

1988

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

Utah Supreme Court

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UTAH SUPREME COURT
BRIEF

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IN THE SUPREME COURT OF THE STATE OF UTAH
DOCKET NO. ~~880198~~ S9

KAREN C. MARTINEZ,)	
)	
Plaintiff/Respondent,)	
)	
vs.)	
)	
JESS M. MARTINEZ,)	Case No. 880189-SC
)	Priority No. 13
Defendant/Petitioner.)	

BRIEF OF PLAINTIFF/RESPONDENT

IN RESPONSE TO A PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT, RELATED TO AN APPEAL FROM
A DECREE OF DIVORCE ENTERED BY
THE SECOND JUDICIAL DISTRICT COURT,
DAVIS COUNTY, UTAH AND
THE HONORABLE RODNEY S. PAGE

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IN THE SUPREME COURT OF THE STATE OF UTAH

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TABLE OF AUTHORITIES

STATUTES CITED

Uniformed Services Former Spouses Protection Act, PL97-252	29, 30
Retirement Equity Act of 1984 PL98-397	30
Civil Service Retirement Spouse Equity Act, 1984 PL98-615	30

CASES CITED

<u>Asper v. Asper</u> , 753 P.2d 978 (Utah App. 1988)	39
<u>Daniels v. Daniels</u> , 418 N.W.2d 924 (Mich. App. 1988)	19
<u>Dogu v. Dogu</u> , 652 P.2d 1308 (Utah 1982)	31
<u>Englert v. Englert</u> , 576 P.2d 1274 (Utah 1978)	27, 29
<u>Freyer v. Freyer</u> , 524 N.Y.S.2d 147 (Sup. 1987)	19
<u>Gardner v. Gardner</u> , 748 P.2d 1076 (Utah 1988)	28, 29, 30
<u>Greer v. Greer</u> , 353 S.W.2d 427 (N.C. App. 1987)	20
<u>In re Marriage of Graham</u> , 574 P.2d 75 (Colo. 1978) . .	14, 15, 23
<u>In re Marriage of Grubb</u> , 745 P.2d 661 (Colo. 1987) . .	24
<u>In re Marriage of Olar</u> , 747 P.2d 676 (Colo. 1987) . .	23, 24
<u>In re Marriage of Smith</u> , 518 N.E.2d 450 (Ill. App.) (Dist. 1987)	19
<u>Maloney v. Maloney</u> , 524 N.Y.S.2d 758 (A.D. 2 Dept. 1988)	33, 34
<u>Martinez v. Martinez</u> , 754 P.2d 69 (Utah App. 1988) . .	16
<u>Mortenson v. Mortenson</u> , 760 P.2d 304 (Utah 1988)	28
<u>Noble v. Noble</u> , 761 P.2d 1369 (Utah 1988)	27

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	iii
JURISDICTIONAL STATEMENT	iv
STATEMENT OF THE CASE BELOW	iv
STATEMENT OF ISSUES PRESENTED FOR REVIEW	iv
STATEMENT OF PARTIES AND TERMS	1
STATEMENT OF FACTS	3
SUMMARY OF ARGUMENTS	11
ARGUMENT	13
POINT I	13
POINT II	26
POINT III	31
POINT IV	37
POINT V	38
CONCLUSION (RELIEF SOUGHT ON APPEAL)	39

<u>Peterson v. Peterson</u> , 748 P.2d 593 (Utah App. 1988)	. . .	27
<u>Peterson v. Peterson</u> , 737 P.2d 237 (Utah App. 1987)	. . .	16
<u>Rayburn v. Rayburn</u> , 738 P.2d 238 (Utah App. 1987)	. . .	28
<u>Thomas v. Thomas</u> , 417 N.W.2d 563 (Mich. App. 1987)	. . .	20
<u>Woodward v. Woodward</u> , 656 P.2d 431 (Utah 1982)	21, 29, 30

JURISDICTIONAL STATEMENT

Plaintiff does not dispute defendant's statement.

STATEMENT OF THE CASE BELOW

Plaintiff does not dispute defendant's statement.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

POINT I

UTAH DIVORCE COURTS MUST RETAIN BROAD, EQUITABLE POWERS TO ALLOCATE THE BENEFITS AND SUCCESSES AS WELL AS THE DEBTS AND LIABILITIES OF THE MARRIAGE. DUE PROCESS REQUIRES CATEGORIES AND DEFINITIONS THAT ARE FLEXIBLE TO ACHIEVE FAIRNESS.

POINT II

THE UTAH COURT OF APPEALS' REMEDY OF "EQUITABLE RESTITUTION" IS A SOUND AND CREATIVE REFINEMENT TO FASHION AN EQUITABLE RESULT WHERE A MAJOR INVESTMENT IN HUMAN CAPITAL BY BOTH PARTIES HAS RESULTED IN A POTENTIAL FOR SUBSTANTIALLY INCREASED EARNINGS FOR ONE PARTY BUT NO BENEFIT, UNDER A TRADITIONAL ASSET DISTRIBUTION, TO THE OTHER PARTY.

POINT III

BY ALLOCATING THE "EQUITABLE RESTITUTION" FIRST AND THEN THE ALIMONY (IF ANY) AND CHILD SUPPORT, THE TRIAL COURT CAN EASILY ACHIEVE AN EQUITABLE RESULT.

POINT IV

SINCE THE EVIDENCE USED BY THE UTAH COURT OF APPEALS TO AWARD INCREASED ALIMONY, INCREASED CHILD SUPPORT, AND EQUITABLE RESTITUTION WAS ALL PRESENTED AT THE TIME OF TRIAL, THE APPEALS COURT DECISION SHOULD BE MADE RETROACTIVE TO THE TIME OF TRIAL TO AVOID THE HARSH RESULT OF PLAINTIFF HAVING LIVED WITH INADEQUATE AMOUNTS FOR THE THREE YEARS OF THE APPEALS PROCESS.

POINT V

PLAINTIFF HAVING CARRIED A SUBSTANTIAL FINANCIAL BURDEN IN BRINGING A SIGNIFICANT CHANGE IN THE LAW TO RESOLVE INEQUITITIES IMPOSED BY THE TRIAL COURT, SHE SHOULD BE AWARDED A SUBSTANTIAL CONTRIBUTION TOWARD HER COSTS AND ATTORNEY'S FEES THROUGHOUT THIS PROCESS.

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BRIEF OF PLAINTIFF/RESPONDENT

STATEMENT OF PARTIES AND TERMS

In the interest of brevity and precision the following shorthand terms will be utilized in lieu of the bulkier, yet more precise definitions.

