolled limitations period.

Reversed and remanded.

1. Limitation of Actions ⇐58(1)

Six-month limitations period for filing charge of discriminatory or unfair employment practice with Civil Rights Commission began to run on date employee was given notice of his discharge, which constituted allegedly discriminatory act, not date of his actual separation from employment. C.R.S. 24-34-403.

2. Limitation of Actions ⇐104½

Running of six-month limitations period applicable to employee's discriminatory discharge claim was equitably tolled based on employer's failure to give employee notice of his statutory rights under state civil rights statute; employer failed to furnish salesman who maintained office within his home required poster or any other notice of his rights as required by state civil rights laws. C.R.S. 24-34-403.

4. Other courts have considered the problem of how to fairly compensate a working spouse who has supported the other spouse while he or she obtains a professional degree. One jurisdiction has created what is known as "reimbursement alimony" which awards maintenance to the supporting spouse in an amount to equal the money spent by the supporting spouse towards the education. *Mahoney v. Mahoney*, 91 N.J. 488, 453 A.2d 527 (1982). Another court held that the supporting spouse was entitled to restitution of the money spent towards the attainment of the other spouse's degree in order to prevent unjust enrichment of the student-spouse. See *Hubbard v. Hubbard*, 603 P.2d 747 (Okla.1979). We recognize that our approach to compensat-

ing a spouse for his or her support of the other spouse in the attainment of an educational degree is to a certain extent limited by the statutory framework contained in the Uniform Dissolution of a Marriage Act. Other courts, interpreting their own statutory provisions regarding maintenance, have held that a demonstrated capacity of self-support on the part of the supporting spouse is but one factor to be considered in the awarding of maintenance, recognizing that a spouse who is capable of supporting someone through school will in most cases be capable of supporting him or herself after the marriage is dissolved. See *Washburn v. Washburn*, 101 Wash.2d 168, 677 P.2d 152 (1984).

missing from his lot. Shortly thereafter, the petitioner Delcief was observed in possession of the vehicle. It had been painted black, the back seats were missing, the radio had been replaced and the vehicle serial numbers had been removed from the front of the windshield.

Delcief was charged in the Circuit Court for Baltimore City with theft in violation of § 342 of Art. 27 in the form of indictment prescribed by § 344(a); it was alleged that on April 20, 1982, Delcief

"did unlawfully steal property and services, of Netelers Used Cars, John Ensweler Agent, Finksburg, Maryland, of the value of more than \$300.00 current money, to wit: One 1971 Volkswagon bus, VIN # 2212136295, in violation of Article 27, Section 342 of the Annotated Code of Maryland, contrary to the form of the Act of Assembly, in such case made and provided, and against the peace, government and dignity of the State."

Delcief moved to dismiss the indictment on the ground that it failed to allege the elements of the offense and adequately to inform him of the charge against him. The court denied the motion. Delcief thereafter filed a motion for a bill of particulars, demanding, among other things, that the State set forth "the exact way and manner in which the defendant was allegedly involved and exactly how he actually committed such acts in ... said indictment." The State refused to furnish the particulars on the ground that it had already provided Delcief with the functional equivalent of the particulars through pretrial discovery. The trial court declined to order the State to furnish the particulars. On the same date, defense counsel agreed that he had received the "functional equivalent" of the demanded particulars through pretrial discovery. Delcief was tried and convicted by a jury for theft.

The Court of Special Appeals affirmed the conviction in an unreported opinion. It noted that under § 342 of Art. 27 "theft" is a single crime, its five subsections delineat-

ing manners or methods by which the crime may be committed. It reasoned, therefore, that the effect of the indictment was to charge theft by any or all of the five methods. It concluded that there is no constitutional requirement that the means by which an offense is committed be set forth in the indictment. With regard to the demanded particulars, the court noted that Delcief was bound by the admission of his attorney that, in actuality, he had received the "functional equivalent" of a bill of particulars and consequently the trial court's denial did not constitute reversible error.

II

In *Jones v. State*, 303 Md. 323, 493 A.2d 1062 (1985) we found no merit in an identical constitutional challenge to the statutory form of charging document for the crime of theft, as authorized by § 344(a) of Article 27. For reasons set forth in that opinion, we affirm the judgment.

JUDGMENT AFFIRMED, WITH COSTS.

COLE, Judge, concurring.

