St. Mary's Law Journal

Volume 20 | Number 4 Article 6

1-1-1989

Should Your Spouse be Compensated for Putting you through School - Texas Says No; Is that Just and Right.

Darryl J. Silvera

COMMENTS

Should Your Spouse Be Compensated For Putting You Through School? Texas Says No; Is That Just And Right?

Darryl J. Silvera

I. INTRODUCTION

Manuel and Maria Frausto were married for over ten years.[1] In the early stages of their marriage, both were school teachers.[2] Eventually, both agreed that Manuel would attend medical school while Maria would con-

1. *See* Frausto v. Frausto, 611 S.W.2d 656, 657 (Tex. Civ. App.—San Antonio 1980, writ dism'd w.o.j.)(summary of facts of Frausto's divorce suit).
2. *Id.* at 658.

tinue her work in education.[3] Following Manuel's completion of his medical education, the couple had two children.[4] However, the Frausto's subsequently divorced.[5] Although there was no disagreement regarding custody of the children, the trial court's division of the marital estate was contested.[6] On appeal, the husband asserted that the trial court's order requiring him to pay $20,000 in future payments to Maria as reimbursement for educational expenses was invalid.[7] The court of appeals reversed the trial court and held that the wife was not entitled to the $20,000 as reimbursement because the husband's education was not community property subject to division on divorce.[8] The *Frausto* court acknowledged the reasoning used by courts of other jurisdictions,[9] but ultimately relied on the Texas Supreme Court's decision in *Nail v. Nail*[10] to declare that an educational degree is not property.

---

3. *Id.* Evidence at trial showed that a "considerable portion" of the marital expenses were paid by Maria. *Id.*

4. *Id.* During the marriage, two children were born in 1973 and 1975. *Id.*

5. *See id.* at 657-58 (wife appointed managing conservator). Despite Manuel's acquisition of a medical degree, he was unable to hold down a steady job. *See id.* at 658. Testimony elicited at trial indicated the husband's ability to be steadily employed was limited by physical injuries sustained to his legs. *See id.* The evidence further indicated that Manuel was a heavy spender and, at the time of the divorce, no substantial community estate existed. *See id.*

6. *See id.* at 657 (husband possessory conservator and ordered to pay child support). The divorce decree provides in pertinent part:

> The Court further finds that during the marriage the parties have invested approximately $40,000 in Respondent's medical education and that Respondent is now a medical doctor, licensed to practice medicine in the State of Texas. It is therefore,
>
> DECREED, that Respondent, Manuel Jesus Frausto, shall pay to Petitioner, Maria Lourdes N. Frausto, *as part of the division of the estate of the parties* and as reimbursement for Petitioner's share of the community expense for Respondent's education, the amount of $20,000.00 payable in the amount of $200.00 per month, plus interest at 9% per annum on the unpaid balance . . . .

Id. (emphasis added).

7. *See id.* at 658 (trial court's division apparently included medical education). The wife, among other things, received the family home, household furnishings and appliances, all personalty in her control, 1977 and 1969 Ford Mustangs, and all employment and retirement benefits. *See id.* at 657-58 n.2.

8. *See id.* at 659 (trial court can divide only estate of parties). The appellate court, relying on the Texas Supreme Court decision in *Nail v. Nail*, reasoned that the professional degree was not a property right. *See id.*; *see also* Nail v. Nail, 486 S.W.2d 761, 764 (Tex. 1972). In *Nail*, the court determined that professional goodwill was not property capable of division on divorce. *See id.* (goodwill of husband's medical practice not property subject to division).

9. *See* Frausto v. Frausto, 611 S.W.2d 656, 658 (Tex. Civ. App.—San Antonio 1980, writ dism'd w.o.j.)(at time of decision no Texas cases on point). The *Frausto* court looked to California and Colorado, both of which held professional educations nondivisible at divorce. *See In re* Marriage of Aufmuth, 152 Cal. Rptr. 668, 672 (Ct. App. 1979)(spouse's education not subject to division); Todd v. Todd, 78 Cal. Rptr. 131, 135 (Ct. App. 1969)(legal education intangible and not community property); *In re* Marriage of Graham, 574 P.2d 75, 77 (Colo. 1978)(master's degree in business not property capable of division in divorce proceeding).

10. 486 S.W.2d 761 (Tex. 1972).

The *Nail* court held that the personal goodwill of a spouse's medical practice, although accruing during the marriage, was not property subject to division upon divorce.[11] More recently, Texas appellate courts have held that in certain instances, professional goodwill is property capable of being divided in divorce proceedings.[12] The continuing validity of the *Frausto* decision is uncertain because the Texas Supreme Court has yet to address the issue of whether an educational degree is property. Regardless of whether a degree is defined as property or used as a factor in dividing the parties estate, there still remains the issue of how to ascertain the value of an education. To provide consistent divisions of community property in the future and, more importantly, to recognize the financial contribution made to an education of a spouse, Texas should adopt a statutory right of reimbursement for educational expenses.[13]

This comment will explore the historical development of property rights in professional/graduate degrees, current Texas law and what lies ahead in the future. Initially, the definition and disposition of community property under Texas law will be examined. A concise explanation of a Texas trial court's jurisdiction to divide the marital estate will follow. Next, the leading cases addressing the character of educational degrees in both community and noncommunity jurisdictions outside Texas will be discussed. In addition, California's enactment of a statutory provision dealing with property interests in degrees will be examined. Finally, this comment will state the reasons why Texas should adopt a statutory remedy similar to one found in the California Civil Code.

