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A Property Theory of Future Earning Potential in Dissolution Proceedings

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A PROPERTY THEORY OF FUTURE EARNING POTENTIAL IN DISSOLUTION PROCEEDINGS

State participation in domestic relations, particularly divorce, is a form of societal protection. When the state, through its courts or laws, establishes procedures for the dissolution of a marital community, society is assured a necessary continuity. Although an individual family unit may change, the laws governing divorce provide for preservation of the rights, privileges, and duties of the family relationship. The state accomplishes this first by allocating and establishing title to property of the marriage, and second by providing for the ongoing support of those who had been financially dependent upon the marital community.[1]

This comment begins by outlining state participation in the division of marital property and in the allocation of support between husband and wife. The focus then shifts to a discussion of future earning potential as a possible asset subject to property division. Finally, the comment concludes that future earning potential should be subject to community property division.

I. PROPERTY DIVISION UPON DISSOLUTION

A. *Community Property Theory*

In Washington, property division is strongly influenced by community property principles.[2] "The fundamental premise of the community property system is that both spouses contribute to property acquisitions in a joint effort to promote the welfare of the relationship."[3] Because both husband and wife contribute equally to the marital community, the property acquired through these contributions should be divided equally upon dissolution. Community property theory therefore recognizes the equal co-ownership which inheres in each spouse by virtue of the marital relationship.[4]

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1. Children are the notable members of this latter class, but a discussion of child support theory is beyond the scope of this comment. For a discussion of this and other implications of Washington domestic law, see Rieke, *The Dissolution Act of 1973: From Status to Contract?*, 49 WASH. L. REV. 375 (1974).

2. WASH. REV. CODE § 26.16.030 (1979).

3. Cross, *The Community Property Law in Washington*, 49 WASH. L. REV. 729, 746 (1974), *citing* Togliatti v. Robertson, 29 Wn. 2d 844, 852, 190 P.2d 575, 578 (1948).

4. Cross, *supra* note 3, at 733. Thus, under Washington law, an award of community property to a spouse changes the form of the "tenancy" from community to separate, thus causing a segregation or partition of the property. By contrast, under the principles of the common law, title to property vested solely in the husband; consequently, an award of property to the wife created a legal interest where there had been none.

Washington law, however, does not require an equal division of property upon dissolution,[5] nor does it limit division solely to community property.[6] A dissolution court is given broad discretion to achieve a "just and equitable" result.[7] This injection of equitable principles into the division of property seems at first glance somewhat counter to the strict logic of community property theory. It is, however, consistent with Washington's treatment of property distribution in dissolution actions.

B. Equitable Principles and Dissolution

State involvement in dissolution protects both the parties and society. The law recognizes that society's best interests are served by the exercise of equitable judicial powers to attain post-dissolution fairness between the parties.[8] This balancing of equities may occur either through a property division or through an award of spousal support (alimony).

An award of alimony was traditionally "an allowance in a divorce action to the wife from the husband for her support, in lieu of the legal obligation of the husband to support her."[9] At present, however, this patriarchal view of alimony is less persuasive because of the expanding role of women in society and in the work force; notions such as the husband's "obligation" have become anachronistic.[10] In addition, the exclusion of husbands from receipt of alimony has been held unconstitutional.[11] Consequently, alimony has become less a judicial enforcement of a legal duty, and more a means of providing support during the period of transition from a married to a single status.

An award of property, however, may serve this same equalizing function, since in Washington all the assets of the parties are available for distribution.[12] Moreover, as the comparison below illustrates, the use of property as a means for redistribution has attributes unavailable with conventional alimony:

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5. *In re* Marriage of Donovan, 25 Wn. App. 691, 696, 612 P.2d 387, 389–90 (1980).

6. WASH. REV. CODE § 26.09.080 (1979).

7. *Id.*

8. *See* Erickson v. Erickson, 30 Wn. 2d 914, 918, 194 P.2d 954, 956 (1948) (describing historical bases for equitable powers of divorce court); *In re* Marriage of Nicholson, 17 Wn. App. 110, 115–19, 561 P.2d 1116, 1119–27 (1977) (court's equitable powers are not affected by new dissolution act).

9. Valaer v. Valaer, 45 Wn. 2d 565, 570, 277 P.2d 326, 329 (1954).

10. *See generally* Freeman, *Should Spousal Support be Abolished?*, 48 L.A.B. BULL. 236 (1973).

