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EQUITABLE INTEREST IN ENHANCED EARNING CAPACITY:

The question of how to treat a professional degree upon marital dissolution has produced a passel of conflicting state court opinions. The issue

1. Courts have wrestled with the issues of whether a degree is property that can be valued and distributed, whether the supporting spouse will be compensated for contributions made to the student spouse's professional education, and what the proper measure of an award for those contributions will be. Most courts have held that the degree is not property, but have granted restitution to the supporting spouse.

This Note is not intended to be a compendium of the decisions on this issue. The cases cited in In re Marriage of Washburn, 101 Wn. 2d 168, 677 P.2d 152 (1984), are the leading cases from other states. See infra note 29 and accompanying text.


Eleven states (California, Florida, Georgia, Indiana, Iowa, Nebraska, New York, North Carolina, 431
arises when the degree is acquired through the mutual efforts of the marital partners, but before the couple realizes the fruits of their labors, the marriage is dissolved. Typically, the husband leaves with the diploma and the enhanced earning capacity it provides, while the wife seeks recognition of her investment of time, money, work and emotion.²

The Washington Supreme Court addressed this problem in *In re Marriage of Washburn.*³ The court held that a supporting spouse should be compensated for contributing to the attainment of a student spouse’s degree. The court stated that such a contribution is a factor that trial courts must consider in dividing property or in awarding maintenance.⁴ It also held that trial courts must consider the future earning prospects of each spouse in making an award.⁵ Nonetheless, the court affirmed an award that was limited to restitution of direct expenditures and opportunity costs.⁶ A vigorous dissent argued that a professional degree is property subject to distribution, and that the value of the degree is the enhanced earning capacity of the student spouse.⁷

This Note first analyzes the court’s opinion and concludes that it fails to identify clearly the property nature of the supporting spouse’s interest,⁸ diverges from desirable trends in property law,⁹ and is contrary to compelling social and economic policy.¹⁰ Second, the Note maintains that restitution is an inadequate remedy;¹¹ a spouse who provides support during a period of professional education should have an equitable interest in the enhanced earning capacity of the student spouse, based on an economic partnership model of marriage.¹² Although some courts and commentators

Pennsylvania, Vermont, Wisconsin) now have statutes that require a contribution by one spouse to the education or career potential of the other spouse to be considered as a factor in awarding maintenance and/or in dividing property. See California Legislation, 10 Fam. L. Rep. (BNA) 1674 (Oct. 16, 1984); Freed & Foster, (1984), supra, at 399–400; Freed & Foster, (1983), supra, at 311–12.

2. About 70 cases deciding how to treat professional degrees have appeared in reporters or been described in secondary literature. The author has found only two cases among that group in which a husband claimed an interest in his wife’s professional degree. In each case, the husband was denied relief on the grounds that he had made no sacrifices during his wife’s education that limited his own career growth. Saint-Pierre v. Saint-Pierre, 357 N.W.2d 250, 262 (S.D. 1984); Griffin v. Griffin, 10 Fam. L. Rep. (BNA) 1091 (Mich. Cir. Ct. Nov. 22, 1983). See also *In re Marriage of Hall,* 103 Wn. 2d 236, 248, 692 P.2d 175, 182 (1984) (husband may not offset his goodwill with future earning potential of salaried wife). See infra notes 123 & 140.

4. *Id.* at 170, 178, 677 P.2d at 153, 158.
5. *Id.* at 180, 677 P.2d at 159.
7. *Id.* at 184, 190, 677 P.2d at 161, 164 (Rosellini, J., dissenting).
8. See infra notes 40–63 and accompanying text.
9. See infra notes 77–102 and accompanying text.
10. See infra notes 103–24 and accompanying text.
11. See infra notes 125–36 and accompanying text.
12. See infra notes 137–43 and accompanying text.
argue that such a solution raises problems of involuntary servitude and speculation, this Note concludes that such problems are of less importance than the need to grant an appropriate expectation remedy to the supporting spouse. Finally, the Note proposes a method of valuing the supporting spouse's interest.

I. BACKGROUND TO WASHBURN

In Washburn, the supreme court consolidated two cases for review. The first case involved the Washburns. Mr. and Ms. Washburn were married in 1971 when both were undergraduate students. In 1974, Mr. Washburn enrolled in veterinary school. Ms. Washburn worked full-time, while Mr. Washburn studied and held part-time and summer employment. Mr. Washburn began his veterinary practice in July of 1979, after nearly five years of training and internships. The couple separated eighteen months later, and after another six months, a dissolution decree was entered.

The second case involved the Gillettes. Mr. and Ms. Gillette were married in 1968. Six years later, Ms. Gillette agreed to support her husband while he obtained a veterinary degree. In return, he promised that after he obtained the degree, she would never have to work again. For the next seven and one-half years, Ms. Gillette worked full-time, while Mr. Gillette studied and worked part-time. Ms. Gillette declined offers of job promotions to move with her husband to the location of the graduate school. They separated in October of 1981, and he completed his education in June of 1982. A decree of dissolution was entered in March of 1983.

In each case, the trial court held that neither the professional degree nor the increased earning capacity it brought to the student spouse was property. The Washburn trial court denied Ms. Washburn's request for maintenance and did not compensate her for her contributions to the cost of the education. On the other hand, the Gillette trial court awarded Ms. Gillette $19,000 as an equitable right to restitution, based on her contributions and lost opportunities. She also received a maintenance award of one dollar per year. 

13. See infra notes 64–76 and accompanying text.
14. See infra notes 143–56 and accompanying text.
15. Washburn, 101 Wn. 2d at 168–70, 677 P.2d at 152–54.
16. Id. at 170–71, 677 P.2d at 154.
17. Id. at 171–72, 677 P.2d at 154; Letter from Timothy Esser, attorney for respondent Gillette, to author (Nov. 6, 1984) (date of graduation) (copy on file with the Washington Law Review).
18. 101 Wn. 2d at 171, 172, 677 P.2d at 154, 155.
19. Id. at 171, 183, 677 P.2d at 154, 160.
20. Id. at 172–73, 677 P.2d at 155.
21. Id. at 173, 677 P.2d at 155. For a discussion of the significance of the one dollar maintenance award, see infra notes 49–50, 128 and accompanying text.
The supreme court reversed the Washburn trial court, and remanded for consideration of the compensation due Ms. Washburn. The court upheld Ms. Gillette's $19,000 in restitution as an award that was "in effect maintenance," and then reversed the one dollar per year maintenance award as unnecessary.

II. THE COURT'S ANALYSIS

A. The Majority Opinion

The supreme court declined to address the question of whether a professional degree is property. However, it held that a supporting spouse's contribution to the cost of an education is a factor to be considered in framing a decree. The court stated that an award could be effected under the state's dissolution statute as an equitable property division, as maintenance, or as a combination of both.

In reaching its conclusions, the court considered the approaches adopted by other courts. It rejected a theory that the student spouse had been unjustly enriched, maintaining that such a determination would invite the introduction of evidence as to fault. Instead, the court based its opinion on the liberal provisions of Washington's dissolution statute. It directed trial courts to consider the factors listed in the property division and maintenance sections of the dissolution statute, and also to consider the following four factors:

1. the amount of community funds spent on direct educational costs;
2. the amount the community would have earned had the student spouse been employed;
3. educational or career opportunities given up by the supporting spouse; and
4. "[t]he future earning prospects of each spouse, including the earning potential of the student spouse with the professional degree."

22. 101 Wn. 2d at 170, 184, 677 P.2d at 153–54, 161.
23. Id. at 170, 182–83, 677 P.2d at 154, 160.
24. Id. at 183, 677 P.2d at 160.
25. Id. at 176, 677 P.2d at 157.
26. Id. at 170, 178, 677 P.2d at 153, 158.
28. 101 Wn. 2d at 183, 677 P.2d at 158, 161; accord In re Marriage of Lundberg, 107 Wis. 2d 1, 318 N.W.2d 918, 924 (1982).
29. 101 Wn. 2d at 174–76, 677 P.2d at 155–56; see also id. at 188–92, 677 P.2d at 163–66 (Rosellini, J., dissenting).
31. 101 Wn. 2d at 176–78, 677 P.2d at 157–58.
33. 101 Wn. 2d at 179–80, 677 P.2d at 159 (emphasis added).
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The court did not provide a precise valuation formula, so as not to encroach upon the discretion of trial courts.34

B. The Dissent

The dissent contended that the student spouse’s enhanced earning capacity is not simply a factor to be considered.35 Rather, it would have characterized the professional degree and the enhanced earning capacity as property subject to distribution.36 The dissent compared the degree and the enhanced earning capacity to other intangible and contingent property rights that courts have found to be divisible upon dissolution, including goodwill37 and unmatured pension and retirement benefits.38 The dissent generally agreed that trial courts should consider the majority’s four factors but objected that the majority’s holding on valuation was limited to reimbursement and/or rehabilitation, maintaining that such an award undercompensated the supporting spouse.39

III. CRITIQUE OF THE WASHBURN OPINION

Washington’s dissolution act allows spouses to arrange their marital separation by agreement.40 Spouses may independently fashion solutions to meet their particular financial and psychological needs. Thus, the statute serves judicial economy and enhances citizen autonomy.41 Also, the likelihood that the parties will face the trauma of adversary proceedings is reduced. For these policies to be fulfilled, however, the judiciary must establish clear and consistent rules that provide potential litigants a reliable basis for reaching settlements.