---

11. *See id.* at 764 (goodwill of medical practice personal, not commercial). Husband and wife were married roughly 26 years prior to their divorce. *See id.* at 761. Husband obtained his medical degree and was licensed to practice opthamology. *See id.* at 762. Although the husband's earning capacity was $52,000 per annum, the community estate contained little, if any, liquid assets. Besides the marital house, its furnishings, two cars and a boat, the only other marital asset was the husband's medical practice. As part of the property division, the trial court awarded the wife $40,000 as her interest in her husband's medical practice payable in monthly installments of $400.00 each for the first two years and $300.00 per month thereafter until the remaining balance was paid in full. *See id.* The Texas Supreme Court recognized that only marital property is subject to division and reasoned that the goodwill, the asset of the practice, was not property and therefore not divisible. *See id.* at 763-64.

12. *See* Eikenhorst v. Eikenhorst, 746 S.W.2d 882, 889 (Tex. App.—Houston [1st Dist.] 1988, no writ)(goodwill in form of stock appreciation divisible upon divorce); Finn v. Finn, 658 S.W.2d 735, 739 (Tex. App.—Dallas 1983, writ ref'd n.r.e.)(goodwill of spouse's law firm not property).

13. *Compare* Frausto v. Frausto, 611 S.W.2d 656, 659 (Tex. Civ. App.—San Antonio 1980, writ dism'd w.o.j.)(medical education not property) *and* Nail v. Nail, 486 S.W.2d 761, 764 (Tex. 1972)(goodwill not property) *with* Eikenhorst v. Eikenhorst, 746 S.W.2d 882, 889 (Tex. App.—Houston [1st Dist.] 1988, no writ)(goodwill evidenced by stock appreciation divisible on divorce) *and* Finn v. Finn, 658 S.W.2d 735, 740-41 (Tex. App.—Dallas 1983, writ ref'd n.r.e.)(two prong test to determine if professional goodwill is property).

II. COMMUNITY PROPERTY AND METHODS OF DISPOSITION IN TEXAS

Article XVI, section fifteen of the Texas Constitution defines separate property as all property owned by a person before marriage[14] and property subsequently acquired by devise,[15] descent,[16] or gift.[17] Property acquired during marriage, other than property defined as separate, is community property.[18] The classification of property generally arises upon death or di-

---

14. TEX. CONST. art. XVI, § 15 (1876, amended 1987). Section 15 provides:

> All property, both real and personal, of a spouse owned or claimed before marriage, and that acquired afterward by gift, devise or descent, shall be the separate property of that spouse; and laws shall be passed more clearly defining the rights of the spouses, in relation to separate and community property . . . .

Id. See generally Hughes, *Community-Property Aspects of Profit-Sharing and Pension Plans in Texas—Recent Developments and Proposed Guidelines for the Future*, 44 TEX. L. REV. 860, 862-63 (1966)(definition of community property in exclusionary terms); McKnight, *The Constitutional Redefinition of Texas Matrimonial Property As It Affects Antenuptial and Interspousal Transactions*, 13 ST. MARY'S L.J. 449, 457 (1982)(analysis of Texas Constitution article XVI, section 15); McKnight, *Matrimonial Property*, 26 SW. L.J. 31, 35 (1972)(no correlative constitutional definition of community property).

15. *See* TEX. PROB. CODE ANN. § 3(h) (Vernon 1980)(devise is testamentary disposition of personal or real property); *see also, e.g.*, Estate of Hanau v. Hanau, 721 S.W.2d 515, 518 (Tex. App.—Corpus Christi 1986)(disposition of corporate stock by will), *aff'd in part, rev'd in part*, 730 S.W.2d 663 (Tex. 1987); Harper v. Swoveland, 591 S.W.2d 629, 630 (Tex. Civ. App.—Dallas 1979, no writ)(property devised by will vests in devisee at testator's death); Federal Underwriters Exch. v. Walker, 134 S.W.2d 388, 395 (Tex. Civ. App.—Austin 1939, writ dism'd by agr.)(property must be part of testator's estate to be devised).

16. *See* TEX. CONST. art. XVI, § 15 (1876, amended 1987)(property acquired by descent during marriage remains separate property). Descent is the acquisition of property by operation of law. *See* TEX. PROB. CODE ANN. § 45 (Vernon 1980)(descent and distribution provision); *see also* Dopps v. Dopps, 636 S.W.2d 723, 725 (Tex. App.—Corpus Christi 1982, no writ)(one-half interest in real property by descent and distribution vested in children as heirs at law); Anderson v. Anderson, 535 S.W.2d 943, 947 (Tex. Civ. App.—Waco 1976, no writ)(one-half of community funds in joint bank account automatically vested upon death in heirs at law); *In re* Copeland's Estate, 179 A.2d 475, 479 (Vt. 1962)(descent is taking by succession or devolution of property by law).

17. *See* TEX. CONST. art. XVI, § 15 (1876, amended 1987)(defines separate property). A gift is a gratuitous and voluntary transfer of property. *See* Hilley v. Hilley, 161 Tex. 569, 575, 342 S.W.2d 565, 569 (1961)(defines gift); *see also* Kiel v. Brinkman, 668 S.W.2d 926, 930 (Tex. App.—Houston [14th Dist.] 1984, no writ)(use of "free of cost" sufficient definition of gratuitous); Bradley v. Bradley, 540 S.W.2d 504, 512 (Tex. Civ. App.—Fort Worth 1967, no writ)(consideration in form of down payment not gift).