11. Orr v. Orr, 440 U.S. 268 (1979).

12. WASH. REV. CODE § 26.09.080 (1979). *See also In re* Marriage of Hadley, 88 Wn. 2d 649, 565 P.2d 790 (1977); *In re* Marriage of Dalthorp, 23 Wn. App. 904, 598 P.2d 788 (1979). Washington courts also have the power to make unequal awards of property.

ALIMONY AWARD	PROPERTY DIVISION
Generally ends with either the obligor's or recipient's death.[13]	Survives death of either party.[14]
Is subject to modification.[15]	Is generally not modifiable.[16]
Is predicated upon the need of the recipient and the ability of the obligor.[17]	Is the recognition of an ownership right, and need not be keyed to financial resources.[18]
Is a tax deduction to the obligor and taxable income to the recipient.[19]	Is neither a deduction nor income.[20]

Property division provides more stability in distribution than does alimony. The task remains, however, of determining the existence of marital property. A truly equitable result may be obtained only if in fact all the property—real and personal, tangible and intangible—is available to the court for distribution.[21]

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13. WASH. REV. CODE § 26.09.170 (1979); Bird v. Henke, 65 Wn. 2d 79, 395 P.2d 751 (1964); Sutliff v. Harstad, 5 Wn. App. 539, 488 P.2d 288 (1971).

14. *See generally* Cross, *supra* note 3.

15. WASH. REV. CODE § 26.09.170 (1979); Thompson v. Thompson, 82 Wn. 2d 352, 510 P.2d 827 (1973).

16. WASH. REV. CODE § 26.09.170 (1979). *See generally* Rieke, *supra* note 1, at 405–06.

17. WASH. REV. CODE § 26.09.090 (1979). *See also* Kelso v. Kelso, 75 Wn. 2d 24, 448 P.2d 499 (1968).

18. WASH. REV. CODE § 26.09.080 (1979). *See also* Cross, *supra* note 3, at 818–19.

19. I.R.C. § 215(a); I.R.C. § 71(a) (1).

20. McCombs v. Commissioner, 397 F.2d 4 (10th Cir. 1968).

21. Washington's preference for using property division instead of alimony for purposes of adjusting the equities affects the use of alimony in dissolution. In Washington, permanent alimony is neither favored nor a matter of right. Berg v. Berg, 72 Wn. 2d 532, 434 P.2d 1 (1967); Mose v. Mose, 4 Wn. App. 204, 480 P.2d 517 (1971). Additionally, its award is governed by the financial need of the recipient and the ability of the payor to make the payments. *In re* Marriage of Hadley, 88 Wn. 2d 649, 674–76, 565 P.2d 790, 803–04 (1977) (Horowitz, J., dissenting); Friedlander v. Friedlander, 80 Wn. 2d 293, 494 P.2d 208 (1972); Morgan v. Morgan, 59 Wn. 2d 639, 369 P.2d 516 (1962). By contrast, California—also operating within a community property system—has chosen to utilize alimony rather than property division as a vehicle for equitable adjustment. Comment, *California Divorce Reform: Its Effect on Community Property Awards*, 1 PAC. L. J. 310, 316–17, 320 (1970). California's preference is dictated by the statutory requirement that community property be divided equally. CAL. CIV. CODE ANN. § 4800(a), (b) (1)–(2) (1970). Consequently, alimony is treated more favorably in California than it is in Washington. *Compare In re* Marriage of Aufmuth, 89 Cal. App. 3d 446, 152 Cal. Rptr. 668 (1979) (no abuse of discretion for trial court to retain jurisdiction over amount of spousal support) *and In re* Marriage of Rosan, 24 Cal. App. 3d 885, 101 Cal. Rptr. 295 (1972) (statute did not relieve husband of any continuing obligation to provide spousal support) *with* Berg v. Berg, 72 Wn. 2d 352, 434 P.2d 1 (1967) (not the policy of the law to place permanent responsibility on divorced spouse to support other indefinitely) *and* Mose v. Mose, 4 Wn. App. 204, 480 P.2d 517 (1971) (permanent alimony disfavored). *Compare also* Friedlander v. Friedlander, 80 Wn. 2d 293, 297, 494 P.2d 208, 211 (1972) (lifestyle acquired during marriage not a

II. CURRENT TRENDS IN PROPERTY THEORY

Recent legal developments have indicated a judicial willingness to break new ground in achieving equitable results in dissolution actions. Over the last twenty years, the concept of property has undergone significant change.[22] For example, courts have treated pension rights,[23] personal goodwill in a business or profession,[24] and increased earning capacity from education[25] as property that may be valued and divided upon dissolution. This has been done even though such assets do not have exchange or market value, and often cannot be assigned, sold, transferred, conveyed or pledged. The courts have proceeded upon the theory that failure to treat such assets as divisible property would be inequitable;[26] consequently, courts have been willing to stretch conventional theories of property in order to achieve justice between the parties.