I concur in the result in this case for the reasons stated in my concurring opinion in *Jones v. State*, 303 Md. 323, 493 A.2d 1062, 1071 (1985) (Cole, J., concurring).



303 Md. 347

Jeanne P. ARCHER

v.

Thomas P. ARCHER.

No. 153, Sept. Term, 1984.

Court of Appeals of Maryland.

June 12, 1985.

The Circuit Court, Prince George's County, James Magruder Rea, J., held in

divorce action that a medical degree or license was not marital property, and the wife appealed. Certiorari was granted prior to consideration of appeal by intermediate appellate court. The Court of Appeals, Murphy, C.J., held that: (1) medical degree and license were not marital property, and (2) chancellor was empowered to take into account such matters as husband's earning capacity in making alimony award.

Affirmed.

1. Divorce \S 252.3(1)

A professional degree or license does not possess any of the basic characteristics of property with the ambit of marital property as defined under \S 8-201(e) of the Property Disposition in Divorce and Annulment Law. Code, Family Law, \S 8-201(e).

2. Divorce \S 252.3(1)

Husband's medical degree and license were not marital property. Code, Family Law, \S 8-201(e).

3. Divorce \S 237

Under \S 11-106 of the Family Law article [Code, Family Law, \S 11-106], chancellor in divorce action was empowered to take into account such matters as husband's earning capacity in making an alimony award.

4. Divorce \S 237

Any income actually earned as a result of one spouse's acquisition of a professional degree/license, together with sacrifices of other spouse toward its attainment, are factors which may be considered by the court in making alimony award.

Allen J. Kruger, Laurel (Kristen I. Schoeck and Goldman, Nichols, Kovelant, Hurtt & Kruger, Laurel, on the brief), for appellant.

Paul S. Warshowsky, Columbia (Levan, Schimel, Richman & Belman, P.A., Columbia, on the brief), for appellee.

Argued before MURPHY, C.J., SMITH, ELDRIDGE, COLE, RODOWSKY and McAULIFFE, JJ., and W. ALBERT MENCHINE, Associate Judge of the Court of Special Appeals (retired), Specially Assigned.

MURPHY, Chief Judge.

The question presented is whether a medical degree and license to practice medicine obtained by a spouse during marriage constitutes "marital property" within the contemplation of the Property Disposition in Divorce and Annulment Law (the Act), Maryland Code (1984), \S 8-201(e) of the Family Law Article; that section provides:

"(1) 'Marital property' means the property, however titled, acquired by 1 or both parties during the marriage.

(2) 'Marital property' does not include property:

(i) acquired before the marriage;

(ii) acquired by inheritance or gift of a third party;

(iii) excluded by valid agreement; or

(iv) directly traceable to any of these sources."

I

Jeanne (Appellant) and Thomas (Appellee) Archer were married on August 6, 1977. At that time, Thomas had just completed his first year of medical school. Jeanne, having completed two years towards an undergraduate degree, discontinued her studies to work full time. She continued to work after the birth of the Archers' two children in 1981 and 1982. During the marriage, Thomas attended medical school for three years, obtained his medical degree and license and completed two years of his residency. The United States Navy paid Thomas' medical school expenses, together with a tax-free stipend of approximately \$500 per month, in exchange for Thomas' four-year commitment to serve the Navy upon graduation. In addition to the stipend, Thomas' earnings during the marriage consisted of approximately \$1,500 each summer from work

done while in medical school and \$15,000 to \$18,000 per annum while completing two years of his residency requirement.

The Archers were temporarily separated for most of 1979 and were permanently separated in October of 1982. They were divorced by decree of the Circuit Court for Prince George's County on July 12, 1984; the decree awarded Jeanne custody of the two children, child support of \$250 per child per month and alimony of \$100 per month for a period not to exceed one year. The decree also required Thomas to maintain medical and life insurance for the benefit of the two children.

The question of whether Thomas' medical degree and license constituted marital property for purposes of making a monetary award to Jeanne under § 8-205(a) of the Family Law Article was separately considered. That section provides that after the court determines "which property is marital property, and the value of the marital property, [it] may grant a monetary award as an adjustment of the equities and rights of the parties concerning marital property, whether or not alimony is awarded." In determining the amount and method of payment of a monetary award, the court is enjoined by § 8-205(a) to consider each of ten specified factors, including "the contributions, monetary and nonmonetary, of each party to the well-being of the family"; "the economic circumstances of each party at the time the award is to be made"; "how and when specific marital property was acquired, including the effort expended by each party in accumulating the marital property"; and "any other factor that the court considers necessary or appropriate to consider in order to arrive at a fair and equitable monetary award." Section 8-205(b) permits the court to reduce to judgment "any monetary award made under this section, to the extent that any part of the award is due and owing."