18. TEX. FAM. CODE ANN. § 5.01(b) (Vernon 1975)(definition of community property); *see, e.g.*, Lee v. Lee, 112 Tex. 392, 403, 247 S.W. 828, 832-33 (1923)(property and gains acquired during marriage community property); Allen v. Allen, 704 S.W.2d 600, 604 (Tex. App.—Fort Worth 1986, no writ)(beauty salon capitalized with community funds deemed community property); *In re* Marriage of York, 613 S.W.2d 764, 770 (Tex. App.—Amarillo 1981, no writ)(business profits earned during marriage community property); Maben v. Maben, 574 S.W.2d 229, 232 (Tex. Civ. App.—Fort Worth 1978, no writ)(wife's earnings from separate business and husband's salary both community property); Horlock v. Horlock, 533

vorce when it becomes necessary to make a valuation and division of spousal interests in specific property.[19] Upon the death of a spouse, the deceased's property interest is subject to testamentary[20] or nontestamentary disposition.[21] Where the marriage, however, is dissolved by divorce, the spouses'

S.W.2d 52, 60 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ dism'd)(stocks acquired during marriage presumed community property); Logan v. Logan, 112 S.W.2d 515, 524-25 (Tex. Civ. App.—Amarillo 1937, writ dism'd)(all property earned during marriage including rents, profits, revenues held community property). *See generally* Bell, *The Evolution of the Community-Out-First Presumption: A Matter of Trust*, 24 S. TEX. L.J. 191, 201 (1983)(commingled property presumed community property); McKnight, *Matrimonial Property*, 21 SW. L.J. 39, 40-47 (1967)(general overview of division and control of community property).

19. *See, e.g.*, Berry v. Berry, 647 S.W.2d 945, 947 (Tex. 1983)(valuation and partition of retirement benefits at time of divorce); Eggemeyer v. Eggemeyer, 554 S.W.2d 137, 138 (Tex. 1977)(divorce suit contesting division of realty); Nail v. Nail, 486 S.W.2d 761, 764 (Tex. 1972)(suit contesting type of property subject to division); Busby v. Busby, 457 S.W.2d 551, 552 (Tex. 1970)(divorce action seeking partition of military benefits); Marshall v. Marshall, 735 S.W.2d 587, 598 (Tex. App.—Dallas 1987, no writ)(division of debts, household furnishings, and automobile). Valuation of the husband's and wife's property also arises in estate matters due to the death of one spouse. *See, e.g.*, Maples v. Nimitz, 615 S.W.2d 690, 691 (Tex. 1981)(suit by wife's estate to recover community property retained by husband's estate); Valdez v. Ramirez, 574 S.W.2d 748, 749 (Tex. 1978)(characterization of nonemployee's interest upon death in community benefits); Williams v. McKnight, 402 S.W.2d 505, 506 (Tex. 1966)(determination of widow's interest in joint bank account funds); *see also* Greene, *Valuation and Inclusion of Community Property in the Gross Estate: A New Approach*, 15 HOUS. L. REV. 93, 96 (1977)(extent and valuation of deceased's estate); Thiede, *The Community Property Interest of the Non-Employee Spouse in Private Employee Retirement Benefits*, 9 U.S.F.L. REV. 635, 636 (1975)(interests in retirement benefits valued upon dissolution of marriage, death of non-employee spouse, and death of employee spouse).

20. *See* TEX. PROB. CODE ANN. § 37 (Vernon Supp. 1988)(distribution of property by intestacy). Section 37 provides for the distribution of a deceased's estate:

> When a person dies, leaving a lawful will, all of his estate devised or bequeathed by such will, and all powers of appointment granted in such will, shall vest immediately in the devisees or legatees of such estate and the donees of such powers; and all the estate of such person, not devised or bequeathed, shall vest immediately in his heirs at law.

Id.; *see also* Najvar v. Vasek, 564 S.W.2d 202, 207 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.)(disposition of property controlled by deceased through will). In the absence of a will, the deceased's property passed to heirs at law by intestate succession. *Id.*; *see also* Huffman v. Huffman, 329 S.W.2d 139, 143 (Tex. Civ. App.—Fort Worth 1959)(deceased's property disposed of by law or by will), *aff'd*, 161 Tex. 267, 339 S.W.2d 885 (1960). *See generally* Bailey, *Intestacy in Texas: Some Doubts and Queries*, 32 TEX. L. REV. 497, 501 (1954)(historical analysis of intestacy law in Texas); Comment, *Contractual Wills: Do 1979 Probate Code Revisions Solve Procedural Problems?*, 12 ST. MARY'S L.J. 436, 437 (1980)(probate courts compelled to enforce "last" will).

21. *See* TEX. PROB. CODE ANN. § 450 (Vernon 1980 & Supp. 1988). Section 450 states in pertinent part:

> (a) any of the following provisions in an insurance policy, contract of employment . . . deposit agreement, employee's trust, retirement account . . . pension plan, trust agreement, conveyance of real or personal property, or any other written instrument effective

community property is subject to division.[22] The division of property interests may be effectuated before marriage by the parties' execution of a pre-

---

as a contract, gift, conveyance, or trust is deemed to be nontestamentary, and this code does not invalidate the instrument or any provision:

(1) that money or other benefits theretofore due to, controlled, or owned by decedent shall be paid after his death to a person designated by the decedent . . . .