A. PLAINTIFF: In this action Karen C. Martinez was plaintiff at the trial, appellant during the appeal at the Utah Court of Appeals, and is presently respondent on certiorari before this court.

B. DEFENDANT: Jess M. Martinez was defendant at the trial, respondent on appeal to the Utah Court of Appeals, and petitioner on certiorari before this court.

C. HUMAN CAPITAL: The term utilized by economists to describe the decision by rational persons to forego current income or benefits in order to invest in training, education or other intellectual improvement which will significantly increase potential earnings to the individual or individuals in which the investment has been made. The term reflects the similarity in

thought processes associated with decisions made to invest in tangible capital goods and in intellectual capital, both of which lead to increased future income, which is the measure of the increased productivity and the return on the investment. At the trial on this matter plaintiff's expert witness provided uncontroverted testimony that this concept was generally accepted within the field of economics and that the concept was so well accepted that it had evolved into a major subdiscipline within the field. (Trial Transcript page 79 lines 5-13, hereinafter "TT 79, 5-13"; TT 85, 11-23; TT 86, 10-22.)

D. BENEFITTED SPOUSE: That spouse upon whom the education, training or license has been conferred as a result of a marital decision to defer current consumption in order to invest in "HUMAN CAPITAL" with the intention that the family will enjoy a substantially increased future standard of living as a result of the increased earning power vested in that spouse as a result of that investment.

E. CONTRIBUTING SPOUSE: The husband or wife of the BENEFITTED SPOUSE who has contributed to the Human Capital investment effort by sacrificing his or her current standard of living in return for the prospect of a higher family standard of living in the future. These contributions can be direct financial contributions, where that spouse's income actually defers some or all of the actual costs of schooling or other training. However, such contributions are more likely to be indirect, in the form of a reduced standard of living during the

investment phase, the carrying of a disproportionate share of the family responsibilities during the investment phase, or perhaps foregoing career enhancement opportunities, all for the purpose of facilitating the investment in the benefitted spouse.

STATEMENT OF FACTS

Due to the significant misstatements of fact in defendant's brief, plaintiff accepts that statement only to the extent that defendant's statement of fact is not corrected hereunder. Of the misstatements, those deemed relevant to the issues before the court are corrected as follows:

A. MARITAL HISTORY: Plaintiff accepts defendant's statement of the marital history with the following exceptions: The parties never moved to Hill Air Force Base. Defendant was employed at Hill Air Force Base during the second year of the parties' marriage and earned between \$8,000 and \$9,000 that year. (TT 5.) From 1968 through 1977 plaintiff was employed for the first one and one-half years until the parties moved to Germany. (TT 29, 5-13.) In addition, she bore all three of the parties' children during that period, Brent on October 1, 1970, Ryan on August 31, 1971 and Heather on May 29, 1975. Plaintiff began working again when defendant went to college and worked six more years including through defendant's medical school. (TT 34, 13-19.)

In his presentation of income figures on his chart, defendant conveniently omits the three years of medical school during which time he was not employed other than in the educational investment undertaken in pursuit of his anticipated profession. (Defendant/Petitioner's brief page 4, hereinafter "D/P B 4".) Plaintiff worked outside of the home for all three of those years, although her earning capacity was admittedly limited by the three small children. She worked as a hostess, waitress and in other positions for which income is generally meager, but for which the hours of employment were suitable to her requirement to care for the three children during the day-time hours while defendant was engaged in his schooling efforts. (TT 34, 13-19.)

Defendant's statement in his brief that "plaintiff did not work except in 1978, 1979 and 1980 when she was employed as a part-time waitress" (D/P B 5) ignores two of the years that she worked outside the home, unfairly ignores all of the support functions provided by plaintiff during the educational process, and ignores the limitations placed on her employment opportunities by defendant after the parties moved to Pennsylvania. Defendant moved the family to an isolated farm house at first where no work was available (TT 36, 2-8) and after he moved them to a bigger city, he told her she could not work at Burger King (TT 37, 2-4) or at Gysinger Clinic (TT 37, 14-15). Her diligent efforts to find work elsewhere were futile (TT 7, 16-23; 36, 14-24.) Defendant also ignores the sacrifices

made by plaintiff and the children during the fifteen years of education and he attempts to limit the court's attention strictly to the outside earnings of the parties during the marriage.

Plaintiff does not attempt to place any inordinate value on her meager earnings during the marriage, nor has she done so throughout any of the prior proceedings on this matter. However, the record is clear and documented by the findings of the trial court that she provided substantial non-monetary support necessary for defendant to complete the educational and training process, and that she and the children made significant sacrifices in their standard of living during that fifteen year process which would not have been necessary had defendant directed all of his efforts toward the family's then-current standard of living. Defendant's statement that "He also saved money which was then used to support the family during the last three years of medical school" (D/P B 5) chauvinistically implies that plaintiff and the children made no sacrifices to facilitate those savings.

Similarly, throughout his brief, defendant alleges that he decided to obtain the college education, he decided to undertake medical school and he incurred the student loans . . . all in total disregard of the sacrifices made by plaintiff and the children. At the trial and throughout these proceedings, plaintiff acknowledged her reluctance to continue the significant sacrifices that were required of her and the children in order to continue the educational process. However, the marriage did not

break up at that time because plaintiff did continue the sacrifices necessary to support the HUMAN CAPITAL investment. (TT 33, 13-21.) In his statement of facts, defendant totally ignores the tremendous emotional price paid by plaintiff during the internship and residency when the family was required to live in a small and primitive shack in the rural Pennsylvania countryside with no telephone, no means of transportation, and no adult association (TT 36, 2-4) nor the stress associated with her having total responsibility for the children on the minimal budget upon which the family subsisted during that training while the defendant was "working an exorbitant number of hours" and on call 36 hours at a time. (TT 19, 6-11.)

B. BREAKUP OF THE MARRIAGE: Defendant's statement of facts as to how the marriage broke up omits several relevant factors and seriously misstates others. Plaintiff did object to the move to Pennsylvania at the outset, as stated by defendant. However, the court should keep in mind the primitive and isolated facilities to which plaintiff and the children were subjected while defendant performed his internship. (TT 36, 2-4.) The stress of this sacrifice was much less on defendant who was gone for days at a time and who had numerous outside challenges and associations at the hospital during this period. (TT 19, 6-12.)