The basis for a general theory of future earning potential as an asset may be found in an examination of dissolution cases which have divided the value of an education or individual goodwill between the parties.

A. Goodwill

Goodwill has been defined as "property of an intangible nature . . . ,

measure of need) *with In re* Marriage of Rosan, 24 Cal. App. 3d 885, 897, 101 Cal. Rptr. 295, 304 (1972) (accustomed standard of living may indicate need). *See also* criteria for maintenance listed in WASH. REV. CODE § 26.09.090 (1979).

22. An analogous theoretical progression may be seen in the area of law involving assignability of future contract rights. At one time, such assignments were considered void because they attempted to assign that which was not property. *See, e.g.*, 4 A. CORBIN, CONTRACTS § 874 (1951). Presently, however, future rights are assignable to the extent that they arise out of an existing or continuing employment or relationship. Assignment of rights under a contract not yet in existence operates only as a promise to assign when the rights arise. *See* RESTATEMENT (SECOND) OF CONTRACTS § 153 (Tent. Draft No. 3, 1967).

The limitation on an assignment of future contract rights is imposed "not because of any logical necessity, but *by virtue of a public policy* which seeks to protect the assignor and third parties against transfers which may be improvident or fraudulent." *Id.*, comment (b), at 187 (emphasis added). *See also* 3 S. WILLISTON, CONTRACTS § 413 (3d ed. 1960). Thus, to the extent that treatment of future earning potential as a property right involves assignment of future contract rights, the concerns expressed by the Restatement do not apply. The only applicable public policy is the public's interest in equitable dissolutions of marriage. *See* notes 58–63 and accompanying text *infra*.

23. *See, e.g.*, Wilder v. Wilder, 85 Wn. 2d 354, 534 P.2d 1355 (1975). *See generally* Annot., 94 A.L.R. 3d 176 (1979).

24. Mueller v. Mueller, 144 Cal. App. 2d 245, 301 P.2d 90 (1956); *In re* Marriage of Fleege, 91 Wn. 2d 324, 588 P.2d 1136 (1979); *In re* Marriage of Campbell, 22 Wn. App. 560, 589 P.2d 1244 (1979); *In re* Marriage of Lukens, 16 Wn. App. 481, 558 P.2d 279 (1976).

25. *In re* Marriage of Horstmann, 263 N.W.2d 885 (Iowa 1978); Inman v. Inman, 578 S.W.2d 266 (Ky. App. 1979); Hubbard v. Hubbard, 603 P.2d 747 (Okla. 1979); Mahoney v. Mahoney, 175 N.J. Super. 443, 419 A.2d 1149 (1980).

26. *See, e.g.*, Inman v. Inman, 578 S.W. 2d 266 (Ky. App. 1979); *In re* Marriage of Lukens, 16 Wn. App. 481, 486, 558 P.2d 279, 282 (1976).

the expectation of continued public patronage."[27] It was originally held only to exist in commercial or trade enterprises.[28] More recently, several community property and common law states have used expanded property theories to find that goodwill is also an asset of an individual,[29] and commentators in other states are urging the adoption of this approach.[30] Thus far, individual goodwill has been found to exist only in those persons with professional careers.[31]

The courts which have addressed the individual goodwill issue stress that a person in a profession or business has usually obtained something quite valuable. The professional individual's skill, training, and reputation create a reasonable expectation of future profit. This expectation is an asset which has been denominated goodwill, and it exists despite its lack of salability or transferability.[32]

Once it is recognized as property, goodwill becomes an asset for which an accounting can be made in a dissolution action.[33] In doing so, courts will look closely at the ongoing value to the person retaining the business or practice, and the corresponding loss in value to their spouse.[34]

In several cases involving individual goodwill, the nonprofessional spouse is analogized to a "silent partner" who is forced to withdraw from the partnership.[35] Thus, an award of goodwill to the nonprofessional

27. *In re* Marriage of Lukens, 16 Wn. App. 481, 483, 558 P.2d 279, 280 (1976). *See also In re* Glant's Estate, 57 Wn. 2d 309, 356 P.2d 707 (1960); *In re* Marriage of Foster, 42 Cal. App. 3d 577, 582, 117 Cal. Rptr. 49, 52 (1974).

28. *In re* Marriage of Lukens, 16 Wn. App. 481, 484, 558 P.2d 279, 281 (1976). Goodwill was often discussed in cases involving contracts not to compete after the sale of a business. Cowan v. Fairbrother, 118 N.C. 406, 24 S.E. 212 (1898).