Id.; *see also* Dickerson v. Brooks, 727 S.W.2d 652, 654 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.)(language in note designating alternative payee held sufficient designation to qualify as nontestamentary transfer under section 450 of Texas Probate Code); Tramel v. Estate of Billings, 699 S.W.2d 259, 262 (Tex. App.—San Antonio 1985, no writ)(insurance proceeds nontestamentary asset under section 450 of Probate Code). *See generally* McLaughlin, *Joint Accounts, Totten Trusts, and the Poor Man's Will*, 44 TEX. B.J. 871, 872-75 (1981)(discusses available methods to effectuate nontestamentary disposition of property). Nontestamentary disposition of property may be accomplished by designation of a beneficiary under the Texas Probate Code. *See* TEX. PROB. CODE ANN. § 450(a)(3) (Vernon Supp. 1988)(procedural requirements for designation of beneficiary of nontestamentary assets). In Texas, nontestamentary disposition may also be effectuated by creation of a trust. *See id.* § 436 (Vernon 1980)(defines trust account as method of nontestamentary disposition of joint funds); *see also* Isbell v. Williams, 705 S.W.2d 252, 257 (Tex. App.—Texarkana 1986, writ ref'd n.r.e.)(must comply with statutory requirements to exempt trust account as nontestamentary asset). Property that qualifies as a nonprobate asset is not subject to testamentary disposition. *See* TEX. PROB. CODE ANN. § 450(a) (Vernon 1980 & Supp. 1988)(list of nontestamentary assets). *See generally* Bell, *Community Property Trusts — Challenges by the Non-participating Spouse*, 22 BAYLOR L. REV. 311, 317 (1970)(valid trusts not testamentary disposition); Campfield, *Interspousal Transfers*, 32 SW. L.J. 1091, 1113 (1979)(analysis of tax consequences and ramifications of community property transfers); Note, *The Trust in Marital Law; Divisibility of a Beneficiary Spouse's Interests on Divorce*, 64 TEX. L. REV. 1301, 1363 (1986)(historical analysis of current Texas law governing treatment of trusts as separate property). Finally, property held by joint tenancy with the right of survivorship is nontestamentary in nature. *See* TEX. PROB. CODE ANN. § 439 (Vernon 1980 & Supp. 1988)(detailing statutory requirements for creation of right of survivorship). The transfer of property pursuant to creation of a valid right of survivorship is a nontestamentary transaction not subject to testamentary law. *Id.* § 441 (Vernon 1980); *see also* Sheffield v. Estate of Dozier, 643 S.W.2d 197, 198 (Tex. App.—El Paso 1982, writ ref'd n.r.e.). In *Sheffield*, the court construed section 439 in conjunction with section 441 of the Texas Probate Code and held that funds in an account with right of survivorship remain property of the joint owner and do not pass to the decedent's estate. *Id.*; *see also* Warach & Wright, *Money, Money, Who Gets the Money? Or Joint Bank Accounts With Right of Survivorship*, 47 TEX. B.J. 237, 238 (1984)(discusses evolution of joint tenancies with right of survivorship in Texas and analyzes section 439 of Texas Probate Code). *But see* TEX. PROB. CODE ANN. § 46 (Vernon 1980)(property held in joint tenancy with no right of survivorship subject to testamentary disposition).

22. *See* TEX. FAM. CODE ANN. § 3.63 (Vernon 1975 & Supp. 1989)(division of property); *see, e.g.*, Roach v. Roach, 672 S.W.2d 524, 527 (Tex. App.—Amarillo 1984, no writ)(trial court authorized to divide marital property); Day v. Day, 610 S.W.2d 195, 198 (Tex. Civ. App.—Tyler 1980, writ ref'd n.r.e.)(spouse entitled to recover community interest in property); Walker v. Walker, 608 S.W.2d 326, 328 (Tex. Civ. App.—Eastland 1980, no writ)(failure to divide community retirement benefits in divorce decree); Kidd v. Kidd, 584 S.W.2d 552, 556 (Tex. Civ. App.—Austin 1979, no writ)(court has authority to order division of marital estate); Garrison v. Texas Commerce Bank, 560 S.W.2d 451, 453 (Tex. Civ. App.—Houston [1st Dist.] 1977, writ ref'd n.r.e.)(court shall order division of community property).

marital agreement,[23] during the marriage by agreement,[24] pending divorce by agreement,[25] or pursuant to the divorce by the court.[26]

III. DIVISION OF MARITAL PROPERTY IN TEXAS

The Texas courts' power to divide marital property in divorce proceedings

---

23. *See* TEX. FAM. CODE ANN. § 5.41 (Vernon Supp. 1989)(premarital agreement is agreement by and between prospective spouses). A premarital agreement may cover the division of property on divorce. *See id.* § 5.43(a)(3); *see also* Williams v. Williams, 569 S.W.2d 867, 870 (Tex. 1978)(spouses may enter into premarital agreements provided contract does not contravene public policy); Dewey v. Dewey, 745 S.W.2d 514, 517 (Tex. App.—Corpus Christi 1988, writ denied)(premarital agreement governs disposition of property listed therein); Huff v. Huff, 554 S.W.2d 841, 843-44 (Tex. Civ. App.—Waco 1977, writ dism'd)(disposition of property and income controlled by premarital agreement). *See generally* Cameron, Hoffman & Ytterberg, *Marital and Premarital Agreements*, 39 BAYLOR L. REV. 1095, 1106 (1987)(thorough discussion of various uses of premarital agreements); McKnight, *The Constitutional Redefinition of Texas Matrimonial Property As It Affects Antenuptial and Interspousal Transactions*, 13 ST. MARY'S L.J. 449, 454 (1982)(analysis of constitutional and statutory amendments and effect on antenuptial agreements).