Defendant's statement of why plaintiff left Pennsylvania is grossly misleading. The actual facts of that separation are that defendant had been involved in an affair with another woman. When plaintiff found a love letter from the girlfriend and

confronted defendant with the same, he told her that he would not give up the girl friend, that he would not take part in any marriage counseling, nor would he attempt to save the marriage. (TT 20, 1-17; 18, 25 to 19, 5; 21, 2-3.) Under those circumstances plaintiff and the children returned to Utah and obtained a job within one week. Both parties still thought the defendant would follow and practice in Utah. (TT 21, 4-6.) Under the circumstances, to claim that she left defendant because of the area and the lack of comfort is absurd. It was plaintiff who was granted the divorce from defendant on the grounds of mental cruelty due to defendant's "consorting with an adult female other than plaintiff." (Findings of Fact and Conclusions of Law, Record 204, hereinafter "R 204".) The court made no finding of desertion or mental cruelty on plaintiff's part.

C. RESIDENT TRAINING: He was eight or nine months into performing his residency training in emergency medicine in Pennsylvania at the time that plaintiff and the children returned to Utah. (TT 17, 16-18.)

D. DEFENDANT'S INCOME: Defendant's statement of his income and expenses implies that he incurred over \$1,200 per month, or approximately \$15,000 per year for professionally required expenditures such as malpractice insurance. This is a gross misrepresentation of the evidence which was adduced at trial which reflected a gross income of \$8,333 per month and a total annual expenditure for business required expenses such as malpractice insurance of \$7,100, or less than \$600 per month.

(TT 9-12.) Defendant also states that there was "nothing left in the tax account after April 15th of each year". (D/P B 7.) In actuality, defendant had not paid any taxes on his \$100,000.00 per year income under the employment contract in effect at the time of trial, but testified that he was putting that much into a tax account in anticipation of the tax payment, based upon the then current maximum tax rate of 50%. (TT 102, 15-22.)

E. LIVING EXPENSES: Defendant's statement as to his living expenses at the time of trial, while technically correct, implies that he was paying a substantial sum toward his student loans and thereby had monthly expenses of \$4,337. (Defendant's exhibit 3, R 223.) In actuality, the amount of his payment toward school loans at the time of trial was minimal. What he claimed for his personal living expenses, excluding the temporary support paid to plaintiff under the temporary order was nearly twice plaintiff's total expenditures for herself and the children based on the temporary support and her limited income. (Plaintiff's exhibit F, R 222.) After the trial the parties' second child, Ryan, returned to Pennsylvania to live with defendant, and the trial court reduced the total child support payable to plaintiff by \$100 per month as a result of that change. (Hearing Transcript 8/29/85, R 200.)

F. ADEQUACY OF EVIDENCE: Further in his argument defendant contends that "Mrs. Martinez failed to present adequate evidence to support a finding that a medical degree was a marital asset;" (D/P B 12, paragraph 2). In actuality, plaintiff qualified two

eminent experts Dr. Chris Lewis, Chairman of the Department of Economics at Utah State University (TT 77, 21-22) and David Dorton, CFA, a business and financial analyst (TT 61 and 62). Both experts testified that the medical degree and license to practice medicine were intangible property acquired as a result of the parties' investment in human capital which conferred a greatly increased income potential upon defendant. (TT 82-87 and TT 63-71.) Defendant presented no expert testimony and the testimony of plaintiff's two experts was neither controverted nor undermined on cross-examination. Plaintiff's expert further testified that the value of the human capital bestowed upon defendant was quantifiable utilizing techniques accepted throughout the economic community. (TT 79, 5-11.) Using conservative factors, the witnesses testified that the asset was worth between 1.6 million and 1.9 million dollars. (TT 71 and 82-84.) The difference in valuation was explained by Dr. Lewis at the trial to arise from the different figures utilized by the witnesses in determining defendant's net income from the practice (excluding fixed business expenditures). Mr. Dorton, who testified first, based his calculations upon answers to earlier interrogatories wherein Dr. Martinez estimated his expenditures to be \$10,000 per year. After defendant's testimony at trial, Dr. Lewis recalculated his evaluation based upon a total cost of doing business of \$7,100 per year. (TT 83, 21-25 and 84, 1-7.) The difference in net income before taxes accounts for the \$100,000 difference in valuation for defendant's expected work

life, discounted to its then present value utilizing conservative discount factors. (TT 80-82 and 91.) This value is not the value of defendant's total income during his life expectancy. It is the value of the additional income attributable to the education and training received during the marriage, and was calculated by deducting the average income for a high school graduate of the same age from defendant's current and projected income (TT 83, 15-20). (The average income for a high school graduate utilized, from U.S. Government tables, was \$33,600 per year, (TT 83, 2-4) which is much higher than defendant's actual pre-education income level of \$8,000 to \$9,000 per year, and reflects the conservative nature of the calculations used by the experts. (See Mr. Dorton's testimony TT 63 through 71 and Dr. Lewis' testimony TT 79 through 86.)

G. EQUITABLE RESTITUTION: Defendant's statement (D/P B 12) that neither party had raised, argued or urged the creation of the doctrine of equitable restitution is technically correct. However, from the time that plaintiff filed her amended complaint in this matter (R 4) through the interrogatory process, (R 59-62) and through the trial itself, plaintiff clearly requested from the court a share of the greatly increased income expectancy vested in defendant during the marriage. (R 127-144, Plaintiff's Trial Brief; TT 66 line 21 through 68 line 6; TT 113-124.) The term equitable restitution was originated by the Court of Appeals in an attempt to solve the equitable dilemmas faced by courts across the country in dealing with cases such as this one.

SUMMARY OF ARGUMENTS

POINT I

In an action for divorce the court has broad equity powers to allocate the benefits and successes as well as the debts and liabilities resulting from the joint actions of the family unit prior to the breakup of the principal partners. The discretion associated with this power is essential to the due process function and should not be restricted nor distorted by unduly restrictive historical definitions and categories which have evolved over the years to expedite judicial processing of divorce cases.

POINT II

The remedy of "equitable restitution" fashioned by the Utah Court of Appeals in this case is a sound and creative refinement of the court's equity powers to identify and allocate the deferred returns from a marital investment in human capital which bestows on one of the partners a potential for substantially increased future earnings.

POINT III

In order to deal equitably with the allocation of intangible marital assets the court may need to reorder the sequence in which divorce issues are resolved.

POINT IV

In the interest of equity, this court should direct that the final remedy fashioned on appeal to correct the harshly inequitable Decree of Divorce entered by the trial court should be made retroactive to May 31, 1985, the date of trial.

POINT V

Plaintiff has clearly carried a substantial burden of bringing about a necessary change in the law of this jurisdiction in order to resolve the inequities imposed upon her by the trial court and should thus be awarded a substantial contribution to the significant costs and attorney's fees incurred throughout the trial and appellate process.