29. Brawman v. Brawman, 199 Cal. App. 2d 876, 19 Cal. Rptr. 106 (1962) (attorney); Stern v. Stern, 66 N.J. 340, 331 A.2d 257 (1975) (attorney); Daniels v. Daniels, 20 Ohio Op. 2d 458, 185 N.E.2d 773 (1961) (characterized the right to practice medicine as a "franchise"); *In re* Marriage of Coger, 27 Or. App. 729, 557 P.2d 46 (1976) (dentist); *In re* Marriage of Fleege, 91 Wn. 2d 324, 588 P.2d 1136 (1979) (dentist); *In re* Marriage of Campbell, 22 Wn. App. 560, 589 P.2d 1244 (1979) (manufacturer's representative); *In re* Marriage of Kaplan, 23 Wn. App. 503, 597 P.2d 439 (1979) (attorney); *In re* Marriage of Freedman, 23 Wn. App. 27, 592 P.2d 1124 (1979) (attorney); *In re* Marriage of Lukens, 16 Wn. App. 481, 558 P.2d 279 (1976) (osteopath). *But cf.* Nail v. Nail, 486 S.W.2d 761 (Texas 1972) (no divisible property value in professional goodwill). For an analysis of the *Nail* result, see Note, 11 ST. MARY'S L.J. 222 (1979).

30. *See, e.g.*, Adams, *Professional Goodwill as Community Property: How Should Idaho Rule?*, 14 IDAHO L. REV. 473 (1978).

31. *See* cases cited *supra* notes 24 & 29.

32. *See, e.g., In re* Marriage of Campbell, 22 Wn. App. 560, 564, 589 P.2d 1244, 1247 (1979); *In re* Marriage of Lukens, 16 Wn. App. 481, 484, 558 P.2d 279, 282 (1976).

33. *In re* Marriage of Lukens, 16 Wn. App. 481, 486, 558 P.2d 279, 282 (1976).

34. *In re* Marriage of Fleege, 91 Wn. 2d 324, 327–30, 588 P.2d 1136, 1138–39 (1979); *In re* Marriage of Lukens, 16 Wn. App. 481, 487, 558 P.2d 279, 282 (1976).

35. *In re* Marriage of Lopez, 38 Cal. App. 3d 108, 107, 113 Cal. Rptr. 58, 67 (1974); Todd v. Todd, 272 Cal. App. 2d 786, 78 Cal. Rptr. 131, 135 (1969); Brawman v. Brawman, 199 Cal. App. 2d 876, 19 Cal. Rptr. 106, 110 (1962).

spouse is akin to an actual sale, in that the professional is "buying out" the spouse's community interest.[36]

The court in a dissolution action involving a professional is faced with three questions of fact. First, it must determine whether professional goodwill exists.[37] Second, the court must ascertain the worth of the goodwill to the individual possessing it, calculated as of the date of the dissolution of the marriage.[38] Third, the court must find the extent to which it is community property.[39] Once these issues are resolved, the goodwill is available as an asset, and may be distributed between the parties. The crucial point, however, is not the means by which goodwill is valued, but that a property interest is found in an intangible.

B. Educational Attainments

Several cases have held that an educational degree is a divisible asset. These cases are based on theories similar to those developed in the goodwill cases. Typically, one spouse attains a degree while the other provides support; then a divorce occurs soon after graduation. Usually there are few assets immediately available,[40] but one spouse leaves the

36.. Golden v. Golden, 27 Cal. App. 2d 401, 75 Cal. Rptr. 735, 738 (1969) (wife's share analogized to increase in stock value); Brawman v. Brawman, 199 Cal. App. 2d 876, 19 Cal. Rptr. 106, 110 (1962) (wife suffering "enforced retirement"). It should be noted that the recognition of professional goodwill has been criticized. *See, e.g.*, Nail v. Nail, 486 S.W.2d 761 (Texas 1972); *In re* Marriage of Fleege, 91 Wn. 2d 324, 330–36, 588 P.2d 1136, 1140–43 (1979) (Stafford, J., dissenting).

37. *In re* Marriage of Lukens, 16 Wn. App. 481, 486, 558 P.2d 279, 282 (1976).