The trial court (Rea, J.) held that a medical degree or license was not marital property under the Act and thus denied Jeanne's prayer for a monetary award. In

so holding, the court adopted the reasoning of the Colorado Supreme Court in its determination of a similar issue in *In re Marriage of Graham*, 194 Colo. 429, 574 P.2d 75, 77 (1978):

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

Jeanne appealed, contending that a medical degree/license is marital property under the Act and, as such, subject to equitable distribution upon divorce by a monetary award. We granted certiorari, 302 Md. 409, 488 A.2d 500 (1985), prior to consideration of the appeal by the intermediate appellate court to consider this issue of first impression in Maryland.

II

The provisions of the Act, together with its underlying history, have been extensively considered in a number of our recent cases. See, e.g., *Schweizer v. Schweizer*, 301 Md. 626, 484 A.2d 267 (1984), and cases cited at 629, 484 A.2d 267. It is sufficient here to note that the Act indicates that nonmonetary contributions within a marriage should be recognized in the event that a marriage is dissolved; that a spouse whose activities do not include the production of income may nevertheless have contributed toward the acquisition of property by either or both spouses during the marriage; that when a marriage is dissolved,

the property interests of the spouses should be adjusted fairly and equitably, with careful consideration given to both monetary and nonmonetary contributions made by the respective spouses; and that the accomplishment of these objectives necessitates that there be a departure from the inequity inherent in Maryland's old "title" system of dealing with the marital property of divorcing spouses.

III

Jeanne maintains that the definition of "marital property"—"all property, however titled, acquired . . . during the marriage"—must be liberally construed to effect its broad remedial purposes and that the term therefore encompasses nontraditional forms of "property" such as a medical degree or license. She recognizes, however, that of the twenty-four jurisdictions which have considered the matter, courts in all

but two jurisdictions have uniformly held that a professional degree or license is not marital property subject to equitable division.¹ Virtually all of these courts, consistent with the rationale advanced by the Colorado Supreme Court in *In re Marriage of Graham, supra*, have held that an advanced degree or professional license lacks the traditional attributes of "property," being neither transferable, assignable, devisable, nor subject to conveyance, sale, pledge or inheritance. Some courts, by way of an additional reason for concluding that a degree/license is not marital property, have held that such items are too speculative to value.² Other courts have said that efforts to characterize spousal contributions as an investment or commercial enterprise deserving of recompense demean the concept of marriage.³ Still other courts have found that the future earning capacity of a degree or license-holding spouse is personal, a mere expectancy and a post-marital ef-

1. *Jones v. Jones*, 454 So.2d 1006 (Ala.Civ.App. 1984); *Pyeatte v. Pyeatte*, 135 Ariz. 346, 661 P.2d 196 (1982); *Wisner v. Wisner*, 129 Ariz. 333, 631 P.2d 115 (1981); *Sullivan v. Sullivan*, 134 Cal. App.3d 634, 184 Cal.Rptr. 796 (1982), *superseded on other grounds*, 37 Cal.3d 762, 209 Cal.Rptr. 354, 691 P.2d 1020 (1984); *Aufmuth v. Aufmuth*, 89 Cal.App.3d 446, 152 Cal.Rptr. 668 (1979), *overruled on other grounds*, *In re Marriage of Lucas*, 27 Cal.3d 808, 166 Cal.Rptr. 853, 614 P.2d 285 (1980); *Todd v. Todd*, 272 Cal.App.2d 786, 78 Cal.Rptr. 131 (1969); *In re Marriage of Graham*, 194 Colo. 429, 574 P.2d 75 (1978); *Wright v. Wright*, 469 A.2d 803 (Del.Fam.Ct.1983); *Hughes v. Hughes*, 438 So.2d 146 (Fla.App.1983); *Severs v. Severs*, 426 So.2d 992 (Fla.App.1983); *In re Marriage of Weinstein*, 128 Ill.App.3d 234, 83 Ill.Dec. 425, 470 N.E.2d 551 (1984); *In re Marriage of Goldstein*, 97 Ill.App.3d 1023, 53 Ill.Dec. 397, 423 N.E.2d 1201 (1981); *In re Marriage of McManama*, 179 Ind.App. 513, 386 N.E.2d 953 (1979), *vacated on other grounds*, 272 Ind. 483, 399 N.E.2d 371 (1980); *In re Marriage of Horstmann*, 263 N.W.2d 885 (Iowa 1978); *Inman v. Inman*, 648 S.W.2d 847 (Ky. 1982); *DeLa Rosa v. DeLa Rosa*, 309 N.W.2d 755 (Minn.1981); *Ruben v. Ruben*, 123 N.H. 358, 461 A.2d 733 (1983); *Lynn v. Lynn*, 91 N.J. 510, 453 A.2d 539 (1982); *Mahoney v. Mahoney*, 91 N.J. 488, 453 A.2d 527 (1982); *Muckleroy v. Muckleroy*, 84 N.M. 14, 498 P.2d 1357 (1972); *Kutanovski v. Kutanovski*, App.Div., 486 N.Y. S.2d 338 (1985); *O'Brien v. O'Brien*, 106 App. Div.2d 223, 485 N.Y.S.2d 548 (1985); *Conner v.*