The Washburn court did not establish a clear rule. The court’s approach to professional degrees is flawed in two respects. First, the opinion is ambiguous concerning the nature of the supporting spouse’s interest;42 it is not

34. Id. at 179, 677 P.2d at 158.
35. Id. at 184, 677 P.2d at 161 (Rosellini, J., dissenting).
36. Id. at 184, 190, 677 P.2d at 161, 164.
37. Id. at 186, 677 P.2d at 162.
38. Id. at 187, 677 P.2d at 162.
39. Id. at 184, 677 P.2d at 161. The court never stated directly that its holding should be limited in all cases to reimbursement, and does not foreclose the possibility of an award based on the student’s enhanced earning capacity. The result of the decision, however, was to limit Ms. Gillette’s recovery to reimbursement. See infra notes 126–29 and accompanying text.
42. See infra notes 47–63 and accompanying text.
clearly identified as property or as maintenance. The court should have identified the interest as a property right. Second, despite its ruling that the student spouse's earning potential should be considered, the court affirmed an award to Ms. Gillette that did not consider earning potential, but was based exclusively on restitution. The award should have reflected the property produced by the community, that is, the enhanced earning capacity of the student spouse. Restitution should not be regarded as an appropriate remedy.

A. Identification of the Interest

Identification of a dissolution award as property or maintenance has important analytical and practical implications. The Washburn opinion is ambiguous concerning the nature of the interest. The court's failure to identify the interest as property results in a rule that diverges from a line of Washington cases that have broadened the traditional definition of property. The holding also fails to take important social and economic policies into account.

1. The Opinion: Ambiguities

The Gillette trial court stated that its $19,000 award was compelled by an "equitable right of restitution, somewhat in the nature of a property right." The trial court combined this property award with a nominal one dollar maintenance award so that it could maintain jurisdiction over the maintenance issue. Apparently, the court intended to protect the recovery against discharge in bankruptcy.

43. The court stated that it was not "inclined to address at this time the somewhat metaphysical question of whether a professional degree is 'property.'" Washburn, 101 Wn. 2d at 176, 677 P.2d at 157.
44. See infra notes 64-124 and accompanying text.
45. See infra notes 125-29 and accompanying text.
46. See infra notes 130-42 and accompanying text.
47. For a discussion of the differences between property division and maintenance awards, see generally H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES §§ 14.1-14.12 (1968); see also infra notes 103-19 and accompanying text.
49. Brief of Appellant Jack Eugene Gillette at app. 3 (quoting Conclusion of Law No. 7), In re Marriage of Washburn, 101 Wn. 2d 168, 677 P.2d 152 (1984); accord In re Marriage of Horstmann, 263 N.W.2d 885 (Iowa 1978); see infra note 128.
50. Brief of Respondent Alice June Gillette, supra note 48, at 36; cf. In re Marriage of Lundberg, 107 Wis. 2d 1, 318 N.W.2d 918, 925 (1982) (Callow, J., dissenting) (if property award is discharged in bankruptcy, maintenance award may be appropriately adjusted). For a discussion of the effect of dischargeability of awards in bankruptcy, see infra note 54.
While professing to affirm the $19,000 award, the supreme court profoundly altered its legal effect by labeling it maintenance. After making this change, the court did an analytical about-face and clothed the award with attributes of property, announcing that it would protect Ms. Gillette's right to receive full payment by providing that the award should not terminate upon her remarriage or death. The court's description of the award as a right to receive a sum certain and its protection of the award against termination would probably cause a federal tax or bankruptcy court to identify the award as property, despite the state court's choice

51. See Washburn, 101 Wn. 2d at 182, 677 P.2d at 160. The reason the court offered for this relabeling is that the award was to be paid in installments, and would thus equalize the parties' standard of living for a limited time. Id. at 182, 677 P.2d at 160. But it is quite common for property division awards to be paid in installments. E.g., Woodworth v. Woodworth, 126 Mich. App. 258, 337 N.W.2d 332, 337 (1983); DeRuwe v. DeRuwe, 72 Wn. 2d 404, 409–10, 433 P.2d 209, 212–13 (1967).

52. 101 Wn. 2d at 183, 677 P.2d at 160. WASH. REV. CODE § 26.09.170 (1983) allows courts to make such provisions. If the court's goal really was to protect Ms. Gillette's right to full payment, one wonders why the court did not also provide that the award should not terminate upon Mr. Gillette's death, which the statute would also have allowed.


The provisions relating to alimony are considerably more complex. Alimony remains deductible by the payor, Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 422(b), 98 Stat. at 797 (to be codified at I.R.C. § 215(a)), and includible in the income of the payee, id. § 422(a), 98 Stat. at 795 (to be codified at I.R.C. § 71(a)). Under the prior law, periodicity was the test to determine if a payment qualified as alimony. See Hjorth, Tax Consequences of Post-Dissolution Support Payment Arrangements, 51 WASH. L. REV. 233, 237 (1976). That test has been replaced with a new definition of alimony, Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 422(a), 98 Stat. at 795 (to be codified at I.R.C. § 71(b)), and with rules designed to prevent excess front-loading of payments, id., 98 Stat. at 796 (to be codified at I.R.C. § 71(f)).

One of the elements of the new definition of alimony is that no liability for payments accrues after the death of the payee spouse. Id., 98 Stat. at 795 (to be codified at I.R.C. § 71(b)(1)(D)). Thus, if a court orders that a maintenance award will be non-terminable upon the death of the payee spouse, as the Washburn court did with its "lump-sum maintenance" award to Ms. Gillette, the award will not be alimony for federal income tax purposes.


54. A property award is typically viewed as a civil debt and is therefore dischargeable in bankruptcy. Payments are not dischargeable, on the other hand, if it can be shown that they are intended for maintenance or support. Melichar v. Ost, 661 F.2d 300 (4th Cir. 1981), cert. denied, 456 U.S. 927.
Examining the four factors the court directed trial courts to consider reveals further ambiguity concerning the nature of the interest. The first two factors, which represent direct expenditures or sacrifices of community funds, clearly have a property nature. The third represents career or educational opportunity costs that in many cases could readily be assigned a value; thus, it too has a tangible property nature. The court stated that the fourth factor, the future earning potential of each spouse, was designed to ensure that trial courts consider the economic condition in which a dissolution decree leaves the parties when determining property division and maintenance issues. Earning potential, however, is the basic source of community property during marriage. Therefore, the fourth factor also carries an implicit assumption that the supporting spouse's interest has a property nature.

(1982); 11 U.S.C. § 523(a)(5) (1982). See generally Hoffman & Murray, Obligations That Cannot Be Erased, 5 Fam. Advoc. 18 (Winter 1983); Note, Congressional Intent in Excepting Alimony, Maintenance, and Support from Discharge in Bankruptcy, 21 J. Fam. L. 525 (1983); Annot., 74 A.L.R.2d 758 (1960 & Later Case Svc. 1975 & Supp. 1984). An obligation that does not terminate upon a specific date or event, such as death or remarriage, is more likely to be found to be in the nature of a dischargeable property settlement, rather than in the nature of support. See Stout v. Prussel, 691 F.2d 859, 861 (9th Cir. 1982). Thus, the court's efforts to protect Ms. Gillette's award had the reverse effect of making it more vulnerable to discharge in bankruptcy.

To date, repayments for loans or contributions to the cost of a bankrupt's education have been held not to be in the nature of support and have been discharged. See Neugebauer v. Neugebauer, 548 P.2d 1032 (Okla. 1976); In re Hogg, [1970-1973 Transfer Binder] Bankr. L. Rep. (CCH) ¶ 64,418 (Bankr. E.D. Wis. Oct. 18, 1971). But cf. Matter of Lynn, 18 Bankr. 501 (D. Conn. 1982) (in spite of state court's finding that degree was property, it was not susceptible for conversion into money for distribution to creditors, and thus not property for purposes of bankruptcy law). Several commentators have advocated a change in the Bankruptcy Code to prevent discharge of marital property awards, especially when they are in the nature of compensation for future income sources such as pensions or enhanced earning capacities. See Branca, Dischargeability of Financial Obligations in Divorce: the Support Obligation and the Division of Marital Property, 9 Fam. L. Q. 405, 432-34 (1975); Bruch, Of Work, Family Wealth, and Equality, 17 Fam. L. Q. 99, 107 & n.28 (1983); Erickson, Spousal Support Toward the Realization of Educational Goals: How the Law Can Ensure Reciprocity, 1978 Wis. L. Rev. 947, 975-81.

55. Washburn, 101 Wn. 2d at 179-80, 677 P.2d at 159; see also supra text accompanying note 33.
56. See Washburn, 101 Wn. 2d at 180, 677 P.2d at 159 (supporting spouse to be awarded up to one-half his or her interest therein).
57. See id. The value of opportunity costs can be easily assigned where a supporting spouse forgoes career opportunities such as a raise or a promotion, as Ms. Gillette did. Where educational opportunities are forgone, a sum representing the projected rehabilitative costs can be awarded. See infra note 123.