24. *See* TEX. FAM. CODE ANN. §§ 5.52-5.53 (Vernon Supp. 1989)(marital agreements). Section 5.52 provides that spouses may now partition or exchange community property by agreement. *See id.* § 5.52. Section 5.53 provides that spouses may agree that property or income of separate property remain separate property. *Id.* § 5.53. A 1987 amendment to article XVI, section 15 provides that "spouses may agree in writing that all or part of their community property becomes the property of the surviving spouse on the death of a spouse." TEX. CONST. art. XVI, § 15 (1876, amended 1987). In light of this amendment, it is arguable that the archaic common-law requirement mandating a partition is no longer a prerequisite to the valid recharacterization of community property. *See* Maples v. Nimitz, 615 S.W.2d 690, 695 (Tex. 1981)(mere execution of signature agreement attempting to operate as a one-step partition of community funds held impermissible under Texas Constitution). *But see* TEX. CONST. art. XVI, § 15 (1876, amended 1987)(recharacterization of community property by agreement); TEX. FAM. CODE ANN. § 5.54 (Vernon Supp. 1989)(agreements between spouses to exchange property interests must be in writing and signed); *see also* Recio v. Recio, 666 S.W.2d 645, 648 (Tex. App.—Corpus Christi 1984, no writ)(oral agreement insufficient); Le Blanc v. Waller, 603 S.W.2d 265, 266 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ)(property presumed community property unless written partition agreement).

25. *See* TEX. FAM. CODE ANN. § 3.631(a) (Vernon Supp. 1989)(property settlements incident to divorce). This section provides in pertinent part that "[t]o promote amicable settlement of disputes on the divorce or annulment of a marriage, the parties may enter into a written agreement concerning the division of all property and liabilities of the parties." *Id.*; *see also* Matthews v. Matthews, 725 S.W.2d 275, 279 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.)(equitable property settlement invalid where spouse subjected to duress); Patino v. Patino, 687 S.W.2d 799, 801 (Tex. App.—San Antonio 1985, no writ)(to be enforceable agreements incident to divorce must be just and equitable). *See generally* McKnight, *Family Law: Husband and Wife*, 42 SW. L.J. 1, 15 (1988)(analysis of section 3.631 allowing property agreements incident to divorce by trial court).

26. *See* TEX. FAM. CODE ANN. § 3.63 (Vernon Supp. 1989)(division of property).

originated by statutory authority in 1841.[27] Today, the courts' authority in dividing marital assets between spouses is embodied in section 3.63 of the Texas Family Code.[28] This provision mandates that a trial court divide the "estate" of the parties.[29] Although the term "estate" at one time was alleged to be ambiguous,[30] the current definition of "estate" means the community property of the parties.[31] Therefore, to be part of the "estate," property must be earned during marriage.[32] Absent an agreement between the parties,[33] a Texas trial court is given broad discretion to divide the marital es-

---

27. *See* An Act Concerning Divorce and Alimony, § 4, 1841 Tex. Gen. Laws, 2 H. GAMMEL, LAWS OF TEXAS 483, 484 (1898). This Act provided in part that:

> . . . [t]he Court pronouncing a decree of divorce from the bonds of matrimony shall also decree and order a division of the estate of the parties in such a way as to them shall seem just and right, having due regard to the rights of each party and their children, if any . . . .

Id. See generally Castleberry, *Constitutional Limitations on the Division of Property Upon Divorce*, 10 ST. MARY'S L.J. 37, 38 (1978)(historical perspective of division of property); McKnight, *Division of Texas Marital Property on Divorce*, 8 ST. MARY'S L.J. 413, 422 (1976)(division clause enacted in 1841); McKnight, *Commentary to Title I, Texas Family Code*, 5 TEX. TECH L. REV. 281, 357-373 (1974)(commentary on property division).

28. *See* TEX. FAM. CODE ANN. § 3.63 (Vernon Supp. 1989)(division of parties' estate upon divorce). This section provides:

> (a) In a decree of divorce or annulment the court shall order a division of the estate of the parties in a manner that the court deems just and right, having due regard for the rights of each party and any children of the marriage.
>
> (b) . . . the Court shall also order a division of the following real and personal property, wherever situated, in a manner that the court deems just and right . . . .

Id. (section 3.63(b) deals with the division of quasi-community property).

29. *See id.* § 3.63(a) (court "shall" order division).

30. *See, e.g., Ex Parte* Scott, 133 Tex. 1, 14, 123 S.W.2d 306, 313 (1939)(court cannot divest spouse of separate property); Hedtke v. Hedtke, 112 Tex. 404, 410-11, 248 S.W. 21, 23 (1923)(where minors involved estate includes all property whether separate or community of parties); Tiemann v. Tiemann, 34 Tex. 523, 526 (1871)(not within power of court to divest spouse of separate property); Rice v. Rice, 21 Tex. 58, 71 (1858)(court by statute shall divide estate of parties).

31. *See, e.g.*, Cameron v. Cameron, 641 S.W.2d 210, 213-14 (Tex. 1982)(divestiture of separate property contravenes both statute and constitution); Eggemeyer v. Eggemeyer, 554 S.W.2d 137, 139 (Tex. 1977)(trial court unauthorized to divest spouse of separate property); McIntire v. McIntire, 702 S.W.2d 284, 288 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.)(estate means community property).

32. *See McIntire*, 702 S.W.2d at 288 (estate means community property); TEX. FAM. CODE ANN. § 5.01(b) (Vernon 1975)(definition of community property); *see also* Lee v. Lee, 112 Tex. 392, 403, 247 S.W. 828, 832-33 (1923)(all property and gains during marriage community property).

33. *See* TEX. FAM. CODE ANN. § 5.43(a)(4) (Vernon Supp. 1989)(division of property by premarital agreement); *id.* §§ 5.52-5.53 (partition or exchange of parties community property by agreement); *id.* § 3.631(a) (incident to divorce parties may divide all property and liabilities by written agreement). *See generally* Cameron, Hoffman, & Ytterberg, *Marital and Premarital Agreements*, 39 BAYLOR L. REV. 1095, 1106 (1987)(division of marital property by agree-

tate in a manner that is just and right.[34] The court however, is not required to divide the parties' estate equally,[35] but may consider numerous factors in making an equitable division including fault,[36] disparity in earning capacity,[37] and the extent of each spouses separate property.[38]

---

ment); McKnight, *Family Law: Husband and Wife*, 42 Sw. L.J. 1, 15 (1988)(division of community property by agreement pending divorce).