ARGUMENT

In order to avoid substantial redundancy in the material presented to this court, plaintiff refers the court to Point I of her appellant's brief filed in January, 1986. That brief contains a thorough analysis of the case law up to the time that the brief was filed. Only more recent cases are included in this brief. It is clear that the courts of the various states have experienced considerable difficulty in dealing with the allocation of deferred returns from joint marital investments in human capital which bestow upon one of the partners a substantially increased future earning potential. The Utah Court of Appeals has made commendable progress in this area by creating the remedy of equitable restitution.

POINT I

IN AN ACTION FOR DIVORCE THE COURT HAS BROAD EQUITY POWERS TO ALLOCATE THE BENEFITS AND SUCCESSES AS WELL AS THE DEBTS AND LIABILITIES RESULTING FROM THE JOINT ACTIONS OF THE FAMILY UNIT PRIOR TO THE BREAKUP OF THE PRINCIPAL PARTNERS. THE DISCRETION ASSOCIATED WITH THIS POWER IS ESSENTIAL TO THE DUE PROCESS FUNCTION AND SHOULD NOT BE RESTRICTED NOR DISTORTED BY UNDULY RESTRICTIVE HISTORICAL DEFINITIONS AND CATEGORIES WHICH HAVE EVOLVED OVER THE YEARS TO EXPEDITE JUDICIAL PROCESSING OF DIVORCE CASES.

The legal systems of this country and the State of Utah inherently provide structure and predictability to the interactions between our citizens while retaining the flexibility to adapt to the social evolution of society. Some changes, such as those in the area of women's suffrage and civil rights have been major and highly publicized corrections involving legislation and significant public input. Others, such as in the field of equity, are more subtle and are carried out within the court system without mass public participation. The latter is clearly the case as the courts across the country attempt to deal with the distribution of the less tangible assets which have been jointly acquired by the partners to a now bankrupt marriage. As set forth in plaintiff's earlier brief, some courts have attempted to classify these expectations of increased income or intangible assets as "property" in order to fashion a means by which both marital partners can share in the returns to the investment. As defendant points out in his brief, there has been significant resistance to categorizing such intangibles as property as a result of their lack of transferability and other historic attributes of property. Typical of that resistance, the Colorado Supreme Court, in the Graham case (In Re Marriage of Graham, 574 P.2d 75 [Colo. 1978]) stated that the educational degree at issue therein did not . . .

. . . have an exchange value or any objective transferrable value on an open market. It is personal to the holder. It terminates on the death of the holder and is not inheritable. It cannot be assigned, sold, transferred, conveyed or pledged. Id. at 77.

While the Colorado Court recognized that the educational degree requires a substantial investment of study time and effort by the benefitted spouse, they totally ignored the additional effort, support and sacrifices made by the contributing spouse. Having done that, the court dismissed the value of the increased income potential conferred upon the benefitted spouse, and denied Mrs. Graham what the trial court had originally awarded her as a share of the discounted value of this flow of increased future earnings. (Id. at 77.) The court totally ignored the investment decisions that had lead to the undertaking, and the joint nature of the effort and sacrifices made by both partners to bring about the resultant return on the investment.

Many of the states which refused to characterize such increased future earnings as property have attempted to reach an equitable result by "reimbursing" the contributing spouse for her efforts and sacrifices through an award of alimony based upon the increased earnings of the benefitted spouse. (See plaintiff's original brief, Issue number 1.) In order to avoid the unfairness of such an allocation, (wherein the contributing spouse's share of the joint investment in human capital is terminated by the non-related event of her remarriage) some of the states have attempted to make all or part of the contributing spouse's alimony non-terminable by his or her remarriage. As Judge Orme point out in the Appeals Court decision in the case at bar, to award the contributing spouse regular alimony, terminable upon remarriage, is to "force her to forego marriage and perhaps

even be celibate for many years simply to realize a return on her investments and sacrifices" Martinez v. Martinez, 754 P.2d 69 at 77, fn 9 (Utah App. 1988) citing Hubbard v. Hubbard, 603 P.2d 747 at 752 (Okla. 1979). The glaring inequity of this terminable alimony approach is further highlighted by the fact that after the remarriage of the contributing spouse, the benefitted spouse now receives the entire return on the investment which was made by both marital partners and the resulting standards of living are very unequal. See citations on original brief.

The non terminable alimony approach was alluded to by Judge Orme in footnote 4 of the opinion in Peterson v. Peterson, 737 P.2d 237 (Utah App. 1987) at page 242 wherein he stated

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).

The approach suggested by Judge Orme is consistent with the position taken by plaintiff in her original (appellant's) brief to this court. At that time plaintiff came to the conclusion

that, under the then-existing tax laws, the non-terminable alimony approach was the only way to equitably allocate the benefits from the investment in human capital. The primary basis for such a position was that by making the payment alimony, the speculative nature of the future income would be eliminated, with both parties receiving their shares of the "return" as it was actually earned. In addition, the tax attributable to the portion of the income transferred to the contributing spouse would be shifted to her as she received the payment. If the transfer had been treated as a transfer of a property asset, the payment would have to have been made by the benefitted spouse from "after tax dollars" thereby placing the entire income package in the highest possible income tax bracket, and shifting to the benefitted spouse an unreasonable tax burden which he or she might not have been able mitigate through tax shelters.

With the change in the taxability of transfers between parties to a divorce brought about by the Tax Reform Act of 1986, the court now has the power to allocate the tax incidence of transfer payments made pursuant to a divorce action in order to achieve equity in the distribution. As a result, the need to term the transfer "alimony" in order to reach equity from the tax angle is no longer existent, and the allocation can be dealt with directly and without confusing normal alimony principles. The courts of this country have historically experienced very little difficulty in valuing and allocating tangible property assets, including capital assets, acquired during a marriage. In those

cases the courts do not limit their valuation to the mere depreciated value of the capital property assets of the family business, but value the business based upon its overall future income expectancy arising from that asset and other factors such as goodwill.

The courts have also been able to allocate assets which are primarily intangible, but have both tangible and intangible characteristics. The example used in plaintiff's initial brief was a McDonald's franchise. Although the investors might well pay \$500,000 to open a McDonald's franchise, less than half that value would be attributed to tangible property assets, with the remainder of the value attributable to goodwill and sales promotions performed nationwide for the purpose of developing and maintaining future income for all franchisees. The courts have no problem valuing that franchise at the time of a divorce, and the value placed on the asset at that time would not be limited to the actual cash inputs by each of the partners. The value would include the assets, the national goodwill that comes with the franchise and the local goodwill attributable to the successful operation of the store at issue, and reflected in the income expectancy projections utilized by the valuation experts.