This Note does not endorse the use of the court's first three factors in calculating the supporting spouse's award. The fact that they can be readily assigned values is pointed out merely to demonstrate that the property nature of the interest is implicit in the court's holding. But see Mahoney v. Mahoney, 91 N.J. 488, 453 A.2d 527, 534 (1982) (introducing concept of "reimbursement alimony" for contributions made to other spouse's professional training).
58. Washburn, 101 Wn. 2d at 180-81, 677 P.2d at 159.
Even the case cited by the court to support its holding, *DeRuwe v. DeRuwe*, lends credence to this property interpretation. In that case, a wife received a property award in recognition of the prospects of future income from a business that had been developed by the community’s efforts. Similarly, courts should base a property award to a supporting spouse on the prospects of future income from a student spouse’s earning capacity that has been enhanced by the community’s efforts.

Moreover, dicta in the *Washburn* opinion add to the ambiguity. For example, the court mentioned the supporting spouse’s “return on his or her investment in family prosperity” and discussed the “mutual expectation that they would both share in the increased earnings.” Such language buttresses an argument for a property interest in enhanced earning capacity.

2. Special Concerns: Involuntary Servitude, Death and Disability, and Liens on Future Income

Several arguments appear frequently in decisions and commentaries that take a position against granting a supporting spouse a property award based on enhanced earning capacity. First, it is argued that since an award of property is not modifiable, it would subject the student spouse to involuntary servitude. Under a maintenance order, in contrast, a student spouse could seek a modification, if the choice was made to abandon the profession and the earning capacity was thereby diminished.

On closer examination, however, the involuntary servitude argument is less than compelling. A property award does not require that the student spouse work at a particular job or profession. The student spouse need only pay the judgment debt. The amount of that debt and the terms on which it is paid can be keyed to particular career goals and to the environment in which

60. 72 Wn. 2d 404, 433 P.2d 209 (1967). The spouses in *DeRuwe* owned extensive ranching operations. Both spouses had worked hard during their 22 years of marriage to develop their properties into an estate valued at $865,000. *Id.* at 405, 406 & n.1, 433 P.2d at 210 & n.1, 211. The court was reluctant to divide the ranch properties, because their continued success depended upon the husband’s continued ownership and management of the properties. *Id.* at 407, 433 P.2d at 211. The court’s solution was to make an “in futuro” award of $100,000 in community property to the wife, to be deferred for a ten-year period and then paid with interest. Until paid, the award was to be secured by liens or mortgages. *Id.* at 409–10, 433 P.2d at 212–13. The court also made an award of maintenance, *id.* at 407, 433 P.2d at 211, a further indication that the “in futuro” award was property.

61. *Id.* at 406, 409, 433 P.2d at 211, 212.


63. *Id.* at 182, 677 P.2d at 160; see also *id.* at 173, 677 P.2d at 155.

64. *Id.* at 179 n.3, 677 P.2d 158 n.3. However, when the earning capacity of a payor spouse is curtailed voluntarily, the Washington courts will not grant a reduction of the maintenance obligation, absent a substantial showing of good faith. Carstens v. Carstens, 10 Wn. App. 964, 967–68, 521 P.2d 241, 243 (1974).
which they are pursued. Additionally, the involuntary servitude argument is not convincing where the student spouse has established an earnings history at the time of trial, as was the case in both *Gillette* and *Washburn*.

A second argument raised is that an award based on enhanced earning capacity is speculative, because the professional may encounter a lack of market opportunities, become disabled, or suffer an untimely death. It is pointed out that whereas maintenance typically terminates upon the death of the payor, a judgment to pay a property debt might encumber the student spouse's estate, robbing a later-formed family of an inheritance they might otherwise expect.

However, market trends and risks of disability or death can be taken into account by experts qualified to make economic projections of future income. Also, many professionals carry disability and life insurance that would be adequate to cover a loss of income due to injury or death. As to the inheritance rights of a second family, the second spouse presumably would know, when making the choice to marry, of any outstanding debts to the first spouse. Moreover, unless the debt were secured by a lien, a family allowance and an award in lieu of homestead to the second spouse would be exempt from the first spouse's claim. In any case, the slight chance of disability or death should not outweigh the rights of the supporting spouse.

Finally, it is argued that labeling enhanced earning capacity as property and assigning it a value for purposes of distribution is equivalent to placing an improper lien on future income. This concern becomes irrelevant, in fact, it would be preferable for a court to order the purchase of such a policy to protect the award. See *infra* note 159 and accompanying text.


66. *See supra* notes 16–17 and accompanying text; *infra* note 147 and accompanying text.


70. In fact, it would be preferable for a court to order the purchase of such a policy to protect the award. See *infra* note 159 and accompanying text.


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however, when one recognizes that the student spouse's earning capacity is not identical to that spouse's future income. Earning capacity is a distinct property that has the potential of producing future income. Courts routinely apportion many other types of income-producing property. Thus, there is no analytical justification for denying a community interest in earning capacity, when the interest is limited to that portion of the earning capacity that is directly attributable to contributions and efforts made during the marriage.

3. The New Property

Increasingly, employment and work-related benefits are being identified as the principal forms of wealth in post-industrial society. Courts in other
jurisdictions have held that career assets such as a law practice, an accounting practice, partnership interests, and employee stock options are property subject to distribution. The United States Supreme Court has also acknowledged the existence of the new property. The Court has found a property interest for due process purposes in public education as well as in a number of work-related new forms of wealth, including wages, welfare benefits, Social Security disability payments, and government employment.

In keeping with this legal and sociological evolution of new forms of property, the Washington courts have held that career assets such as goodwill and pension benefits are property. In Washburn the Washington
court held that goodwill is property and that it should be valued for distribution in a divorce proceeding. The court based its decision on the fact that goodwill is an asset that can be sold or transferred and that it is a property interest that is protected by the due process clause of the Fourteenth Amendment. The court also noted that goodwill is a form of personal property that is separate from the personal property of the individual who possesses it. The court held that goodwill is a property interest that is entitled to protection under the due process clause of the Fourteenth Amendment.

Of the eleven states that have statutes relating to the treatment of professional degrees in dissolution proceedings, see supra note 1, none expressly approves valuation of the enhanced earning capacity of the student spouse. For example, recovery to a supporting spouse under Indiana's statute is incredibly restrictive, limiting the award to reimbursement for contributions to "tuition, books and laboratory fees." See IND. CODE ANN. § 31-1-11.5-I(c) (Burns Supp. 1984).

It is possible, however, that many of the other statutes could be interpreted to allow valuation of the enhanced earning capacity. Wisconsin's statute, for example, can be interpreted to indicate compensation in the future. See WIS. STAT. ANN. §§ 767.255, 26 (West 1981 & Supp. 1984-85); Krauskopf, supra note 1, at 403. The Wisconsin courts have not granted, in any reported decision, an award based on a present value capitalization of enhanced earning capacity, although in the most recent decision from that jurisdiction the court stated that such a calculation is an acceptable method of valuation. Haugan v. Haugan, 117 Wis. 2d 200, 343 N.W.2d 796, 803 (1984).

These inadequate legislative provisions bring into question whether the legislative branch can effectively protect the supporting spouse's interest in this "new property." The decisionmaking process in the legislative setting consists of compromise and negotiation. That process is a good one when all points of view are fairly represented. It seems preferable, however, that a remedy for a supporting spouse be formulated in the courts. In a judicial setting, individual circumstances can be taken into account, and the decisionmaker is not faced with the well-organized lobbies of professional associations whose members are vitally affected by such laws. See Peck, Comments on Judicial Creativity, 69 IOWA L. REV. 1, 1-11, 40-42 (1983).

83. See generally M. GLENDON, supra note 77, at 92 & n.161, 187-90.
Supreme Court diverged from this trend. The court should have recognized the professional degree and its accompanying enhanced earning capacity as a new form of property.\textsuperscript{90}

Community property principles also support a property label. Under Washington's community property law, community property is property that is acquired through the labor or industry of either spouse,\textsuperscript{91} or for other valuable consideration. Thus, except for gifts to the community, community property is property that is acquired onerously.\textsuperscript{92} The character of an asset becomes fixed at the time of its acquisition; assets acquired during the marriage are presumed to be community property.\textsuperscript{93} Thus, where a professional degree is onerously acquired during the marriage, it should be identified as property with a community character.