34. TEX. FAM. CODE ANN. § 3.63 (Vernon Supp. 1989). Since this section's enactment, the trial court has retained great discretion in determining what constitutes a just and right division of the parties' estate. *See, e.g.*, McKnight v. McKnight, 543 S.W.2d 863, 866 (Tex. 1976)(division of community property within court's discretion); Cockerham v. Cockerham, 527 S.W.2d 162, 173 (Tex. 1975)(trial court has discretion to divide spouses' estate in just and right manner); Thomas v. Thomas, 738 S.W.2d 342, 345 (Tex. App.—Houston [1st Dist.] 1987, no writ)(trial court's division of corporate stock). A trial court's division of community property will stand absent abuse of discretion. *See, e.g.*, Haley v. Haley, 713 S.W.2d 801, 803 (Tex. App.—Houston [1st Dist.] 1986, no writ)(abuse of discretion found where court awarded property not based on evidence); Mata v. Mata, 710 S.W.2d 756, 760 (Tex. App.—Corpus Christi 1986, no writ)(court abused discretion in property division by assigning value to automobiles based on data not in evidence); Aronson v. Aronson, 590 S.W.2d 189, 190 (Tex. Civ. App.—Dallas 1979, no writ)(trial court division awarding wife property valued at $90,051 while awarding husband property with net value of $4,939 was abuse of discretion).

35. *See* TEX. FAM. CODE ANN. § 3.63 (Vernon Supp. 1989)(just and right division). Trial courts may make an unequal division in rendering an equitable distribution of the parties' community property. *See, e.g.*, Eikenhorst v. Eikenhorst, 746 S.W.2d 882, 889 (Tex. App.—Houston [1st Dist.] 1988, no writ)(division distributing 56% of community property to wife held valid); Huls v. Huls, 616 S.W.2d 312, 317 (Tex. Civ. App.—Houston [1st Dist.] 1981, no writ)(court's division that awarded wife 85% and husband only 15% of marital assets upheld); Thomas v. Thomas, 603 S.W.2d 356, 358 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ dism'd)(trial court did not abuse discretion in awarding wife 70% and husband 30% of parties' estate).

36. *See* Murff v. Murff, 615 S.W.2d 696, 698-99 (Tex. 1981)(fault considered as factor in property division). Among other factors, a court may consider fault in rendering a just and right property division. *See id.* When considering fault as a factor, the trial court may consider statutory fault grounds for divorce. *See* TEX. FAM. CODE ANN. § 3.01 (Vernon 1975)(insupportability as grounds for divorce); *id.* § 3.02 (cruelty); *id.* § 3.03 (adultery); *id.* § 3.04 (felony convictions); *id.* § 3.05 (abandonment); *id.* § 3.06 (living apart); *id.* § 3.07 (confinement to mental hospital). Common fault factors considered by trial courts are cruelty, insupportability and adultery. *See, e.g.*, Oliver v. Oliver, 741 S.W.2d 225, 228-29 (Tex. App.—Fort Worth 1987, no writ)(husband's adulterous relationship factor in awarding wife 80% of community estate); Baker v. Baker, 624 S.W.2d 796, 798 (Tex. App.—Houston [14th Dist.] 1981, no writ)(court permitted to consider insupportability in dividing property); Clay v. Clay, 550 S.W.2d 730, 734 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ)(wife's cruelty toward husband considered by court in division). The trial courts, however, are not required to consider fault in dividing the parties' estate. *See* Young v. Young, 609 S.W.2d 758, 760-61 (Tex. 1980)(trial court not required to consider fault even though divorce granted based on fault); Barber v. Barber, 621 S.W.2d 671, 673 (Tex. App.—Waco 1981, no writ)(fault not considered in property division).

37. *See, e.g.*, Simpson v. Simpson, 727 S.W.2d 662, 664 (Tex. App.—Dallas 1987, no writ)(wife awarded majority of community assets where wife earned $5,000 and husband earned $300,000 annually); Rafidi v. Rafidi, 718 S.W.2d 43, 44-45 (Tex. App.—Dallas 1986,

Property may be characterized as either real or personal property.[39] Further, an interest in personal property may be tangible or intangible.[40] In Texas, it is well established that personal wages of a husband and wife are community property.[41] Personal wages or money is a property interest that is readily identifiable, able of valuation, and therefore, easily divisible upon divorce. In contrast, an education is an intangible interest that does not have traditional property characteristics and, upon divorce, is difficult to identify and value.[42] Intangible property interests include, but are not limited to, intellectual property rights,[43] choses in action,[44] and goodwill.[45]

---

no writ)(wife awarded 85-90% of parties' community property where husband had three college degrees and employed as petroleum engineer); Zuniga v. Zuniga, 664 S.W.2d 810, 815 (Tex. App.—Corpus Christi 1984, no writ)(court awarded husband more community property where wife had more education, more diversified job experience and greater earning capacity).

38. *See* Murff v. Murff, 615 S.W.2d 696, 699 (Tex. 1981)(court can consider size of spouses' separate estate in making property division); Allen v. Allen, 704 S.W.2d 600, 606 (Tex. App.—Fort Worth 1986, no writ)(extent of spouses' separate property factor considered in dividing community estate); Baker v. Baker, 624 S.W.2d 796, 798 (Tex. App.—Houston [14th Dist.] 1981, no writ)(extent of separate property permissible factor in division of estate).