38. *In re* Marriage of Fleege, 91 Wn. 2d 324, 327, 588 P.2d 1136, 1140 (1979). In essence, the existence of individual, professional goodwill is derived from its continuing value to the person possessing it. *Id.* at 326–30, 588 P.2d at 1138–40. Factors used in the determination and valuation of such goodwill include the "practitioner's age, health, past earning power, reputation in the community for judgment, skill and knowledge, and his comparative professional success." *Id.* at 326, 588 P.2d at 1138. *See generally* Krauskopf, *Marital Property at Marriage Dissolution*, 43 Mo. L. Rev. 157, 166 (1978). While these criteria are often used, however, there remains no set method for determining goodwill value. *See generally* Adams, *supra* note 30; *In re* Marriage of Lukens, 16 Wn. App. 481, 486, 588 P.2d 279, 282 (1976); Mueller v. Mueller, 144 Cal. App. 2d 245, 301 P.2d 90, 95–96 (1956).

39. *In re* Marriage of Foster, 42 Cal. App. 3d 577, 583, 117 Cal. Rptr. 49, 53 (1974); *In re* Marriage of Fortier, 34 Cal. App. 3d 384, 388, 109 Cal. Rptr. 915, 918 (1973); *In re* Marriage of Lukens, 16 Wn. App. 481, 486, 558 P.2d 279, 282 (1976).

40. While it is true that these decision have involved dissolutions with little tangible property to divide, *see, e.g., In re* Marriage of Hortsmann, 263 N.W.2d 885, 886–88 (Iowa 1978); Inman v. Inman, 578 S.W.2d 266, 269–70 (Ky. App. 1979); Hubbard v. Hubbard, 603 P.2d 747, 751–52 (Okla. 1979), this fact need not detract from the underlying proposition that equity could be served only by a division of the education as an asset of the marriage. The property value of an education is perhaps more readily apparent when there is no other property involved, but the context in which an asset is found should not alter its legal status. The education cases present persuasive arguments for holding education to be a property right, regardless of the presence of other assets in a particular case. *See* cases cited *supra* note 25 and *infra* note 46.

marriage with an education and increased earning potential, while the other spouse is given nothing for her efforts.[41]

The Iowa Supreme Court was the first to hold that, under such a fact pattern, the degree obtained by the educated spouse could be valued and divided upon dissolution.[42] The court reasoned that the supporting spouse was a partner in the other's education, and as such was entitled to a share of the resulting proceeds. The court recognized that the supporting spouse had likely foregone or postponed opportunities for a separate career,[43] and was therefore less likely to be capable of immediate self-support. Furthermore, the supporting spouse was not going to "reap the future benefits of these sacrifices in a way of increased income and a satisfying lifestyle."[44] Finally, the court noted that the educated spouse had received a "windfall" in the form of increased earning capacity. This windfall was the direct result of the unrewarded efforts of the supporting spouse.[45] This holding has been followed in several jurisdictions, with similar rationales being employed.[46]

The courts which have treated an educational degree as a divisible asset agree that the supporting spouse should be compensated for her efforts. In reaching this conclusion, courts have utilized a variety of theories, such as unjust enrichment, restitution, or "return on investment."[47]

41. *See generally* Comment, *The Interest of the Community in a Professional Education,* 10 CALIF. L. REV. 590 (1974); Note, *Divorce after Professional School: Education and Future Earning Capacity May Be Marital Property,* 44 MO. L. REV. 329, 334 (1979).

42. *In re* Marriage of Hortsmann, 263 N.W.2d 885 (Iowa 1978).

43. *Id.* at 887–91. *See* Inman v. Inman, 578 S.W.2d 266, 268–69 (Ky. App. 1979).

44. *In re* Marriage of Horstmann, 263 N.W.2d 886, 887 (Iowa 1978).

45. *In re* Marriage of Horstmann, 263 N.W.2d 886, 891 (Iowa 1978) ("[I]t is the potential for increase in future earning capacity . . . which constitutes the asset for distribution by the court."). *See also* Inman v. Inman, 578 S.W.2d 266, 268 (Ky. App. 1979); *Cf.* Hubbard v. Hubbard, 603 P.2d 747, 751 (Okla. 1979) (return on investment theory); Diment v. Diment, 531 P.2d 1071, 1073 (Okla. App. 1975) ("Although the award of money is termed 'permanent alimony,' it is in substance a property award for the contributions which plaintiff made to defendant's increase in earning capacity.").

46. *See* cases cited *supra* note 25. New Jersey, Colorado, and California have rejected the notion that education can constitute a divisible asset: Stern v. Stern, 66 N.J. 340, 331 A.2d 257 (1975) (*but see* Mahoney v. Mahoney, 175 N.J. Super. 443, 419 A.2d 1149 (1980)); *In re* Marriage of Graham, 194 Colo. 472, 574 P.2d 75 (1978); Todd v. Todd, 272 Cal. App. 2d 786, 78 Cal. Rptr. 131, 134 (1969) (Education is "manifestly . . . of such a nature that a monetary value . . . cannot be placed upon it."); *In re* Marriage of Aufmuth, 89 Cal. App. 3d 446, 152 Cal. Rptr. 668 (1979) (rejecting *Horstmann* analysis on grounds that division of education would involve future earnings, and thus violate community property principles).