\textsuperscript{560, 589 P.2d 1244 (1978) (sales representative); In re Marriage of Lukens, 16 Wn. App. 481, 558 P.2d 279 (1976) (physician in private practice), review denied, 88 Wn. 2d 1011 (1977); see also In re Marriage of Kaplan, 23 Wn. App. 503, 597 P.2d 439 (1979) (existence of goodwill is a question of fact).}


\textsuperscript{The United States Supreme Court has held that a supremacy clause conflict existed with regard to certain pensions regulated by federal statute. See McCarty v. McCarty, 453 U.S. 210 (1981) (federal law precludes courts in community property states from treating military retirement pay as divisible community property); Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979) (Railroad Retirement Act precludes courts in community property states from treating retirement benefits under the Act as divisible community property). See generally Schwartz & McClure, Division of Federal Pension Benefits, 11 COMM. PROP. J. 165 (1984).}

\textsuperscript{Congress responded to McCarty in 1982, however, with the Uniformed Services Former Spouses' Protection Act, Pub. L. No. 97-252, §§ 1001-1006, 96 Stat. 730, 730-38 (1982) (codified in scattered sections of 10 U.S.C.). The Act provided that subject to certain limitations, military pensions may be considered divisible community property. 10 U.S.C. § 1408 (c)(1) (1982). The Washington court then revived its former position that such retirement benefits are a form of divisible property. In re Marriage of Smith, 100 Wn. 2d 319, 669 P.2d 448 (1983) (abandoning the holding in In re Marriage of Dessauer, 97 Wn. 2d 831, 839, 650 P.2d 1099, 1103 (1982), that after McCarty a military pension could neither be characterized as community property for division nor valued to offset property against value).}

\textsuperscript{In August of 1983, Congress enacted similar amendments allowing states to treat a portion of railroad workers' pensions as divisible community property. That portion that is equivalent to the amount the worker would have received under Social Security if railroad service qualified as employment under the Social Security Act is not divisible, however. Railroad Retirement Solvency Act of 1983, Pub. L. No. 98-76, §§ 419(a), (b), 97 Stat. 411, 438 (to be codified at 45 U.S.C. § 231m(b)(2)). Also, former spouses may qualify as independent beneficiaries under certain circumstances. 45 U.S.C.A. § 231a(c)(4) (West Supp. 1984) (divorced wife); 45 U.S.C.A. § 231a(f)(1)(v) (West Supp. 1984) (surviving divorced wife). But cf. In re Marriage of Roark, 34 Wn. App. 252, 659 P.2d 1133 (1983) (railroad retirement benefits can properly be considered as one of the economic circumstances of the parties in making an equitable property division, but are not divisible community property). Roark was decided in March of 1983, before the above legislation was enacted. Presumably, if the court faced the issue again, it would abandon the holding in Roark, as the similar holding in Dessauer was abandoned.}

\textsuperscript{90. See Washburn, 101 Wn. 2d at 185-87, 677 P.2d at 162 (Rosellini, J., dissenting).}

\textsuperscript{91. In re Marriage of Brown, 100 Wn. 2d 729, 737, 675 P.2d 1207, 1212 (1984).}

\textsuperscript{92. Id. at 735, 737-38, 675 P.2d at 1211, 1212 (citing W. De Funiaq & M. Vaughn, Principles of Community Property § 82, at 201 (2d ed. 1971)); Cross, supra note 59, at 746 & n.74.}

\textsuperscript{93. Stokes v. McDowell, 70 Wn. 2d 694, 424 P.2d 910 (1967); Cross, supra note 59, at 746-47 (citing Yesler v. Hochstettler, 4 Wash. 349, 30 P. 398 (1892)).
Neither a professional degree nor the enhanced earning capacity associated with it, of course, is actually possible to divide. Both will remain with the student spouse. Nonetheless, earning capacity is the basic community asset; more precisely, it is the source that produces community property.\textsuperscript{94} As such, the enhanced earning capacity acquired during the marriage is the proper measure of a property award to a supporting spouse.\textsuperscript{95}

\textsuperscript{94} Cross, \textit{supra} note 59, at 749 n.86, 768 n.178, 773.

\textsuperscript{95} See \textit{In re} Marriage of Horstmann, 263 N.W.2d 885, 891 (Iowa 1978) (degree is not divisible, but enhanced earning capacity is asset for equitable distribution); O'Brien v. O'Brien, 114 Misc. 2d 233, 452 N.Y.S.2d 801, 805 (1982) (license is personal, but its economic fruits are subject to transfer under equitable distribution law).

Some would point out that earning capacity is separate property after the marriage ends. An illustrative case is \textit{In re} Marriage of Brown, 100 Wn. 2d 729, 675 P.2d 1207 (1984).\textsuperscript{96} Brown refined the former Washington rule that personal injury damage awards, including those for an injury to one spouse's earning capacity, are community property. See \textit{id}. at 731–34, 675 P.2d at 1209–10. The court held that awards received due to a tortious injury to one spouse's earning capacity that occurs during marriage are community property during marriage, but become the separate property of the injured spouse upon separation or dissolution. \textit{id}. at 738–39, 675 P.2d at 1212–13. By analogy, one could argue that income received due to an enhancement of earning capacity that occurs during marriage would be community property during marriage, but would become the separate property of the "enhanced" spouse upon dissolution.

The key to the \textit{Brown} holding, however, is that compensation for personal injury is not acquisition by onerous title. \textit{id}. at 736–37, 675 P.2d at 1211–12. Rather, it is a "fortuitous acquisition." \textit{id}. at 734, 739, 675 P.2d at 1210, 1213 (quoting but disapproving the result in \textit{In re} Marriage of Parsons, 28 Wn. App. 276, 278, 622 P.2d 415, 416, \textit{review denied}, 95 Wn. 2d 1019 (1981)). Thus, the onerous acquisition of a professional education is distinguishable.

Furthermore, the \textit{Brown} court recognized that earning capacity is property, and that its character is community during the marriage. \textit{id}. at 738, 675 P.2d at 1212. The award proposed in this Note is not an award of post-marital earnings per se, although those earnings may determine the value of the award. Rather, it is an award in recognition of the enhancement to the earning capacity that occurred when the earning capacity was a community asset. For a discussion of the question of putting a lien on future earnings, see \textit{supra} notes 73–76 and accompanying text.

Finally, even if a court made the less desirable characterization of the enhanced earning capacity as separate, a similar result would be reached under an equitable lien theory. The lien would arise because community funds and labor would have improved the separate property of the student spouse. The supporting spouse may have to rebut a presumption of gift, which should not be difficult since it would be clear that the supporting spouse was making an investment with an expectation of future benefit. See Cross, \textit{supra} note 59, at 778 & n.224 (where community's contribution can be reasonably viewed as a business investment, it is unlikely to be found to be a gift). For a discussion of how the conduct of the spouses evidences their mutual intent to make an investment, see \textit{infra} notes 133–42 and accompanying text.

The measure of the community's interest should be the increased value of the earning capacity, and should not be limited by the amount of the community funds advanced. See Baker v. Baker, 80 Wn. 2d 736, 745, 498 P.2d 315, 321 (1972) (investment of community funds and labor to improve separate property gives rise to equitable lien for increase in value); Bartke, \textit{Yours, Mine and Ours—Separate Title and Community Funds}, 44 \textit{WASH. L. REV.} 379, 389, 393–94, 400–01, 419 (1969) (court should treat expenditures as an equity investment of community funds, and award a fair share of resulting gain that is not limited to reimbursement of the capital funds, especially where the improved property results in no income to the community); Cross, \textit{supra} note 59, at 780 (where community funds are spent by one spouse to improve other spouse's separate property, the increased value of the separate property should be the measure of recovery). But cf. Jensen v. Jensen, 665 S.W.2d 107, 109 (Tex. 1984) (community is entitled to reimbursement for reasonable value of time and effort expended by either or both spouses to

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The Treatment of a Professional Degree at Dissolution

Not all improvements in earning capacity that occur during marriage, however, should be characterized as community property and evaluated upon dissolution. For example, in *In re Marriage of Hall*, the spouses married while both were medical students. They attained their medical doctorates in the same year; apparently, neither postponed training on behalf of the other. The husband went into private practice and enjoyed a good reputation as a consultant; the wife pursued an academic career, published widely, and became known as one of the top ten authorities in the nation in her field. At the time of their dissolution, each had been out of school well over a decade. When the trial court found that the husband had goodwill but that the wife, being salaried, did not, the husband appealed. One of his contentions was that his wife's future earning potential was an asset that should offset his goodwill.

The *Hall* court declined to find, on those facts, that future earning potential was an asset that could be used to offset goodwill. The court did, however, cite to *Washburn* while emphasizing the importance of future earning potential, and found that it was a substantial factor to be considered in making a just and equitable property division.

If the husband in *Hall* made sacrifices to further his wife's earning potential, those sacrifices were undoubtedly reciprocated by his wife. Additionally, he had already benefited, over the years, from any sacrifices made to further her career. Based on those facts, the supreme court properly declined to treat the wife's future earning capacity as a marital asset. Mechanisms already exist in the Washington dissolution act to reach a just and equitable result in such cases. But in cases such as *Washburn*, where the community expends funds or labor to enhance the earning capacity of only one spouse, or where one spouse's earning capacity will be suddenly and substantially enhanced after the marriage due to efforts made during the marriage, it becomes important to evaluate the enhanced earning capacity as property in which a community interest exists.