39. *See* TEX. FAM. CODE ANN. § 5.41(2) (Vernon Supp. 1989)(defines property); *see also* Cearley v. Cearley, 544 S.W.2d 661, 662 (Tex. 1976)(personal income of spouses during marriage community property); Branecky v. Seaman, 688 S.W.2d 117, 120 (Tex. App.—Corpus Christi 1984, no writ)(improvements to realty held community property).

40. *See generally* Castleberry, *Constitutional Limitations on the Division of Property Upon Divorce*, 10 ST. MARY'S L.J. 37, 65 (1978)(earning capacity is recognized property right); McKnight, *Division of Texas Marital Property on Divorce*, 8 ST. MARY'S L.J. 413, 426 (1976)(discusses divisible and nondivisible property interests); Schaefer, *Wife Works So Husband Can Go to Law School: Should She Be Taken in as a "Partner" when "Esq." Is Followed by Divorce? Or Can You Have a Community Property Interest in a Professional Education?*, 2 COMM. PROP. J. 85, 86 (1975)(education acquired during marriage should be community property).

41. *See* TEX. FAM. CODE ANN. § 5.01(b) (Vernon 1975)(defines community property); *see also, e.g.*, Cearley v. Cearley, 544 S.W.2d 661, 662 (Tex. 1976)(income of either spouse during marriage is community property); Norris v. Vaughan, 152 Tex. 491, 501, 260 S.W.2d 676, 682 (1953)(rights or property acquired while married community property); Maben v. Maben, 574 S.W.2d 229, 232 (Tex. Civ. App.—Fort Worth 1978, no writ)(earnings of wife and salary of husband both community property). *See generally* McKnight, *Family Law — Husband and Wife*, 34 SW. L.J. 115, 126 (1980)(property obtained during marriage presumed community); Comment, *Community Property Rights and the Business Partnership*, 57 TEX. L. REV. 1018, 1039 (1979)(business profits community property).

42. *See generally* Chastin, Henry & Woods, *Determination of Property Rights Upon Divorce in South Carolina: An Exploration and Recommendation*, 33 S.C.L. REV. 227, 230 (1981)(problems with valuing intangible rights); Krauskopf, *Classifying Marital and Separate Property—Combinations and Increase in Value of Separate Property*, 89 W. VA. L. REV. 997, 1009 (1987)(valuing marital contributions); Mullenix, *The Valuation of an Educational Degree at Divorce*, 16 LOY. L.A.L. REV. 227, 259 (1983)(in depth discussion of valuing degrees).

43. *See, e.g.*, 35 U.S.C. § 101 (1982)(patentable inventions); *id.* § 154 (1982)(grants exclusive rights to patent owner). Another type of intellectual property is a copyright. *See* 17 U.S.C. § 102(a) (1982)(protects mediums of expression); *see also* Comment, *Copyright Protection for the Intellectual Property Rights to Recombinant Deoxyribonucleic Acid: A Proposal*, 19

A. *When Is Goodwill Community Property?*

Texas courts initially precluded personal professional goodwill from the definition of property, thus excluding this intangible property interest from division upon divorce.[46] Consistent with this early view, the Texas Supreme Court in *Nail v. Nail*[47] held that the personal goodwill of a sole medical practitioner was not property, and was not divisible as part of the parties' estate.[48] The court reasoned that the goodwill itself was not a vested property right separate from the doctor's person, but was rather a mere expectancy.[49] Subsequent decisions have limited *Nail* to the court's language because the facts of *Nail* concerned only *individual* professional goodwill,

---

ST. MARY'S L.J. 1083, 1096 (1988) (discussion of protection of copyrights by statute and case law). Service marks are also property rights capable of protection. *See* 17 U.S.C. § 1053 (1982)(registrable service marks); *see also* Application of Radio Corp. of Am., 205 F.2d 180, 182 (C.C.P.A. 1953)(purpose of service mark to protect intangible property rights such as services). *See generally* Armstrong, *From the Fetishism of Commodities to the Regulated Market: The Rise and Decline of Property*, 82 NW. U.L. REV. 79, 83 (1988)(historical perspective of intellectual property rights); Lee & Livingston, *The Road Less Traveled: State Court Resolution of Patent, Trademark, or Copyright Disputes*, 19 ST. MARY'S L.J. 703, 713 (1988)(general discussion of intellectual rights under state law).

44. *See* Whittlesey v. Miller, 572 S.W.2d 665, 667 (Tex. 1978)(loss of consortium cause of action); Renger Memorial Hosp. v. State, 674 S.W.2d 828, 830 (Tex. App.—Austin 1984, no writ)(cause of action property right).

45. *See, e.g.*, Eikenhorst v. Eikenhorst, 746 S.W.2d 882, 888-87 (Tex. App.—Houston [1st Dist.] 1988, no writ)(goodwill in form of stock appreciation); Rathmell v. Morrison, 732 S.W.2d 6, 17 (Tex. App.—Houston [14th Dist.] 1987, no writ)(goodwill of professional partnership); Geesbreght v. Geesbreght, 570 S.W.2d 427, 436 (Tex. Civ. App.—Fort Worth 1978, writ dism'd)(goodwill of medical practice).

46. *See* Nail v. Nail, 486 S.W.2d 761, 764 (Tex. 1972)(personal goodwill not divisible).

47. 486 S.W.2d 761 (Tex. 1972). Dr. and Mrs. Nail were married from 1945 to 1971. *Id.* at 761. During their marriage, Dr. Nail acquired his medical degree and license. At divorce, there was an issue over whether Dr. Nail's medical practice was community property divisible as part of their "estate." The trial court determined that the practice was part of the "estate" and valued Mrs. Nail's interest at $40,000, based on expert testimony. *Id.* at 761, 763.