Although Washington has not spoken directly on the subject, the reasoning of the cases holding education acquired during marriage to be a divisible asset would seemingly fit with the domestic law of this state. *Cf.* Childers v. Childers, 15 Wn. App. 792, 552 P.2d 83 (1976) (upholding trial court requirement that husband pay for wife's post-dissolution education), *rev'd on other grounds,* 89 Wn. 2d 592, 575 P.2d 201 (1978).

47. *In re* Marriage of Horstmann, 263 N.W.2d 885 (Iowa 1978) (unjust enrichment); Inman v.

Again, as in the goodwill cases, the particular theory used is not as meaningful as the fact that the court found a property interest in something intangible and speculative.

III. FUTURE EARNING POTENTIAL

A. Need for Recognition as an Asset

Presently, persons who divorce professional spouses can, in Washington and other states, reasonably expect to be compensated for their share of the future value of a presently owned asset (i.e., the professional's potential for future earnings). This result may be achieved through a division of professional goodwill or professional education.[48] Individuals involved in dissolutions with nonprofessional spouses, however, are left to alimony or traditional property division to protect their interests, neither of which may be adequate.[49] In such cases, equality of treatment requires that the future earning potential of the nonprofessional spouse be ascertained and divided.[50] Unlike the goodwill and education cases, a general property theory of future earning potential would not be limited to business and professional persons. It would apply whenever the efforts of one spouse contributed to the earning potential of the other.

B. Basis for Recognition as an Asset: The Goodwill and Education Cases as Precedent

The goodwill and education decisions base their allocation of intangible property upon the contributions made to the marriage by the nonprofessional or supporting spouse. Similar contributions exist in any marriage where one spouse achieves a degree of economic success through the other's support, whether that support is monetary or moral. In such a

Inman, 578 S.W.2d 266 (Ky. App. 1979) (restitution); Hubbard v. Hubbard, 603 P.2d 747 (Okla. 1979) (return on investment). The court in *Horstmann*, while stating that it was going to consider potential earning capacity, in fact based the award to the wife on a restitution theory. *See* Note, *supra* note 41, at 336–38.

48. *See* cases cited *supra* notes 24 & 25.

49. *See* notes 13–21 and accompanying text *supra*.

50. To illustrate: Assume that couple A and couple B are obtaining dissolutions at the same time. The husband in couple A is a doctor in private practice, while the husband in couple B is a corporate executive; neither wife works outside the home. Other than the different careers of the husbands, both couples have substantially the same income, and have approximately the same amount of tangible property. Assuming that the property of each marriage is divided equally between the spouses at dissolution, the wife in couple A will receive more in a property division than her counterpart in couple B. This is because divisible goodwill will exist in the medical practice of A. In short, regardless of the amount allocated to the wife in B, under current Washington law she stands to receive less than the wife in A because there is less total property available to her.

case, the supporting spouse is entitled to share in the assets obtained with her help, including the asset of future earning potential. Applying a theory invoked in the goodwill and education cases, the supporting spouse can be viewed as "investing" in the wage earner.[51] Similarly, the wage earner would be unjustly enriched if no recompense is made to the supporting spouse for her efforts on the wage earner's behalf.[52]

As a practical matter, the fact that a general theory of future earning potential would encompass both professionals and nonprofessionals is of no significance. Determination of the existence of nonprofessional earning capacity would require no more speculation than professional earning capacity. Testimony could be taken regarding the likelihood of continued employment, and availability of similar positions. Essentially, the inquiry would be very similar to that made in a professional goodwill case.[53]

As a theoretical matter, however, the significance of the professional/nonprofessional distinction is more troublesome. This is because goodwill is a recognized property concept, and is now readily adapted to the professional person. Likewise, division of educational achievements is gaining in acceptability. Yet, this has not always been the case. Both property concepts were developed by courts desiring to divide marital assets in a fair manner.[54] In so doing, they applied existing theories,[55] but the final result was that property was found where it had not been before. The equitable considerations that prompted the expansion of property concepts to include education and individual goodwill can be equally applied to a theory of future earning potential as property.