The most difficult assets for the courts to allocate have been those which are entirely intangible, with none of the "hands on" characteristics of tangible property. These assets generally have a value far in excess of the token value of any property or certificate associated with the asset, and often contain elements

of speculation and other uncertainties as to future payouts. The assets are admittedly more difficult to value, but at trial both of plaintiff's expert witnesses testified, without contradiction, that such valuations are possible and are accepted by the business and economic community. (TT 63-65 and TT 79-88). Other courts have concluded that such valuation and equitable distribution is not only possible but required. In addition to cases cited in original brief, see In re Marriage of Smith, 518 N.E.2d 450 at 457 (Ill. App. 1 Dist. 1987) where the Illinois court held that

"(A) contributing spouse is entitled to some form of compensation for financial efforts and support provided to the student spouse in the expectation that the marital unit would prosper in the future as a direct result of the couple's previous sacrifices."

The New York Supreme Court continues to hold that one party's academic degree acquired during a marriage is marital property subject to equitable distribution reasoning that just as

"a non-vested pension is an asset subject to equitable distribution on divorce (s)o it should also be with professional licenses and academic degrees. Otherwise, with the simple stroke of serving a summons immediately prior to graduation day, a spouse contemplating divorce could prevent a spouse who assisted in his or her spouses (sic) attaining such a degree or license from receiving that which he or she is entitled to Freyer v. Freyer, 524 N.Y.S.2d 197 149 (Sup. 1987).

Likewise, the Michigan Court of Appeals continues to hold that, following its Woodworth decision (cited in plaintiff's original brief) a professional degree should be valued and equitably divided either in the property settlement or as alimony. Daniels v. Daniels, 418 N.W.2d 924 at 927 (Mich. App.

1988). See also Thomas v. Thomas, 417 N.W.2d 563 at 566 (Mich. App. 1987) where the contributing spouse was awarded one-eighth of the value of the student spouse's law degree, based on a valuation using information known at the time of trial, the contributing spouse having also received all equity in the parties' home and the bulk of other martial assets.

In Greer v. Greer, 353 S.E.2d 427 at 431 (N.C. App. 1987) the North Carolina Court found that the husband who sacrificed so his wife could obtain her medical degree was entitled to compensation. Under the North Carolina statute, professional licenses are separate property. However, the statutory factors used to determine an equitable result include "direct or indirect contributions made by one spouse to help educate or develop the career potential of the other spouse." The court specifically considered the contributing spouse's greater role in child care and homemaking duties in making the award. In addition to affirming that the contributing spouse deserved a cash award for the value of his contribution, the court affirmed the trial court awarding him the family home, despite the fact that he was not the custodial parent, to make the property distribution equitable.

As with the goodwill of the McDonald's franchise, the value of these intangible assets is a direct function of the future flow of income attributed to the asset. These valuation problems have generally been overcome by the courts in dealing with expected retirement benefits as was the case in Woodward v.

Woodward, 656 P.2d 431 (Utah 1982). As set forth in Woodward, the problems with speculation as to the duration of future retirement payouts and the amount of such payouts can be overcome by a structured payout of the benefits as they are received by the marital partner on whom the intangible asset was vested. In essence, the Woodward case tells us that the non-pensioned (contributing) spouse is entitled to one-half of the value of the pension which accrued to the pensioned (benefitted) spouse during the course of the marriage. In those cases it is clear that the contributing spouse (non-pensioned spouse) should receive one-half of the retirement payment as it is received, if the retirement benefit accrued entirely during the time that the parties were married, and if the court does not elect to place a present value on the pension benefits and offset it with other property accrued during the marriage partnership.

The courts have had the most difficulty in dealing with valuation and distribution of human capital acquired during a marriage and conferred entirely upon one of the spouses. In essence, the marital effort is a partnership undertaking wherein there is a significant shift of the marital resources to support the investment in the education and training of the benefitted spouse, to include a significant shift in the allocation of domestic duties, such as care for the home and children, to the contributing spouse. The contributing spouse is also called upon for direct contributions to the financial support of the family during the education of the benefitted spouse. Clearly, the

problem is that the asset acquired as a result of this investment is in the brain of the benefitted spouse. That being the case, it is impossible for the court to reach out and touch the asset and perhaps somehow divide portions of the brain between the parties.

Investment decisions involving such tangible assets as retirements are not always clear even to the participating parties. But, even in those cases the parties have often forgone a different job with higher current wages or perhaps lived in a less desirable location in order to secure the deferred benefit. Closer analysis of the process shows, however, that the investment decisions made by the parties in the human capital market are exactly the same as if the investment had been made in a machine for a family business. (TT 85, 11-23; 86, 7-22.)

Defendant urges this court to take the narrow view of "property", ignoring the economically accepted concept of Human Capital and the sacrifices by both parties involved in the investment process to obtain the medical degree, license and specialization. Such a narrow approach would merely perpetuate past inequities arising from problems which the courts have had in grasping these relatively complex economic concepts. Whether saleable or not, the asset is the result of the joint investment and acquired as a result of the conscious decisions by the partners to make current sacrifices during the investment phase of the process in order to reap the expected future benefits. The fact that these benefits take the form of an increased flow

of income which vests in the brain of the benefitted party does not change the reality of the decision process. The essence of that decision is that the parties defer current income, expenditures and standard of living in order to bring about the expectation of substantially increased future income, expenditures and standard of living from the returns to that investment. As with the case of capital machinery, the investment decision is not made unless the expected return is high enough to make the current sacrifices worthwhile. In this case, if the expected income level as a result of the investment in human capital is not high enough to justify the sacrifices and reduction in current standard of living, then the rational, economically-oriented decision-maker will not undertake the investment. In the case of Dr. Martinez, the expectation was to raise the family income from the \$8,000 to \$9,000 per year level prior to his entry into the educational process to a level of \$100,000 or more per year, as was reflected by his current contract at the time of trial.