97. Id. at 237–38, 692 P.2d at 176.
98. Id. at 238, 692 P.2d at 176–77.
99. Id. at 247, 692 P.2d at 181.
100. Id. at 247–48, 692 P.2d at 181–82.
102. Another example is instructive. Consider an apprentice carpenter who becomes a master while remaining continuously employed. The position is acquired at no cost to the community, and it is likely that the master carpenter's spouse will already have benefited from the gradually enhanced earning capacity during the marriage. As in *Hall*, there is no need to characterize the carpenter's enhanced
4. Policy Considerations

For psychological, social, and economic reasons, a division of property that is based on the professional's enhanced earning capacity is preferable to a maintenance award. First, there are psychological costs associated with maintenance. Maintenance does not reflect the equitable positions of the parties relative to each other. On the contrary, a belief that one spouse depends on the other for support has traditionally been implicit in the award. Thus, it very often places the recipient spouse in a subservient position psychologically.

Anger, disappointment, or resentment might motivate a payor spouse to delay payment under a maintenance order. Such feelings may also serve as disincentives to the payor to work at full potential, in order to avoid precipitating an upward modification of the award. Moreover, ineffective enforcement and the potential for downward modification can have devastating effects on the recipient spouse's financial security, which, in turn, may wreak havoc on that spouse's emotional well-being. Such considering earning capacity as community property. See Comment, 'Til Degree Do Us Part, supra note 1, at 291 n.86. But cf. Weitzman, supra note 77, at 1220 (apprenticeship, union membership, on-the-job training, work experience, job security and senior rights are career assets that should be identified as community property); Comment, A Property Theory of Future Earning Potential in Dissolution Proceedings, 56 WASH. L. REV. 277, 284–85 (1981) (advocating adoption of a general property theory of future earning potential).

103. Compare WASH. REV. CODE § 26.09.090(1) (1983) (court may grant maintenance in such amounts and for such periods as it deems just) with WASH. REV. CODE § 26.09.080 (1983) (court shall make such disposition of the property as shall appear just and equitable).

104. See Kelso v. Kelso, 75 Wn. 2d 24, 448 P.2d 499 (1968). Under the provisions of the 1973 statute, need is not an essential criterion in awarding maintenance, but it underlies at least three of the six factors the trial court is to consider. WASH. REV. CODE § 26.09.090 (1)(a), (b), (e) (1983).

105. D. CHAMBERS, MAKING FATHERS PAY 73 (1979) ("The man who used his wife's access to money during marriage as a way of keeping her servile and dependent may maintain this pattern after divorce . . . . Unpredictability in payments induces anxiety in the woman and is thus a source of power for the male, assuring him at once of her dependence on him and her comparative lesser worth."); Nagel & Weitzman, Women as Litigants, 23 HASTINGS L.J. 171, 189 (requesting support payments can be degrading paternalistic procedure even when support is considered income accrued as a result of inadequately compensated work and payment for obtaining rehabilitative education or training). Some of these feelings are evident in the briefing on behalf of Ms. Washburn. See Reply Brief of Appellant Marigail Washburn at 17, In re Marriage of Washburn, 101 Wn. 2d 168, 677 P.2d 152 (1984) ("An award of maintenance . . . does not address the issue of her contribution and sacrifice . . . . Marigail is not looking for help from Jerry. She is entitled to a property award . . . .") (emphasis added).


107. In re Marriage of Horstmann, 263 N.W.2d 885, 892 (Iowa 1978) (husband complains that potential for increase in maintenance from nominal one dollar per year will loom over him and may deter him from certain undertakings).

sequences should be avoided, particularly where the recipient has an interest in the subject asset, the professional degree, as a matter of right.

In contrast, a property division has the psychological advantage of closure. Though there may be installment payments to make, it is a clean break in the sense that both parties know their financial positions. A sum certain is due, and there is no concern about modification.

Another policy concern is that social and economic displacement costs are likely to be higher under a maintenance order than under a judgment that properly identifies and divides all of the marital property. A number of studies have shown that after divorce, men generally are more financially secure than women. For instance, Weitzman's 1978 study in Los Angeles County revealed the striking fact that within the first year after divorce, men experienced a forty-two percent improvement in their standard of living while women experienced a seventy-three percent loss. Major factors contributing to this disparity are inadequate spousal support awards and ineffective enforcement of awards.

This disparity is likely to be more acute for long-term homemakers or young mothers with no work experience than it is for women who have successfully supported a husband through professional school. The latter group, however, will also be affected by these economic realities. Many of

Eckman, supra note 106, at 93-94 (difficulties in securing credit and making long-range plans due to noncompliance by fathers with child support orders). The enforcement problems for child support are analogous to those for spousal support.


110. Weitzman, supra note 77, at 1251.

111. Maintenance is awarded in only 14.9% of all cases. Bureau of the Census, U.S. Dep't of Commerce, Current Population Reports, Series P-23, No. 124, Child Support and Alimony: 1981 (Advance Report) 2 table A (1983). Of those women awarded maintenance, only 43.5% received full payment; 32.6% received no payments. Id. The mean amount received in 1981 was $3,000. Id. at 2. See also Albrecht, supra note 109, at 65-66; Weitzman, supra note 77, at 1253-56.

Another reason for the post-divorce wealth disparity is the "discounted 'woman's wage,'" Hunter, supra note 109, at 21, which has been most recently reported to be at 64 cents to every dollar earned by men. Narrowing the Wage Gap, Time 41, col. 1 (Nov. 12, 1984). See generally M. Glendon, supra note 77, at 51, 130-32, 192-95. Also crucial is the fact that women generally are awarded custody of minor children; thus, their support obligations increase while men's decreases. Child support awards, notoriously inadequate and difficult to enforce, do little to ameliorate the woman's dilemma. See generally Hunter, supra note 109; Krause, Reflections on Child Support, 17 Fam. L.Q. 109 (1983). Much has been written documenting the woman's journey from divorce to poverty and welfare. See, e.g., McDonald & Diehl, Women and Welfare, 14 Clearinghouse Rev. 1036 (1981); Pearce, The Feminization of Poverty: Women, Work and Welfare, 11 Urb. & Soc. Ch. Rev. 28 (1978); Staff of House Comm. on Ways and Means, 98th Cong., 1st Sess., Background Material on Poverty XII, XIV-XV, 51-59, 61-62, 77-90, 130-40 (Comm. Print 1983).
them are likely to be supporting young children, particularly if the divorce occurred within a few years after the husband began his career.112

An award properly based on the supporting spouse’s expectation of a fair return on the investment in the jointly acquired professional degree will alleviate some of the burdens on families and the social welfare system.113 There must be a recognition of the social upheaval and economic injustice that results from a failure to identify and distribute equitably all of the family assets in a dissolution proceeding.

A final policy consideration is that identifying the supporting spouse’s award as property will reduce judicial and administrative costs. A division of property is resolved within the divorce proceeding. It is a judgment like any other, that may not be revoked or modified unless grounds for reconsideration or a new trial are shown within the appropriate statutory time limits.114 Enforcement may be had by writ of execution on real or personal property.115

In contrast, under a maintenance order, the potential exists for further hearings on a motion for modification116 or to collect delinquent payments.117 Also, if support enforcement fails, the government must bear the costs of aid to families in need.118 These problems are exacerbated by the high divorce rate.119 Judicial and administrative efficiency are better served by the finality of a division of property.

5. Summary

The trial judge needs to know what constitutes property available for distribution.120 After identifying all the property, the trial court must deter-

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112. Ms. Washburn, for example, is the mother of a child born in April of 1979, nearly a year after Mr. Washburn’s graduation in June of 1978. The child was two years old when the decree of dissolution was entered on June 2, 1981. See Washburn, 101 Wn. 2d at 171, 677 P.2d at 154. Custody is with the mother. Decree of Custody, Visitation, Child Support and Property Division at 2, In re Marriage of Washburn, No. 81-3-00368-2 (Wash. Super. Ct. Snohomish Co. March 2, 1981).


An excellent example of the confusion that can result from an ambiguous identification of a dissolution award is the controversy resulting from In re Marriage of Freedman, 35 Wn. App. 49, 665 P.2d 902, review denied, 100 Wn. 2d 1019 (1983). In Freedman, the court of appeals upheld a trial
mine the character of the property as community or separate.\textsuperscript{121} Then, the court can place a value on the property and exercise its discretion to make a fair and equitable distribution.\textsuperscript{122}

When a court applies this process in the professional degree context, it is preferable that it identify the supporting spouse’s interest as property rather than grant maintenance.\textsuperscript{123} Where spouses have jointly invested time,

court’s creation of an award labeled spouse’s economic benefit expectancy (“SEBE”) to compensate a wife for her interest in the goodwill of her husband’s law practice. The court held that there was “no magic” in the label applied to the award. 35 Wn. App. at 51, 665 P.2d at 904; see also In re Marriage of Hadley, 88 Wn. 2d 649, 658, 565 P.2d 790, 795 (1977) (label applied to the award is not controlling; ultimate question is whether result is just and equitable), cited with approval in Washburn, 101 Wn. 2d at 182, 677 P.2d at 160. Since Freedman, the SEBE doctrine has been raised in at least two appeals of dissolution cases involving professional goodwill. See In re Marriage of Hall, 103 Wn. 2d 236, 240, 692 P.2d 175, 177 (1984); In re Marriage of Carlton, No. 82-3-01132-6, slip op. at 2 (Wash. Super. Ct. Kitsap Co. Apr. 16, 1984), appeal docketed, No. 78-11-2-II (Wash. Ct. App. May 11, 1984). The fallout of Freedman is also discernible in the failure of the Washburn court to establish clear guidelines as to the identification of the supporting spouse’s award. Brief of Amicus Curiae Professor Luvern V. Rieke, supra, at 12.