Conner, 97 App.Div.2d 88, 468 N.Y.S.2d 482 (1983); *Lesman v. Lesman*, 88 App.Div.2d 153, 452 N.Y.S.2d 935 (1982); *Conteh v. Conteh*, 117 Misc.2d 42, 457 N.Y.S.2d 363 (1982); *Pacht v. Jadd*, 13 Ohio App.3d 363, 469 N.E.2d 918 (1983); *Lira v. Lira*, 68 Ohio App.2d 164, 428 N.E.2d 445 (1980), *later proceeding*, 12 Ohio App.3d 69, 465 N.E.2d 1353 (1983); *Hubbard v. Hubbard*, 603 P.2d 747 (Okla.1979); *Lehmicke v. Lehmicke*, — Pa.Super. —, 489 A.2d 782 (1985); *Hodge v. Hodge*, — Pa.Super. —, 486 A.2d 951 (1984); *Wehrkamp v. Wehrkamp*, 357 N.W.2d 264 (S.D.1984); *Saint-Pierre v. Saint-Pierre*, 357 N.W.2d 250 (S.D.1984); *Frausto v. Frausto*, 611 S.W.2d 656 (Tex.Civ.App.1980); *DeWitt v. DeWitt*, 98 Wis.2d 44, 296 N.W.2d 761 (1980), *superseded by statute*, *In re Marriage of Lundberg*, 107 Wis.2d 1, 318 N.W.2d 918 (1982); *Grosskopf v. Grosskopf*, 677 P.2d 814 (Wyo. 1984).

2. *Todd v. Todd*, 272 Cal.App.2d 786, 78 Cal.Rptr. 131 (1969); *In re Marriage of Goldstein*, 97 Ill. App.3d 1023, 53 Ill.Dec. 397, 423 N.E.2d 1201 (1981); *Lynn v. Lynn*, 91 N.J. 510, 453 A.2d 539 (1982); *Mahoney v. Mahoney*, 91 N.J. 488, 453 A.2d 527 (1982); *Pacht v. Jadd*, 13 Ohio App.3d 363, 469 N.E.2d 918 (1983); *Saint-Pierre v. Saint-Pierre*, 357 N.W.2d 250 (S.D.1984).

3. *Sullivan v. Sullivan*, 134 Cal.App.3d 634, 184 Cal.Rptr. 796 (1982); *Mahoney v. Mahoney*, 91 N.J. 488, 453 A.2d 527 (1982); *Lesman v. Lesman*, 88 A.D.2d 153, 452 N.Y.S.2d 935 (1982).

fort—not divisible as “marital property.”⁴ And some other courts, in declining to find that a graduate degree or professional license is marital property, express the view that such items are best considered when awarding alimony.⁵