The 1987 Colorado case cited by defendant recognized the inequity in the Graham decision, supra. The Colorado Supreme Court granted certiorari in In re Marriage of Olar, 747 P.2d 676 (Colo. 1987), because its holding in Graham that an advanced degree is not marital property brought a "harsh and often unfair outcome" for the contributing spouse. The court recognized that the "deferral of earning capacity . . . at the expense of the current standard of living of the couple" is made with "an

expectation of a higher standard of living in the future." The contributing spouse, when the divorce comes before the fruits of the joint investment are realized, "is left without the resources to recover from the years of deferring the acquisition of property and security." Recognizing that the "potential for injustice" is great, the Colorado Court re-examined the issue. Id at 678. The Court took what was for Colorado a big step toward equity by redefining the statutory "threshold of need" required before awarding maintenance. The Court held that, rather than base a maintenance award on whether the requesting spouse can meet his or her own "minimum requirements to sustain life", the standard in the past, the courts should consider all circumstances including "reasonable needs" and whether "appropriate employment" can be found considering the contributing spouse's "reasonable expectations established during the marriage." Thus, the Court loosened its alimony analysis to reach a more fair result. Id. at 681. An unusually harsh court, the Colorado Court did not decide until 1987 that a pension plan is marital property. In re Marriage of Grubb, 745 P.2d 661 at 664 (Colo. 1987).

In his brief, defendant makes a point of the educational debts which remain after the educational process, which he has been ordered to pay. Although the amount of this debt is greatly exaggerated by defendant and is almost negligible compared to the value of the education and training, plaintiff does not claim that she should receive a share of the value of the Human Capital

without consideration for the debt. If the partnership had not been dissolved by divorce the benefit which she and the children would have received would have been on a net basis after the payment of debts and costs of doing business, such as Mal-Practice Insurance. That is why these items were excluded from the valuation formula utilized by the expert witnesses. Taxes were dealt with separately and would be either included or excluded depending on whether the value payable to plaintiff would be from before-tax or after-tax dollars.

Finally, one of the arguments made against allocating the returns to the Human Capital investment which become a part of the brain of the benefitted spouse is that there are no returns unless that benefitted spouse expends his or her effort to bring about the increased income. Again, plaintiff does not claim an interest in defendant's basic earnings after the divorce, except as those earnings would be applicable to the classic alimony analysis. If the court will review the manner in which plaintiff's expert witnesses calculated the value of the investment asset at the time of trial, it will readily recognize that both experts "netted out" the effect of defendant's hourly earnings by deducting from that valuation process the average earnings of defendant's high school graduate contemporaries. Since defendant's contract at the time of trial did not provide for any "overtime" requirements, it must be assumed that the earnings which he would receive under that contract would be for a work week that would be comparable to that put in by his high

school graduate contemporaries. That being the case, the difference between the average high school graduate earnings for a forty hour week and the earnings for a doctor in defendant's position for a forty hour week would be the amount attributable to the return on the Human Capital investment made by the marital partners. Again, plaintiff would not require that defendant work eighty hour weeks in order to provide her with a share of the "overtime" income, but only requests an equal share of the return on the investment made during the marital partnership.

As set forth in the uncontradicted testimony by plaintiff's witnesses, the asset which plaintiff requests be divided is identifiable, quantifiable, and allocable in the interest of equity. Plaintiff should not be denied her share of the partnership investment merely because the returns to that investment do not fit neatly into the package that has been historically titled "property" by the courts in order to expedite administrative handling of cases.

POINT II

THE REMEDY OF "EQUITABLE RESTITUTION" FASHIONED BY THE UTAH COURT OF APPEALS IN THIS CASE IS A SOUND AND CREATIVE REFINEMENT OF THE COURT'S EQUITY POWERS TO IDENTIFY AND ALLOCATE THE DEFERRED RETURNS FROM A MARITAL INVESTMENT IN HUMAN CAPITAL WHICH BESTOWS ON ONE OF THE PARTNERS A POTENTIAL FOR SUBSTANTIALLY INCREASED FUTURE EARNINGS.

The court has broad powers in equity to allocate fairness, not necessarily only property as that term has been developed throughout the years in the court system. For instance, in Peterson v. Peterson, 748 P.2d 593 at 596 (Utah App. 1988), the court awarded the wife the husband's premarital home for the benefit of the children to help ameliorate the emotional trauma of divorce contrary to the general rule that premarital property is separate. In Noble v. Noble, 761 P.2d 1369 at 1373 (Utah 1988) the court also gave premarital assets to the non-acquiring spouse to achieve "a fair, just and equitable result between the parties."

The rules in equity allow more attention to the specific facts of each case, and grant the court far greater discretion in determining fairness under the particular circumstances of that case. During the marital dissolution process the court is forced to deal with an exceptional range of issues that result from the marital partnership and should not be precluded from allocating the benefits of investment in Human Capital and other intangibles merely because those assets do not fit into any preconceived definitions of property or include characteristics which have been expected of tangible personal property which has been allocated in previous cases. This court specified that "all assets" and income and circumstances should be considered for an equitable result, including "potential earning capacity." Englert v. Englert, 576 P.2d 1276 (Utah 1978). While plaintiff acknowledges the need for categorizations and definitions to

facilitate the administrative processing of cases, the form provided by that structure should not supersede the fairness demanded by due process. Justice Zimmerman's concurring opinion in Mortenson v. Mortenson, 760 P.2d 304 at 310 (Utah 1988) expresses this fairness policy. Although there are general rules in dividing assets of a marriage, these can be ignored "in the greater interest in a just and equitable decree." In Gardner v. Gardner, 748 P.2d 1076 at 1081 (Utah 1988) Justice Stewart states that in cases such as the one at bar where the assets are meager when the divorce occurs soon after graduation, the court must look at ways other than the typical division of assets and award of alimony because "equity and fairness required another solution" to "equalize the parties' respective standards of living" The Court in Peterson v. Peterson, 737 P.2d 237 at 242 (Utah App. 1987) recognized the need for a more creative remedy in cases such as this one, reaffirmed in Rayburn v. Rayburn, 738 P.2d 238 (Utah App. 1987).

In setting forth the remedy of "equitable restitution" the Court of Appeals recognized that the parties had made a conscious investment decision in the Human Capital which was ultimately manifested in defendant's greatly increased earning power. The court also recognized that the "asset" was obtained by joint sacrifices. Not wanting to call the asset which was the return from this investment "property" because of the definitional problems set forth in many of the cases where the courts had attempted to deal with the asset as classical property, the court

has essentially created a group of assets or "pseudo-property" which can be allocated in order to further the requirements of justice in cases involving investments in human capital. While the concept is revolutionary, it does provide a logical foundation for dealing with the allocation of intangible assets and is clearly consistent with this court's approach to allocating retirement benefits which accrued during a marriage as set forth Woodward and Englert. In both retirement and Human Capital cases the asset is very intangible in nature, cannot be sold or traded, and is vested in the benefitted party (i.e. the party whose contribution to the marital partnership was from employment outside the home). Both assets require valuation of a future flow of income which may or may not actually take place depending on the longevity of the vested or benefitted party. And, in some cases, realization of the asset requires the continued labor of the vested or benefitted party. As the Gardner court states, concerning retirement benefits, "Regardless of how remote the full value of an asset is, it still has a present value" Citing Englert, supra, 576 P.2d 1274 (Utah 1978), the court reiterated that martial property "encompasses all assets of every nature possessed by the parties, whenever obtained and from whatever source derived." Gardner, supra, at 1078 - 1079.