The problem in these cases is that the federal and state family law system is premised on the identification of dissolution awards as maintenance or property. Practitioners and litigants need to know whether an award is maintenance or property, so that they will know how it is to be enforced or taxed, or if it can be terminated, modified, or discharged in bankruptcy. See Inker, Walsh & Perocchi, Alimony and Assignment of Property: The New Statutory Scheme in Massachusetts, 11 Fam. L.Q. 59, 69 (1977). Divorce reform has not yet reached the stage of a unified “post-marital transfer payment,” although that may be in the future. See H. Krause, Family Law in a Nutshell §§ 30.1, 31.1–2 (1977). For further illustration of property/maintenance ambiguity problems, see Kinne v. Kinne, 82 Wn. 2d 360, 510 P.2d 814 (1973); Thompson v. Thompson, 82 Wn. 2d 352, 510 P.2d 827 (1973); Wagner v. Wagner, 25 Wn. App. 439, 607 P.2d 1251, rev’d, 95 Wn. 2d 94, 621 P.2d 1279 (1980).


122. In Washington, it is left to the discretion of the trial judge to determine how property is to be equitably divided, after its character and value have been ascertained. Wash. Rev. Code § 26.09.080 (1983). However, some case law suggests that where property is found to have a community character, a trial court may not award less than one-third of the value of the property to either spouse, in the absence of significant statutory factors or equities. In re Marriage of Dessauer, 97 Wn. 2d 831, 835, 838–39, 650 P.2d 1099, 1100–03 (1982) (affirming award of 75% of value of community property to wife, where her earning capacity was limited due to her health, age, and sex), overruled on different grounds, as discussed supra note 89; Rehak v. Rehak, 1 Wn. App. 963, 966, 465 P.2d 687, 689 (1970) (affirming award of virtually all of community property to wife, where husband had significant separate property); see also In re Marriage of Donovan, 25 Wn. App. 691, 696, 612 P.2d 387, 390 (1980) (affirming award to wife that was twice as great as award to husband, where difference in future earning potential was significant).

123. Because maintenance awards are granted much more often to wives than to husbands, it is possible that labeling the award maintenance would unfairly discourage a husband who supported his wife during her professional education from claiming any compensation. This may partially explain why so few husbands have pursued such an award. See supra note 2; see also infra note 140.

In Washington, property awards are generally favored over maintenance. Like many other states,
funds, or labor into the acquisition of a professional degree, the court then should characterize the property as community. When the Washburn court did not clearly identify the supporting spouse's interest as a property right, it invited confusion and a lack of predictability at the trial court level. As a result, settlements are discouraged and the judicial system's reliability and efficiency are needlessly impaired.

B. Valuation of the Interest

The Washburn decision is also flawed by its apparent alliance with the line of cases that employs a restitution theory of valuing professional degrees. Those cases grant out-of-pocket expenses and/or the cost of lost opportunities to the supporting spouse, but refuse to structure a maintenance award for purposes of advancing that spouse's own career goals. See Washburn, 101 Wn. 2d at 180 n.4, 677 P.2d at 159 n.4; In re Marriage of Fernau, 39 Wn. App. 695, 705, 694 P.2d 1092, 1099 (1984); Roberto v. Brown, 107 Wis. 2d 17, 318 N.W.2d 358 (1982). However, such an award should not eliminate the supporting spouse's vested interest in the student spouse's professional degree. For example, if a husband supported his wife during ten years of medical training, but his career choice of architecture would require only five years of training, her support of him during that period would not be adequate compensation. Thus, after valuing the professional degree acquired during the marriage and assessing his proper interest, a court could use his projected educational costs to offset his interest in the medical degree. For a discussion of valuation methods, see infra notes 143-56 and accompanying text.

If a court makes the less preferred decision to identify the award as maintenance, the amount of maintenance granted should be tied by means of a percentage escalation clause to the student spouse's expected increase in ability to pay. See, e.g., In re Marriage of Fernau, 39 Wn. App. 695, 698, 694 P.2d 1092, 1095 (1984). The use of escalation clauses in spousal maintenance awards has never been expressly approved by the Washington appellate courts, although their use has been approved tacitly and in dicta. See, e.g., Verde v. Verde, 78 Wn. 2d 206, 471 P.2d 84 (1970); Jensen v. Jensen, 54 Wn. 2d 473, 341 P.2d 882 (1959); Berry v. Berry, 50 Wn. 2d 158, 163-64, 310 P.2d 223, 226 (1957); Dillon v. Dillon, 34 Wn. 2d 12, 207 P.2d 752 (1949). See generally Annot., 19 A.L.R.4th 830 (1983).

125. Several courts describe such an award as "reimbursement alimony." See, e.g., Mahoney v. Mahoney, 91 N.J. 488, 453 A.2d 527 (1982); Reiss v. Reiss, 195 N.J. Super. 150, 478 A.2d 441 (1984). But cf. In re Marriage of Horstmann, 263 N.W.2d 885, 891 (Iowa 1978) (affirming valuation based on cost, which wife did not appeal; but other methods could have been used).
nance or property award that considers the expectation interest of the supporting spouse in the enhanced earning capacity of the student spouse.

1. The Opinion: Inappropriate Use of Restitution

The Washburn court left ambiguous the valuation issue, just as it did the issue of identifying the nature of the interest. It is unclear whether the court meant what it said, or whether it meant what it did. The court said that trial courts must consider the earning potential of the student spouse in determining compensation to the supporting spouse. Nevertheless, it affirmed an award to Ms. Gillette in which that factor did not play any part. A remand to the Gillette trial court for consideration of the student spouse's earning potential would have been a better result.

Also, by reversing the one dollar maintenance award, the court limited Ms. Gillette's recovery to restitution. Restitution is not an appropriate means by which to fulfill the court's stated intention of allowing the supporting spouse to share temporarily the lifestyle he or she helped the student spouse to attain.

The goal of restitution is to return both parties to the positions they held prior to entering into the transaction. Restitution is an equitable remedy that generally is applied to contracts that have been discharged due to impossibility or frustration of purpose. It is also applied to quasi-contracts, contracts implied in law when the parties have made no explicit agreement in advance of performance.

None of these situations is analogous to the joint acquisition of a professional degree. The student spouse in fact received the degree and obtained the enhanced earning capacity. Therefore, the contract's purpose

126. Washburn, 101 Wn. 2d at 180, 677 P.2d at 159; supra note 33 and accompanying text.
127. See Washburn, 101 Wn. 2d at 172–73, 677 P.2d at 155 (citing Conclusion of Law 4, Clerk's Papers 75–76.) The trial court stated that $3200 of the award was based on Ms. Gillette's direct contributions to the community during the educational period; that would correspond to the supreme court's first factor. See supra note 33 and accompanying text. An additional $12,000 was based on the wife's reduced living standards and reduced opportunity to accumulate property; that would correspond to the court's second and third factors. Id. The remainder was for inflationary effects.
128. The award the trial court gave Ms. Gillette closely resembles the award in In re Marriage of Horstmann, 263 N.W.2d 885 (Iowa 1978). In Horstmann, the court made a property award based on the amounts expended by the wife, and a one dollar maintenance award. Id. at 891–92. Applying an investment analogy to such a remedy, the property award serves as a return of the wife's principal; the maintenance, which can be modified as the husband's earnings increase, gives the wife the potential for realizing a return on her principal.
129. See Washburn, 101 Wn. 2d at 179, 677 P.2d at 158.
131. Id.
was not frustrated; fulfillment is still possible. Furthermore, an analogy to quasi-contract is inappropriate since a mutually beneficial enterprise was contemplated by both parties in advance of performance. In the *Gillette* case, the husband explicitly promised his wife that she would never have to work again after the degree was obtained.\(^{133}\) An explicit promise is not necessary, however, because the conduct of the parties is sufficient evidence of their mutual intent to increase their family wealth.\(^{134}\) Thus, restitution is not an analytically appropriate remedy.

Moreover, restitution is an inadequate remedy because it fails to recognize the supporting spouse’s expectation interest.\(^{135}\) To the extent that the current value of the degree exceeds its cost, restitution to the supporting spouse is inadequate and unjust.\(^{136}\)

2. The Economic Partnership

Modern marriage is a partnership of coequals.\(^{137}\) The labors of the

\(^{133}\) See infra notes 137–42 and accompanying text. Also, the presumption of community property weighs against a conclusion that the benefits of their efforts should accrue only to the student spouse. See supra notes 91–95 and accompanying text.


\(^{135}\) See, e.g., Brigner, *supra* note 1, at 44.

One commentator succinctly described the injustice that results from a failure to properly assess enhanced earning capacity: “Only by rewarding a share of the harvest—which in these cases is real, bountiful, and capable of estimation—can the wife be fairly compensated . . . what court would repay the farmer for many lost seasons of industry in successful harvests, by awarding him only the value of his seeds?” Brigner, *supra* note 1, at 44.