Notwithstanding the overwhelming number of jurisdictions which hold that a degree or license is not marital property, Jeanne urges adoption of a minority view advanced by an intermediate appellate court in Michigan and a trial court in Massachusetts, both holding that a professional degree or license is marital property. *Woodworth v. Woodworth*, 126 Mich.App. 258, 337 N.W.2d 332 (1983); *Reen v. Reen*, 8 Fam.L.Rep. (BNA) 2193 (Mass.Prob. and Fam.Ct. Dec. 23, 1981).⁶ In *Reen*, the court held, without elaboration, that a husband's license to practice orthodontia constituted marital property. *Woodworth* held that a husband's law degree, earned during marriage, was marital property. In rejecting the majority view, the court held that the fact that an educational degree or license does not conform with traditional property concepts—not being transferable, assignable nor subject to sale, conveyance or pledge—was outweighed by the need to achieve the “most equitable solution” when one spouse sacrifices and works for the benefit of the other who pursues a professional degree and enhances his earning capacity. 337 N.W.2d at 335. That marriage is not a commercial enterprise or investment from which dashed expectations or efforts ought to be recompensed was, in the Michigan court's opinion, merely a

characterization of “marriage while it endures”; it failed, the court said, to focus upon dissolution of the marriage and how best to compensate, not for a failed expectation, but for one spouse's share of the fruits of a degree which she helped the other earn. *Id.* at 336. The view that valuation of a degree is too speculative to constitute marital property was also rejected, it being concluded that courts have been adept at calculating future earnings in a number of contexts, such as personal injury, wrongful death and workers' compensation cases. *Id.* Lastly, the view that the non-degree spouse's contributions are best considered when awarding alimony was also rejected; the court reasoned that the purpose of alimony was for spousal support, involving a variety of factors in the determination of whether alimony should be awarded, including financial condition and the ability to be self-supporting. In the case of a spouse who has worked and supported the other spouse through graduate school, the court said that the former will usually be capable of self-support. Moreover, as Michigan courts have discretion to terminate an alimony award upon remarriage of the spouse who is awarded alimony, the court concluded that the award of alimony was not an adequate means for recognizing the contributions of a spouse who has helped the other through graduate school.

The effect of *Woodworth* in Michigan is by no means clear. More recently, the issue of whether a professional degree is a

4. *In re Marriage of Weinstein*, 128 Ill.App.3d 234, 83 Ill.Dec. 425, 470 N.E.2d 551 (1984); *Wilcox v. Wilcox*, 173 Ind.App. 661, 365 N.E.2d 792 (1977); *Mahoney v. Mahoney*, 91 N.J. 488, 453 A.2d 527 (1982); *O'Brien v. O'Brien*, 106 App. Div.2d 223, 485 N.Y.S.2d 548 (1985); *Conner v. Conner*, 97 A.D.2d 88, 468 N.Y.S.2d 482 (1983); *Saint-Pierre v. Saint-Pierre*, 357 N.W.2d 250 (S.D.1984); *Frausto v. Frausto*, 611 S.W.2d 656 (Tex.Civ.App.1980).

5. *Wisner v. Wisner*, 129 Ariz. 333, 631 P.2d 115 (1981); *Kutanovski v. Kutanovski*, App.Div., 486 N.Y.S.2d 338 (1985); *O'Brien v. O'Brien*, 106 App.Div.2d 223, 485 N.Y.S.2d 548 (1985); *Conteh v. Conteh*, 117 Misc.2d 42, 457 N.Y.S.2d 363

(1982); *Pacht v. Jadd*, 13 Ohio App.3d 363, 469 N.E.2d 918 (1983); *Lira v. Lira*, 68 Ohio App.2d 164, 428 N.E.2d 445 (1980), *later proceeding*, 12 Ohio App.3d 69, 465 N.E.2d 1353 (1983); *Daniels v. Daniels*, 20 Ohio Ops.2d 458, 185 N.E.2d 773 (1961); *Hodge v. Hodge*, — Pa.Super. —, 486 A.2d 951 (1984).

6. Jeanne also relies on two New York trial court cases to support the contention that a professional degree or license is marital property. We note, however, that on appeal the judgments were reversed in both cases. See *Kutanovski v. Kutanovski*, App.Div., 486 N.Y.S.2d 338 (1985); *O'Brien v. O'Brien*, 114 Misc.2d 233, 452 N.Y.S.2d 801 (1982).

marital property asset has generated a split of opinion among Michigan's intermediate appellate courts. *Olah v. Olah*, 135 Mich.App. 404, 354 N.W.2d 359 (1984), rejecting *Woodworth*, held that an educational degree is unique to its possessor and lacks any of the typical attributes of property, even when interpreted in its broadest sense. In *Watling v. Watling*, 127 Mich.App. 624, 339 N.W.2d 505 (1983), the court concluded that the wife had been sufficiently compensated for her contributions towards her husband's dental degree while in his last year of school, having received the benefits of a nineteen-year marriage and having received contributions from the husband for all but the last year of her education towards an advanced degree.