The allocation of these intangible retirement benefits has been so widely accepted within the country that they are codified in federal legislation such as the Uniformed Services Former

Spouses Protection Act (PL 97-252), the Retirement Equity Act of 1984 (PL 98-397), and the Civil Service Retirement Spouse Equity Act of 1984 (PL 98-615).

As is the case with the allocation of retirement benefits under Woodward and the cases which followed, in the event that the future stream of income is considered to be too speculative by the court, or if there are insufficient tangible property assets which have been acquired during the marriage to make an equitable offset in such property for the contributing spouse, then the court has the power to require the allocation of the asset from the vested or benefitted spouse to the contributing spouse at the time that the income is actually received. To require similar payments under the concept of equitable restitution clearly would be as equitably justified as requiring the division retirement benefits as they are received.

While the concept of equitable restitution is more clearly necessary to achieve equity in a case such as this where only minimal tangible real and personal property has been acquired by the parties, and thus are not available to offset for the value of the human capital acquisition, the concept can be applied to any case where the parties have invested in this intangible asset. If the human capital asset is a major acquisition during the marriage, then the equitable allocation set forth under the concept of equitable restitution can take place in tandem with the allocation of other, more tangible assets acquired during the marriage. Or, if the court feels that there are adequate

tangible assets to offset the value of the human capital investment as was the case in Dogu v. Dogu, 652 P.2d 1308 (Utah 1982), Gardner, supra, and similar cases where the parties had enjoyed the fruits of the medical education for many years prior to the dissolution proceedings, then a complete offset could be worked out in conjunction with appropriate valuations.

Although the Court of Appeals realizes that the asset which allows a party to take part in the medical profession is a treasure which is located in the brain of the benefitted party, the court has not been led down the primrose path with claims that we would be killing the goose that laid the golden egg if we attempt to apportion the asset. All we have to do is remain patient and allocate the golden eggs between the parties as they are laid. If the goose stops delivering for any reason, then neither party receives any eggs. Since the Court of Appeals has had the courage to take the pioneering step, and realizing that pioneering advances often require some polish or modification during their evolution, plaintiff petitions this court to sustain that pioneering effort and to perhaps further clarify the method of allocation pioneered by the Court of Appeals.

POINT III

IN ORDER TO DEAL EQUITABLY WITH THE ALLOCATION OF INTANGIBLE MARITAL ASSETS THE COURT MAY NEED TO REORDER THE SEQUENCE IN WHICH DIVORCE ISSUES ARE RESOLVED.

After reviewing the cases throughout the country which have attempted to deal with the thorny issue before this court, plaintiff believes that some of the problems related to achieving an equitable solution in these matters have arisen as a result of the sequence in which the marital dissolutions have been resolved by the various courts. By attempting to deal with classic alimony analysis, and perhaps dealing with the child support analysis prior to deciding the thornier issue addressed by the concept of equitable restitution, the courts have placed themselves in positions from which achieving equity under the circumstances of the particular case are more difficult, and the results often distorted. As a result of the problems observed in those cases, plaintiff would further suggest to the court the following approach to dealing with cases in which human capital and other intangible assets are applicable.

A. ALLOCATE THE INTANGIBLE ASSET:

1. By making this the first step in the process, rather than the second or third, the court will be able to allocate the intangible asset without the overriding concerns of amounts previously allocated to alimony, or the inequity of the alimony awarded to the contributing spouse terminating upon his or her remarriage. The calculation would be made in the manner similar to that performed by plaintiff's experts at the trial during May, 1985. In order to net out the ongoing "work" factor, and to isolate the human capital asset, the base line (pre-investment) income figure would be subtracted from the total

post-investment income figure. In the present case, plaintiff's experts utilized the average income of a high school graduate who was a contemporary of defendant or \$33,600 per year.

Deducting the pre-investment income from the post-investment gross income (which by definition would exclude "costs of business" which were \$7,100 per year at trial) would leave an annual income attributable to the investment of \$59,300.00. (\$100,000 less \$7,100 = \$92,900 less \$33,600 = \$59,300.) Plaintiff's half (since all investment occurred during the marriage) of the return on the investment would be \$29,650 per year or 32.25% of the gross income after required business expenses. The award of equitable restitution to plaintiff could then be defined as 32.25% of defendant's gross income after business expenses, with plaintiff responsible for the taxes on what she received. To facilitate annual changes in income, payments could be made monthly, based upon the prior year's income data, with a one-time adjustment at the end of the year to correct for any current year changes. Reducing the amount which plaintiff received to a fixed percentage of the gross income would reduce inequities which might be brought about by future decreases or increases in defendant's income, and would eliminate the need for frequent adjustments to the equitable restitution formula in order to keep the allocations of return on the investment equal. The New York appeals court used this approach in its 1988 decision in Maloney v Maloney, 524 N.Y.S.2d 758 at 760 (A.D. 2 Dept. 1988) where they held that a professional

license is marital property and that the contributing spouse was entitled, under the facts, to 35% of the value of the license (reduced from 50% because of other factors). Thirty-five percent was \$456,632. The New York court based the present on the present value at the time of trial. Plaintiff's proposal here is more fair because of the deductions before the division and because the award depends on actual income since it would adjust yearly.

2. As shown above, the costs of doing business associated with the post-investment flow of income, such as malpractice insurance or other actual costs of doing business incurred by the benefitted spouse should be netted out. In this particular case, defendant's testimony at trial was that his professional expenditures for dues, malpractice insurance and other related required professional expenditures were \$7,100.00 per year.

3. As referred to earlier, any necessary debt service or debts associated with the investment should be shared equally from the post-investment income flow as would be the case if the parties had stayed together and were required to pay off the loans from the income as it was earned. In his exhibit at trial, defendant claimed that his monthly payments for such loans were \$208 per month or \$2,496 per year. (Defendant's exhibits 3, R 122.)

4. Once each party had been awarded his or her share of the investment proceeds, then the income attributable to their

labor factors should be added to that share. In the present case, plaintiff's annual income at the time of trial was \$10,152, although she testified that she had just become a three-fourth time employee and moved to a different job did not know how much less she would earn. (TT 58, 17-25.) In the case of defendant, he would be awarded the entire base line income for the high school graduate of \$33,600 along with his share of that portion of the current income attributed to return on the investment.