51. *See, e.g.*, Brawman v. Brawman, 199 Cal. App. 2d 876, 19 Cal. Rptr. 106, 110 (1962); Rothman v. Rothman, 65 N.J. 219, 320 A.2d 496, 501 (1974).

52. One court has stated that its division of property included future income potential, but the party whose future capacity was allocated was a professional. *In re* Marriage of Horstmann, 263 N.W.2d 885 (Iowa 1978).

53. *See In re* Marriage of Campbell, 22 Wn. App. 560, 563–64, 589 P.2d 1244, 1247 (1979). *See also* notes 39–41 and accompanying text *supra* for an enumeration of the factors used in determining the value of professional goodwill. Additional support for the recognition of future earning potential as property is found in tort law. In both wrongful death and personal injury actions, courts have allowed the plaintiffs to recover for loss of capacity, measured by their potential for future income, even though such amounts are by necessity conjectural. Both Inman v. Inman, 578 S.W.2d 226, 269 (Ky. App. 1979) and *In re* Marriage of Graham, 194 Colo. 429, 574 P.2d 75, 79 (1978) (Carrigan, J., dissenting), utilize this point. *See also* Note, *supra* note 41, at 334–35.

54. *See generally* Brawman v. Brawman, 199 Cal. App. 2d 876, 19 Cal. Rptr. 106, 108–10 (1962).

55. Such theories include goodwill, restitution, and return on investment. *See* notes 36–38, 44–47 and accompanying text *supra*. The power of the courts to mold theories to ensure justice is well recognized. *See, e.g., In re* Marriage of Donovan, 25 Wn. App. 691, 696, 612 P.2d 387, 389–90 (1980). *Cf.* Witzel v. Tena, 48 Wn. 2d 628, 631–33, 295 P.2d 1115, 1117–18 (1956) (partition action: once equity jurisdiction of the court is invoked, it has power to adjust the equities, even to the extent of divesting one party of his one-half interest in the property).

C. *Potential Objections to Recognition as an Asset*

Objections to the consideration of future earning potential as property take two notable approaches.[56] First, that it does not fit into traditional community property theory;[57] second, that it is too vague to be considered property.[58]

The argument that a theory of future earning potential as property could not be justified under community property law is predicated on the assumption that a lien would have to be imposed on the future earnings of the wage earner, in order for the spouse to collect on the "investment."[59] Were this the case, there would perhaps be difficulties in reconciling the practice to community property principles, since a lien would necessarily involve income obtained after the dissolution and would therefore be separate property.[60]

As in the goodwill cases, however, the future earnings per se would not be divided. The subject of the division would be the potential; the supporting spouse would receive a share proportionate to contributions made during the marriage. In this way, future earning potential is analogous to a pension or retirement right. It is well established that pension rights may be divided in a dissolution action, even though they are unvested and not presently possessory.[61] The division is based upon the percentage of the pension acquired during the existence of a marital community.[62] Division of future earning potential could be treated in a similar manner; to the extent the potential is acquired during marriage, it is divisible as a community asset.

The second argument, that future earning potential is not property, is

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56. Additionally, arguments are based on the sufficiency of existing remedies. *See* notes 13–21 and accompanying text *supra*.

57. *See, e.g., In re* Marriage of Aufmuth, 89 Cal. App. 3d 446, 461, 152 Cal. Rptr. 668, 678 (1979); *In re* Marriage of Fortier, 34 Cal. App. 3d 384, 388, 109 Cal. Rptr. 915, 918 (1973).

58. *See, e.g., In re* Marriage of Graham, 194 Colo. 429, 574 P.2d 75, 77 (1978).

59. *See In re* Marriage of Fortier, 34 Cal. App. 3d 384, 388, 109 Cal. Rptr. 915, 918 (1973) (footnote omitted), where the court stated: "Since the philosophy of the community property system is that a community interest can be acquired only during the time of the marriage, it would then be inconsistent with that philosophy to assign to any community interest the value of the post-marital efforts of either spouse." *See also In re* Marriage of Aufmuth, 89 Cal. App. 3d 446, 461, 152 Cal. Rptr. 668, 677–78 (1979). This interpretation of community property law may not be applicable in Washington. *See* note 21 *supra*.

60. It should be noted, however, that community property principles are not always followed precisely. For example, a basic tenet is the undivided co-ownership by husband and wife, yet, Washington courts are empowered to divide the community property unequally if necessary to achieve equitable results. *See, e.g., In re* Marriage of Donovan, 25 Wn. App. 691, 695–96, 612 P.2d 387, 389–90 (1980); Rehak v. Rehak, 1 Wn. App. 963, 966–67, 465 P.2d 687, 689–90 (1970).