Our cases have generally construed the word "property" broadly, defining it as a term of wide and comprehensive significance embracing "'everything which has exchangeable value or goes to make up a man's wealth—every interest or estate which the law regards of sufficient value for judicial recognition.'" *Deering v. Deering*, 292 Md. 115, 125, 437 A.2d 883 (1981); *Diffendall v. Diffendall*, 239 Md. 32, 36, 209 A.2d 914 (1965). In *Bouse v. Hutzler*, 180 Md. 682, 686, 26 A.2d 767 (1942), we said that the word "property," when used without express or implied qualifications, "may reasonably be construed to involve obligations, rights and other intangibles as well as physical things." "Goodwill," for example, has been characterized as a legally protected valuable property right. *Schill v. Remington Putnam Co.*, 179 Md. 83, 88-89, 17 A.2d 175 (1941)

In *Deering*, we recognized a spouse's pension rights to be a form of marital property subject to equitable distribution. 292 Md. at 128, 437 A.2d 883. In that case, involving consolidated appeals, appellant wives appealed from decrees which denied them any monetary award based on their husbands' pensions which were unmatured, fully vested pension rights based on obligatory contributions deducted from their pay. *Id.* at 118, 120, 437 A.2d 883. Citing *Weir*

v. Weir, 173 N.J.Super. 130, 413 A.2d 638 (1980) and *In re Marriage of Brown*, 15 Cal.3d 838, 126 Cal.Rptr. 633, 544 P.2d 561 (1976) (en banc), we concluded that a spouse's pension rights, "to the extent accumulated during the marriage," constitute a form of "marital property" subject to distribution. 292 Md. at 128, 437 A.2d 883. In so holding, we noted that regardless of the type of retirement plan, vested or unvested, noncontributory or contributory, the critical issue was "whether a property right has been acquired during the marriage and whether equity warrants its inclusion in the marital estate in light of its limitations." *Id.* at 127, 437 A.2d 883 (citing *Weir, supra*, 413 A.2d at 640). We said that as

"'pension benefits represent a form of deferred compensation for services rendered, the employee's right to such benefits is a contractual right, derived from the terms of the employment contract. Since a contractual right is not an expectancy but a chose in action, a form of property, . . . an employee acquires a [judicially recognized] property right to pension benefits when he enters upon the performance of his employment contract.'" *Id.* at 127, 437 A.2d 883 (citing *Brown, supra*, 126 Cal.Rptr. at 637, 544 P.2d at 565).

[1] While, as earlier indicated, we have in some contexts construed the term "property" in a broad sense, there is nothing in the Maryland Act to suggest that the General Assembly intended that a medical degree or license, earned during marriage, would constitute "marital property" subject to equitable distribution upon divorce by a monetary award. We therefore hold, in accordance with the majority view, that a professional degree or license does not possess any of the basic characteristics of property within the ambit of marital property under § 8-201(e) of the Act. While pension rights, as in *Deering*, constitute a current asset which the individual has a contractual right to receive, such rights are plainly distinguishable from a mere expectancy of future enhanced income resulting

from a professional degree. The latter is but an intellectual attainment; it is not a present property interest. It is personal to the holder; it cannot be sold, transferred, pledged or inherited. It does not have an assignable value nor does it represent a guarantee of receipt of a set monetary amount in the future, such as pension benefits. Quite simply, a degree/license does not have an exchange value on an open market. *In re Marriage of Graham*, *supra*, 574 P.2d at 77. At best, it represents a potential for increase in a person's earning capacity made possible by the degree and license in combination with innumerable other factors and conditions too uncertain and speculative to constitute "marital property" within the contemplation of the legislature. *See also Aufmuth v. Aufmuth*, 89 Cal.App.3d 446, 152 Cal.Rptr. 668 (1979), *overruled on other grounds*, *In re Marriage of Lucas*, 27 Cal.3d 808, 166 Cal.Rptr. 853, 614 P.2d 285 (1980); *In re Marriage of Weinstein*, 128 Ill.App.3d 234, 83 Ill.Dec. 425, 470 N.E.2d 551 (1984); *Mahoney v. Mahoney*, 91 N.J. 488, 453 A.2d 527 (1982). Moreover, as *Dewitt v. Dewitt*, 98 Wis.2d 44, 296 N.W.2d 761 (1980), makes clear, income earned after the marriage is dissolved as a result of the degree/license would in no event constitute "marital property" within the definition of that term in

§ 8-201(e), since it would not have been acquired during the marriage.