A restitution award may be appropriate in the rare case where the divorce occurs within a year or two after the educational period begins. Depending on the length of the total educational endeavor, the supporting spouse’s relatively brief investment might not have been a substantial factor in the attainment of the advanced degree.

\(^{136}\) Equality of contribution and sharing is the cornerstone of the community property system. Cross, *supra* note 59, at 733–34 & n.8. Also, a majority of family law commentators writing about both community property and equitable distribution systems advocate this position. See, e.g., Bruch, *supra* note 54, at 101 (1983); Foster & Freed, *Marital Property and the Chancellor’s Foot*, 10 Fam. L.Q. 55,
spouses entitle each of them to manage and share equitably in the proceeds of their mutual enterprises. When one spouse supports the other during the acquisition of a professional education, the marital partners demonstrate an intent to increase the general family wealth. The enhancement of the student spouse's earning capacity as an individual, rather than as


But see M. GLENDON, NEW PROPERTY, supra note 77, at 65–67 (partnership concept may be meaningful in ongoing marriage but should not apply at time of divorce); G. GILDER, SEXUAL SUICIDE 95–109 (1973) (preserving male domination and female dependence in economic matters best promotes stability of families and society; female careerism is costly to society because women will not be creating and maintaining families and thereby socializing men); Glendon, Is There a Future for Separate Property?, 8 Fam. L.Q. 315, 327 (1974) (individualistic values may eventually outweigh the community aspect of marriage, leading to an emphasis on separate property laws rather than a marital partnership model); Oldham, Is the Concept of Marital Property Outdated?, 22 J. Fam. L. 263, 268, 286, 288 (1974) (with a few exceptions, marriages are not "true partnerships" until a child is born or until couple has been married at least five years, since sharing principles do not govern decisions in a short, childless marriage).

As to Professor Oldham's thesis, it would clearly be poor social policy to put pressure on a newlywed woman to have a child as soon as possible after the marriage, if she had no other way to "secure" her claim to any shared marital property. She might thereby delay developing her own career potential, and then, should the marriage fail, her fall into the dizzying spiral of poverty experienced by female-headed families would only be exacerbated. Moreover, a couple's emotional and financial decision to have a child should be subject only to the highest motivations, rather than being muddied by an added factor that would profoundly alter the financial relationship between the spouses. In any event, it should be noted that Oldham acknowledged that "when one spouse supports the other through professional school" an equitable award should be made. Id. at 283.


The premise of the common law system, in contrast, was that a married couple was a unit, controlled by the husband. "By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and cover she performs every thing . . . ." 1 W. Blackstone, Commentaries *442 (emphasis omitted).

139. For a discussion of community property principles, see supra notes 59, 91–95 and accompanying text. For a philosophical discussion of the labor theory of property acquisition, see L. Becker, Property Rights 32–56, 100–01 (1977).

The egalitarian concept of shared responsibilities and rights within the family unit has arrived in the popular culture and will not be dislodged. See generally Here Come the Baby Boomers, U.S. News & World Rep. 68 (Nov. 5, 1984) (discussion of "fundamental changes" in attitudes toward marriage and sex roles toward more egalitarianism); Meislin, Poll Finds More Liberal Beliefs on Marriage and Sex Roles, Especially Among the Young, N.Y. Times, Nov. 27, 1977, at 75, col. 1 (only 27% of respondents aged 18 to 28 preferred traditional roles, as opposed to 59% of respondents over age 45), noted in Weitzman, Changing Families, Changing Laws, 5 Fam. Advoc. 2, 7 (Summer 1982). Decisions as to how family members' resources will be expended are now typically made jointly, with an express or implied intent to do that which will yield the greatest social, economic and psychological benefits to all members of the family. See Krauskopf, supra note 1, at 386–88.
a family member, is secondary.\textsuperscript{140} It would be unjust to describe the supporting spouse’s services as gifts or labors of love,\textsuperscript{141} since that which is produced by the community should be shared by the community. Taking into account the intent of the parties, the just result is to award to the supporting spouse an expectation interest, that is, a share of the current value of the investment in the student spouse’s human capital.\textsuperscript{142}

IV. A VALUATION PROPOSAL: MODIFIED EXPECTATION AWARD

Valuation of the supporting spouse’s interest in the enhanced earning capacity may be difficult or may involve some speculation. This does not justify, however, denying the supporting spouse an appropriate remedy.\textsuperscript{143} A

\textsuperscript{140} See Woodworth v. Woodworth, 126 Mich. App. 258, 337 N.W.2d 332, 334 (1983). The more typical choice to invest in the husband’s education shows a recognition that an investment in his human capital is likely to be more lucrative. For a discussion of the gap between men’s and women’s earnings, see supra note 111.

\textsuperscript{141} See Foster & Freed, Spousal Rights in Retirement and Pension Benefits, 16 J. Fam. L. 187, 187 (1978); Krauskopf, supra note 1, at 394.

Some courts have implied that this economic model of marriage demeans the devoted, giving, love relationship that marriage also represents in our culture. See, e.g., DeWitt v. DeWitt, 98 Wis. 2d 44, 296 N.W.2d 761 (Ct. App. 1980) (superseded by statute as stated in In re Marriage of Lundberg, 107 Wis. 2d 1, 318 N.W.2d 918, 922 (1982)). In DeWitt, the court held that the cost approach valuation of a degree was inappropriate because “[i]t treats the parties as though they were strictly business partners, one of whom has made a calculated investment in the commodity of the other’s professional training, expecting a dollar for dollar return. We do not think that most marital planning is so coldly undertaken.” 98 Wis. 2d at 57, 296 N.W.2d at 767.

To see marriage in this light, as one of life’s highest moral and ethical commitments, is admirable in a non-legal setting. However, to carry those attitudes into the dissolution context is to tread a line dangerously close to the attitudes that underlay fault-based litigation, with its “unholy quadriga of collusion, condonation, connivance and recrimination.” Rieke, supra note 41, at 387–88. As Professor Shultz observed, “[l]ove does not exclude accountability or consequences. Obligation is inextricably interwoven with voluntariness. Intimacy can coexist with planning and choice; indeed today it must.” Shultz, Contractual Ordering of Marriage: A New Model for State Policy, 70 CALIF. L. REV. 204, 210 (1982).

\textsuperscript{142} For an original and sophisticated analysis of this point, see Krauskopf, supra note 1, at 381–82, 388–95. Professor Krauskopf draws interesting analogies to investments by managers in the careers of sports and entertainment figures. See also Weitzman, supra note 77, at 1210–12.

\textsuperscript{143} See Sullivan v. Sullivan, 134 Cal. App. 3d 634, 184 Cal. Rptr. 796, 814 (1982) (“The difficulty of determining the value of an economic interest in a [professional degree] is not a proper basis upon which to deny the existence of such an interest.”) (Zieberth, J., concurring in part and dissenting in part), rev’d, 37 Cal. 3d 762, 691 P.2d 1020, 209 Cal. Rptr. 354 (1984); Washburn, 101 Wn. 2d at 187, 677 P.2d at 163 (Rosolini, J., dissenting) (Courts “rarely deny a remedy for lost future earning capacity” in personal injury actions merely because “some speculation” is involved. “We should be equally hesitant to deny relief to a nonstudent spouse who has lost the economic potential of the partial value of the education that she helped to provide.”) (citing Peck & Hopkins, Economics and Impaired Earning Capacity in Personal Injury Cases, 44 WASH. L. REV. 351 (1969)). See also In re Marriage of Fleege, 91 Wn. 2d 324, 330, 588 P.2d 1136, 1140 (1979) (even though value of goodwill cannot be precisely determined, court should not be deterred from assigning it a reasonable value); In re Marriage of
number of workable solutions have been proposed, each based on capitalization of future earnings.144 Trial courts can adapt various formulas to the particular circumstances of each case to reach a just and equitable result.

The key element of any valuation method is that it should be prospective rather than retrospective.145 As with goodwill, the professional degree may be valued at what it is expected to generate in future dollars.146 That expectation should be modified, however, by the understanding that since the marriage has ended, neither spouse will receive the full benefit of his or her investment in the community assets. If the professional has begun practicing, an actual earnings base will exist upon which projections can be made.147 A body of economic and actuarial knowledge exists to adjust for factors such as market trends, conditions within a particular geographical area, or the desire to develop a particular specialty.148

The more difficult problem is to determine the portion of the projected future earnings that is attributable to the community's efforts during the

Lukens, 16 Wn. App. 481, 486, 558 P.2d 279, 282 (1976) ("fact that professional goodwill may be elusive, intangible, and difficult to evaluate is not a proper reason to ignore its existence . . . ."), review denied, 88 Wn. 2d 1011 (1977).

Valuation methods for intangible assets in dissolution law will evolve and mature as economic and legal theory develops, just as methods for valuing damages have evolved in tort law. See Peck & Hopkins, supra note 65, at 352–56.