5. After the total income figures had been determined under paragraph 4 above, then the court would address whether or not there was a need for alimony under the circumstances as they existed after that first allocation. This would allow the court to equalize the standards of living where there was a particularly lopsided allocation of income such as in the current case where we have attributed \$33,600 to defendant's "work income", while plaintiff's earnings amounted to only \$10,152. Under such circumstances the court might well find that some transfer of income in the form of alimony, which would terminate upon remarriage of the lower income contributing spouse, might well be in order. Under circumstances where the resultant incomes were closely matched after the adjustment, then clearly alimony would not be appropriate to either party.

6. After distribution of the human capital asset and the alimony determination, the burden of supporting the parties' children would then be calculated based upon the total combined

incomes of the parties, with the relative contributions of the parties being based upon their total disposable incomes after the allocation of the portion of the earnings attributable to the human capital investment and any alimony payments. In other words, in this case defendant would not pay child support based on the total \$100,000 per year or \$8,333 per month income, but would pay his child support essentially on the basis of \$63,250 (the \$33,600 he would earn as a high school graduate plus \$29,650, his one-half of the return on the investment) the disposable income remaining after allocating to plaintiff her share of the investment proceeds, less any alimony payments awarded to plaintiff. Although at the time of the trial one of the children was living with defendant, plaintiff acknowledges that the son Ryan is now living with defendant, and has lived with defendant since shortly after the trial in May, 1985. As a result, an offset would be determined from the amount of child support payable from defendant to plaintiff utilizing procedures recommended by the Child Support Task Force for split-custody situations.

7. After making these allocations, the court could then undertake the relative easier task of allocating the tangible real and personal property which was accumulated during the marriage. In this case, with the exception of the equity in the house, the parties stipulated at trial, without prejudice as to plaintiff's claim for a portion of the human capital asset, that they would each keep the personal property which they had at

the time of trial. Under such circumstances, plaintiff would expect that defendant would receive a lien for one-half of the stipulated equity in the parties' home, with that equity payable upon the first to occur of the normal lien payment triggers namely plaintiff's remarriage or cohabitation, the sale of the home, or the youngest child living in the home attaining the age of majority (which was found to be age 21 for support purposes by the trial court). (Findings of Fact and Conclusions of Law paragraph 14, R 206.)

POINT IV

IN THE INTEREST OF EQUITY, THIS COURT SHOULD DIRECT THAT THE FINAL REMEDY FASHIONED ON APPEAL TO CORRECT THE HARSHLY INEQUITABLE DECREE OF DIVORCE ENTERED BY THE TRIAL COURT SHOULD BE MADE RETROACTIVE TO MAY 31, 1985, THE DAY OF TRIAL.

At the trial, both parties had ample opportunity to present testimony as to the valuation of the human capital asset. Defendant knew from the time that the amended complaint was filed that plaintiff claimed an entitlement to a portion of the proceeds realized on what the experts described was the human capital investment during the marriage. Defendant elected not to present expert testimony, and was unsuccessful in attempting to undermine the credibility of the witnesses during cross-examination. Based upon that complete record, the Court of Appeals had no difficulty in ordering an amendment of the decree of divorce as it related to the child support and alimony

figures, and the allocation of income tax exemptions arising out of the parties' children.

Within the analysis of the facts and equities of the case as set forth under Point III above, it is clear that the evidence necessary to make the allocation of plaintiff's share of the investment in human capital is clearly in the record, and an order can be entered by this court as to the allocation which should have been made by the trial court based upon the evidence presented at the hearing on May 31, 1985. In order to rectify the harsh inequity imposed upon plaintiff by the trial court, the ultimate ruling by this court regarding the allocation of that asset, and any adjustments to alimony and child support which ultimately survive the final adjustment by this court should be made retroactive to the date upon which the evidence was presented to the court.

POINT V

PLAINTIFF HAS CLEARLY CARRIED A SUBSTANTIAL BURDEN OF BRINGING ABOUT A NECESSARY CHANGE IN THE LAW OF THIS JURISDICTION IN ORDER TO RESOLVE THE INEQUITIES IMPOSED UPON HER BY THE TRIAL COURT AND SHOULD THUS BE AWARDED A SUBSTANTIAL CONTRIBUTION TO THE SIGNIFICANT COSTS AND ATTORNEY'S FEES INCURRED THROUGHOUT THE TRIAL AND APPELLATE PROCESS.

At the time of trial plaintiff provided the appropriate testimony and evidence necessary to support her claim for

attorney's fees in conjunction with the stipulation by defendant that the attorney's fees reflected on plaintiff's exhibit I, R 122 were reasonable and reflected the labor and cost invested in the case up to that time. The trial court refused to award attorney's fees commensurate with that effort, and essentially limited the fee awarded to her to that which had been charged to defendant by his counsel. The exhibit clearly reflects that the efforts of plaintiff's counsel were far in excess of those provided by defendant's counsel, including an extensively researched trial brief which formed the initial foundation for the appeal to this court and the Court of Appeals. Failure to provide plaintiff with reimbursement for the costs and fees incurred will further reduce what plaintiff actually receives as her equitable share of the marital investment represented by the defendant's medical degree, license and ultimately his medical specialization. In addition, plaintiff should be awarded attorney's fees and costs in connection with the entire appeals process. Asper v. Asper, 753 P.2d 978 at 982 (Utah App. 1988).

CONCLUSION

In fashioning its award of Equitable Restitution, the Utah Court of Appeals recognized and took a courageous pioneering step toward correcting a long standing inequity in allocating intangible marital assets acquired as a result of clearly recognizable investment behavior. The fact that this investment

is in human capital and vests in the brain of the benefitted spouse does not dilute the sacrifices and contributions made in support of that investment by the contributing spouse, who, unfortunately, does not receive an allocation of the improved brain power at the conclusion of the investment process. Her "allocation" would have taken the form of a wife's share of the greatly increased future income and the resultant standard of living. To deny her the share of this investment which she otherwise would have had without the divorce, which was found to be the fault of the party who stands to gain her fair share of the return, would not serve fairness or equity. To deny her that share because of some technical definitional problems with the concept of "property," as argued by defendant, would be to discard the concept of equity by placing form over substance. Plaintiff made the sacrifices, paid the price, and in fairness should receive her share of the proceeds without penalizing her for the extended time required by the appellate process.

RESPECTFULLY SUBMITTED this 17th day of February, 1989.

HANSEN & CRIST

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respondent

CERTIFICATE OF DELIVERY

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

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DATED this 17th day of February, 1989.

Nilda M Bishop