[2] The cases thus lead inexorably to the conclusion that the trial judge in this case correctly found that Thomas' medical degree and license were not encompassed within the legislatively intended definition of marital property in the Maryland statute. *See* n. 1, *supra*, at 1077.⁷

IV

[3] Jeanne does not challenge the amount of her alimony award and we do not, therefore, consider its adequacy in the circumstances of this case. We note that under § 11-106 of the Family Law Article, the chancellor was empowered to take into account such matters as the husband's earning capacity in making an alimony award. Specifically, § 11-106 enjoins the chancellor to consider a number of enumerated factors "necessary for a fair and equitable award" including, among others, "the contributions, monetary and nonmonetary, of each party to the well-being of the family"; "the ability of the party from whom alimony is sought to meet that party's needs while meeting the needs of the party seeking alimony"; and "the financial needs and financial resources of each party."

7. Questions relating to the equitable division of a professional degree or license have been the subject of numerous law review articles. *See* Fitzpatrick and Doucette, "Can the Economic Value of an Education Really be Measured? A Guide for Marital Property Dissolution," 21 J.Fam.L. 511 (1982-83); Krauskopf, "Recompense for Financing Spouse's Education: Legal Protection for the Marital Investor in Human Capital," 28 Kan.L.Rev. 379 (1980); Loeb and McCann, "Dilemma v. Paradox: Valuation of An Advanced Degree Upon Dissolution of a Marriage," 66 Marq.L.Rev. 495 (1983); Moore, "Should A Professional Degree be Considered A Marital Asset Upon Divorce?", 15 Akron L.Rev. 543 (1982); Raggio, "Professional Goodwill and Professional Licenses as Property Subject to Distribution Upon Dissolution of Marriage," 16, Number 2, Fam.L.Q. 147 (1982); "Equitable Distribution of Degrees and Licenses: Two Theories Toward Compensating Spousal Contributions," 49 Brooklyn L.Rev. 301 (1983); Com-

ments, "Division of Marital Property on Divorce: What Does the Court Deem 'Just and Right?', 19 Hous.L.Rev. 503 (1982); Notes, "Domestic Relations: Consideration of Enhanced Earning Capacity of Recently Educated Spouse in Divorce Settlements," 17 Suffolk U.L.Rev. 901 (1983); Comment, "For Richer or Poorer—Equities in the Career—Threshold, No-Asset Divorce," 58 Tul.L.Rev. 791 (1984); "The Supporting Spouse's Rights in the Other's Professional Degree Upon Divorce," 35 U.Fla.L.Rev. 130 (1983); "A Property Theory of Future Earning Potential in Dissolution Proceedings," 56 Wash.L.Rev. 277 (1981); "Family Law: Ought a Professional Degree Be Divisible As Property Upon Divorce?", 22 Wm. & Mary L.Rev. 517 (1981). *See also* 24 Am.Jur.2d *Divorce and Separation* § 898 (1983); Annot., 4 A.L.R. 4th 1294 (spouse's professional degree or license as marital property for purposes of alimony, support, or property settlement).

[1] We share Thomas' view that if public policy dictates that some economic compensation be made to a spouse who makes monetary and nonmonetary contributions to the other spouse's acquisition of a professional degree/license, equitable results can be achieved under § 11-106. Indeed, this section permits the chancellor to consider the circumstances surrounding the acquisition by one spouse of a professional degree/license, as well as that spouse's potential income. Any income actually earned as a result of one spouse's acquisition of a professional degree/license, to-

gether with the sacrifices of the other spouse toward its attainment, are factors which may, and presumably were in this case, considered by the court in making its alimony award to Jeanne.

DECREE AFFIRMED, WITH COSTS.