144. See Fitzpatrick & Doucette, supra note 69 (capitalized present value of enhanced earning capacity, pro-rated by a fraction in which the numerator is the years of marriage during education and the denominator is the total years of education); Rosen & Burke, supra note 65 (capitalized present value of enhanced earning capacity, pro-rated); Schaefer, Wife Works Hard So Husband Can Go to Law School: Should She Be Taken In as a "Partner" when "Esq."


Compare discussion of escalator clause awards, supra note 123.

145. See Schaefer, supra note 144, at 93 & nn.78–79 (value is a prospective concept, based on the potential earning power that an entity possesses). Restitution is inappropriate because it is retrospective. See supra notes 126–36 and accompanying text.

146. Goodwill has been defined as the expectation of continued patronage. In re Marriage of Fleege, 91 Wn. 2d 324, 588 P.2d 1136 (1979). For goodwill valuation methods, see In re Marriage of Hall, 103 Wn. 2d 236, 243–45, 692 P.2d 175, 179–80 (1984) (five valuation methods described); In re Marriage of Freedman, 35 Wn. App. 49, 52, 665 P.2d 902, 905 (1983) (goodwill can be valued as a percentage of the income of the professional spouse, although it is an asset distinct from those separate earnings), review denied, 100 Wn. 2d 1019 (1983).

147. In Washburn, for example, both husbands had established an actual earnings history as professionals at the time of trial. Mr. Washburn had completed one year as a post-graduate intern and two years in practice. Mr. Gillette had completed nearly a year in practice. See supra notes 16–17 and accompanying text.

period of professional education. First, only the enhanced earning capacity should be considered; that is, one should determine the difference between what the student spouse would have made without the degree and that spouse's projected future earnings with the degree. Second, deductions should be made for significant post-divorce sources of future earnings, such as learning experiences at work or in continuing education programs, and the devotion, skill, and business acumen with which the professional builds a practice. On the other hand, the professional degree is a prerequisite to the exercise of such income-enhancing opportunities and abilities, so the degree should be given substantial weight. The question then becomes at what rate a professional education depreciates.

A. Valuation of the Enhanced Earning Capacity

This uncertainty can be avoided by an alternative approach to valuation. Courts could return the supporting spouse's investment on a year-for-year basis. Granting a year of return for every year of support makes it unnecessary to speculate as to the portion of the enhanced earning capacity's value in which a community interest exists. Under this proposal, the supporting spouse's interest in the enhanced earning capacity would extend into the professional's career for the same number of years that it took to acquire the degree. During the early years of the professional's career, however, the earnings will be relatively low. The community's investment in the degree will not have begun to pay out at its average rate of return. The following formula takes that factor into account.

149. It is these post-divorce sources of the professional's earnings that are really being referred to when courts confronted with this issue say they will not put a lien on future earnings. For further discussion on that point, see supra notes 73–76 and accompanying text.

150. Only one commentator has ventured a formula. See Schaefer, supra note 144, at 95–97. Schaefer proposes the use of a “sliding fraction” multiplier in which the numerator would be the total years of professional education and the denominator would be the number of years since the professional education was commenced. For example, the portion of a lawyer's first-year salary attributable to the lawyer's education would be 3/4; the portion of the second-year salary would be 3/5; etc.

151. These are difficult questions, but the element of speculation does not outweigh the importance of recognizing and assigning a value to the supporting spouse's property interest in the enhanced earning capacity. Every valuation involves a certain amount of speculation.

152. At least one court has endorsed such an approach, referring to it as a variation of the labor theory of value. Haugan v. Haugan, 117 Wis. 2d 200, 343 N.W.2d 796, 803 (1984).
The valuation approach proposed here can be best illustrated by referring to the Washburns' situation. First, Mr. Washburn's projected lifetime earnings should be capitalized at present value. Then, that figure should be divided by the number of years remaining in his work-life expectancy. This would result in the present value of the average annual salary for his professional work-life. A similar calculation should be made to obtain the present value of his average annual income as it would have been without the professional degree.\textsuperscript{153} Next, the difference between those two average annual incomes should be multiplied by the five years of Ms. Washburn's investment in her husband's professional training.\textsuperscript{154}

Thus, if the present value of Mr. Washburn's average annual income as a veterinarian were $35,000, and the present value of his average annual income without veterinary training were $20,000, the calculation would be:

\[(\$35,000-\$20,000) \times 5.0\ \text{years} = \$75,000\]

The community would have an interest in $75,000 of Mr. Washburn's enhanced earning capacity. It would then be left to the trial court's discretion to award Ms. Washburn an equitable share of that amount.\textsuperscript{155}

\section*{B. Deduction for Consumption}

If the marriage endured for some time after the education was completed, it is likely that the community would have already received a benefit from its investment, or that the supporting spouse can be at least partially compensated with an award of tangible assets.\textsuperscript{156} The community's interest in the

\textsuperscript{153} This figure would be relatively easy to calculate for college graduates who worked for some time before returning to professional school. In the case of the student whose post-secondary education was not interrupted by a period of employment, actuarial knowledge exists to project typical lifetime earnings for college graduates. See Fitzpatrick & Doucette, supra note 69, at 518–19; Rosen & Burke, supra note 65, at 26; Schaefer, supra note 144, at 93–94.

\textsuperscript{154} It appears from the facts as given in the opinion that the period was two or three months short of five years, including time spent as an intern. See Washburn, 101 Wn. 2d at 170–71, 677 P.2d at 154; supra note 16 and accompanying text. It will be assumed for the sake of this illustration to be exactly five years. A question courts should review on a case-by-case basis is whether a period of paid internship should be included in the period of education. If the internship is required in order to practice the profession, and the difference between the intern's salary and what a practicing professional earns is significant, it should probably be included as education time.

\textsuperscript{155} For a discussion of how that discretion is exercised in Washington, see supra note 122.

professional degree should still be assigned a value, but an amount representing consumption during the post-education period should be deducted from that value.

This could be calculated in at least two ways. The simplest method would be to offset a year of consumption with a year of investment. In the above example, then, if Mr. and Ms. Washburn had enjoyed two years of a higher standard of living after his education, the multiplier would be three instead of five, and the value of property subject to distribution would be $45,000. The weakness of this method is that it incorrectly assumes that during the early years of practice, the salary will be as great as the average annual salary over the professional's work-life, and that the opportunities for consumption will be as great per year as they will be when he actually attains that average annual salary.

A more accurate alternative for most cases would be to calculate the actual increased consumption opportunities of the community in the post-education period. For example, if Mr. Washburn's post-education salary were $25,000 per year, he would contribute $10,000 more to the community over a two-year period than he would have been able to contribute prior to earning the degree. If all of that added buying power were consumed by the community, then the property subject to distribution would be reduced from $75,000 to $65,000. Even if only a portion of the $10,000 were consumed, however, the deduction should be the same, since the remaining assets will appear in the community's accounting and be subject to equitable distribution in another form.

The weakness in this second method is that it relies on a comparison of the actual post-education salary with the projected value of the average annual income without the degree. It is impossible to know if the student spouse would have attained that average income at the same relative point in time. Until the professional reaches the mid-point of the salary cycle, however, this method is likely to be the better alternative.

C. Judicial Resolution

After a value is placed on the enhanced earning capacity, and a reduction for consumption, if appropriate, is made, the court will be in a position to make an equitable distribution of all the property.157 In most cases the student spouse will not yet have accumulated sufficient property to pay the award. Thus, the court can order that it be paid in installments or that payment be deferred for a period of time.158 Also, the court can order that

157. See supra note 122.
158. See, e.g., DeRuwe v. DeRuwe, 72 Wn. 2d 404, 433 P.2d 209 (1967); I. BAXTER, supra note 75, § 41:7(a) at 182.
the payments be protected by the purchase of a declining term life insurance policy.\textsuperscript{159} An effective alternative is to order the purchase of an annuity, if there are sufficient liquid assets to do so.

V. CONCLUSION

The professional degree is one example of the work-related assets that are becoming the primary forms of wealth in society. The Washburn court failed to identify the essential nature of a professional degree as property. The decision thus gives little guidance to trial court judges, who must know what constitutes property subject to distribution in order to structure the dissolution decree properly. A clear distinction between property and maintenance is also important to practitioners and parties, who need to know how to enforce their awards, whether the obligations created are dischargeable in bankruptcy, and what their tax responsibilities will be.

If the supporting spouse is a woman, she typically will not have the same access to wealth through employment as that of her former husband. Courts must recognize this social reality when they consider the future earning prospects of each spouse, as the Washburn court directed them to do.\textsuperscript{160}

Although it is not appropriate to evaluate enhanced earning capacity in all marital dissolutions, it is appropriate when a professional degree is acquired by the joint efforts of the marital partners. Fairness requires that the fruits of their labor be shared. To award restitution or no recovery is to promote injustice, since it denies the supporting spouse access to wealth that he or she helped to produce. The supporting spouse’s investment of labor and funds deserves to be compensated by an award based on expectation. The valuation method proposed here would provide for such an expectation award, while limiting the recovery to a year of return for every year of support.

\textit{Helen A. Boyer}


\textsuperscript{160} 101 Wn. 2d at 180, 677 P.2d at 159.