61. Wilder v. Wilder, 85 Wn. 2d 364, 534 P.2d 1355 (1975).

62. *See id.* at 369, 534 P.2d at 1358.

predicated upon the notion that there are certain attributes which are the sine qua non of property.[63] The validity of this argument, however, is questionable in a state which recognizes either goodwill or education as divisible assets. Both the goodwill and education cases involve property that is scarcely conventional, yet the lack of the traditional earmarks of property has not obscured evidence that valuable interests exist.[64] The valuation of future earning potential would be no more conceptually difficult than valuation of the goodwill of an osteopath,[65] or a dental education.[66]

IV. APPLICATION OF THE THEORY IN WASHINGTON

Even though Washington allows unequal property division, this alone may be inadequate if future earning potential is not considered.[67] The Washington Supreme Court has recommended limits on property division,[68] which have generally been followed.[69] Moreover, traditional property division does nothing for the spouse in a no-asset divorce if the other spouse is not a professional;[70] even if tangible assets exist, the spouse of a nonprofessional comes away with less than the spouse of a professional.[71]

The recognition of future earning capacity as a divisible marital asset would enable courts to devise equitable property distributions in all dissolutions, not just those involving professional persons. Washington has already recognized that the division of property need not be strictly equal to be equitable,[72] and has found the existence of goodwill value in an indi-

63. *See, e.g., In re* Marriage of Graham, 194 Colo. 429, 574 P.2d 75, 77 (1978), where the court considered property to be that which could be "assigned, sold, transferred, conveyed or pledged."

64. *See generally* Comment, *supra* note 41, at 590–602; Note, *supra* note 41, at 331–35. California, which has recognized professional goodwill as an asset, has rejected the notion that education can have divisible value. *See In re* Marriage of Aufmuth, 89 Cal. App. 3d 446, 460–61, 152 Cal. Rptr. 668, 677 (1979); Todd v. Todd, 272 Cal. App. 2d 786, 78 Cal. Rptr. 131, 134–35 (1969).

65. *See In re* Marriage of Lukens, 16 Wn. App. 481, 558 P.2d 279 (1976).

66. *See* Inman v. Inman, 578 S.W.2d 266 (Ky. App. 1979).

67. This is due to the fact that while future earning potential may be considered in awarding alimony, such treatment is unsatisfactory given Washington's negative view toward permanent support awards. *See* notes 12–21 and accompanying text *supra*.

68. Wills v. Wills, 50 Wn. 2d 439, 441, 312 P.2d 661, 662 (1957) (community property should be divided in no greater ratio than 1/3 to 2/3).

69. Rehak v. Rehak, 1 Wn. App. 963, 966–67, 465 P.2d 687, 689–90 (1970) (stating general rule, but allowing for exceptions based on equitable or statutory considerations).

70. *But see* cases cited note 25 *supra*, which allowed a division of an educational degree where no other assets existed.

71. *See* note 50 *supra*.

72. *See, e.g.*, Rehak v. Rehak, 1 Wn. App. 963, 465 P.2d 687 (1970).

vidual;[73] courts in other jurisdictions have found property interests in education.[74] While these advancements are commendable, they still do not adequately protect spouses in dissolutions involving a nonprofessional. This protection may be provided by characterizing, in appropriate circumstances, future earning potential as a divisible asset.

V. CONCLUSION

Given Washington's preference for "equity through property," and the deficiences of alimony,[75] the treatment of future earning potential as property is a desirable and practical next step in the evolution of property law. A perpetual lien upon the wage earner's future earnings is not advocated, nor should there be a division of the future income as such. Rather, the future earning potential of the income producing spouse ought to have a value placed upon it as of the date of dissolution. This value should then be included in the property available for distribution. Aside from the terminology employed, this is little different than what is already being done in Washington with professional goodwill and pension rights, or that done in other states with education. In this way, the investments made by all spouses in their partner's career would be recompensed, thus arriving at a "just and equitable"[76] result.

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73. *See, e.g., In re* Marriage of Lukens, 16 Wn. App. 481, 486, 558 P.2d 279, 282 (1976).

74. *See, e.g., In re* Marriage of Horstmann, 263 N.W.2d 885 (Iowa 1978); Inman v. Inman, 578 S.W.2d 266 (Ky. App. 1979); Mahoney v. Mahoney, 175 N.J. Super. 443, 419 A.2d 1149 (1980); Hubbard v. Hubbard, 603 P.2d 747 (Okla. 1979).

75. *See* note 21 *supra*.

76. WASH. REV. CODE § 26.09.080 (1979).