48. *See id.* at 764. The court was required to determine if the goodwill was property earned during marriage to rule on whether the trial court had authority to award the wife $40,000 under section 3.63 of the Texas Family Code. *See id.*

49. *See id.* at 763-64. The *Nail* court, having no case in point, relied on reasoning from other jurisdictions as well as other Texas decisions. *See id.* The court in reaching its decision stated:

> In any event, it cannot be said that the accrued goodwill in the medical practice of Dr. Nail was an earned or vested property right at the time of the divorce or that it qualifies as property subject to division by decree of court. It did not possess value or constitute an asset separate and apart from his person, or from his individual ability to practice his profession. It would be extinguished in event of his death, or retirement, or disablement . . . .

Id. at 764.

not the goodwill of a professional association or corporation.[50] The ambiguity regarding the goodwill of professional entities was clarified in 1983 by the Dallas Court of Appeals in *Finn v. Finn*.[51] The Dallas court established a two-prong test to determine whether the goodwill of a professional practice is part of the "estate" of the parties and subject to division upon divorce.[52] Goodwill of a professional practice is included in the parties' estate and divisible if: 1) the goodwill exists independently of the professional's individual ability; and 2) the goodwill has commercial value.[53]

B. *Inequity Under* Finn

Although Texas courts have drawn a clear line for determining the divisibility of goodwill,[54] it has not been decided whether goodwill is property. Based on *Finn*, the inclusion of goodwill as part of the parties' "estate" depends on the organizational structure of a professional practice and underlying partnership agreements establishing the commercial value of the goodwill. For example, consider the two following hypotheticals. In the first scenario, husband (H) and wife (W) are married. H attends medi-

---

50. *See* Eikenhorst v. Eikenhorst, 746 S.W.2d 882, 888 (Tex. App.—Houston [1st Dist.] 1988, no writ)(wife awarded interest in husband's commercial goodwill). The appellate courts interpret the *Nail* holding as limited by its own language which states:

> . . . in resolving the question at hand we are not concerned with good will as an asset incident to the sale of a professional practice, or *that may exist in a professional partnership or corporation apart from the person of an individual member*, or that may be an element of damage by reason of tortious conduct.

Id. (quoting *Nail v. Nail*, 486 S.W.2d 761, 764 (Tex. 1972)) (emphasis added by court); *see also* Rathmell v. Morrison, 732 S.W.2d 6, 17 (Tex. App.—Houston [14th Dist.] 1987, no writ)(courts of appeal acknowledge goodwill of professional in partnership or corporate structure may be divisible on divorce); Allen v. Allen, 704 S.W.2d 600, 605 (Tex. App.—Fort Worth 1986, no writ)(goodwill of beauty salon transferable property right); Stephens v. Stephens, 625 S.W.2d 428, 431 (Tex. App.—Fort Worth 1981, no writ)(goodwill of chiropractor not property); Austin v. Austin, 619 S.W.2d 290, 291 (Tex. Civ. App.—Austin 1981, no writ)(proceeds from sale representing goodwill divisible on divorce); Trick v. Trick, 587 S.W.2d 771, 773-74 (Tex. Civ. App.—El Paso 1979, writ dism'd)(goodwill of medical professional association divisible marital property where stock purchase agreement provided goodwill valued at ten percent).

51. 658 S.W.2d 735, 739 (Tex. App.—Dallas 1983, writ ref'd n.r.e.)(professional goodwill divisible marital asset). Prior to this case, the Texas Supreme Court in *Nail v. Nail* held that personal goodwill was not capable of division in a divorce proceeding. *See* Nail v. Nail, 486 S.W.2d 761, 764 (Tex. 1972). However, subsequent to the *Nail* decision but prior to the *Finn* decision, the Fort Worth Court of Appeals held that the goodwill of a doctor's professional corporation was separate from the doctor's person and was a divisible asset. *See* Geesbreght v. Geesbreght, 570 S.W.2d 428, 436 (Tex. Civ. App.—Fort Worth 1978, writ dism'd).

52. *See Finn*, 658 S.W.2d at 740-41. Combining the rationale of the *Nail* decision and that of the *Geesbreght* decision, the court created a two prong test. *See id.*

53. *See id.* at 741 (test to determine if goodwill divisible asset).

54. *See id.* at 739 (professional goodwill with commercial value divisible upon divorce).

cal/law school while W supports the family and pays H's tuition in the total amount of $30,000. After being licensed, H enters his profession as a sole practitioner. H's annual income is $100,000. Assume the practice's goodwill is valued at $50,000. H and W divorce and W asserts that the goodwill earned during marriage is part of the couple's "estate," and is subject to division. Applying the *Finn* two-prong test, there is arguably a determinable commercial value, but the goodwill clearly does not exist independently of the H's individual ability. Thus, the goodwill would not be considered part of the parties "estate" and not divisible. The wife would, therefore, be deprived of her contributions toward the husband's education and career.

Scenario number two: The facts are the same as in scenario number one, except H, rather than being a sole practitioner, is employed at a professional corporation. Further, the shareholder's agreement stipulates that the professional corporation's goodwill is valued at ten percent of earnings. Applying the *Finn* test, the goodwill would be considered part of the H and W's estate because it is independent of the individual's ability and there is an ascertainable commercial value (ten percent of earnings). Therefore, the goodwill would be considered part of the parties' "estate" and may be divided at divorce. The inconsistency in application of the *Finn* test is readily apparent. You have two wives who have respectively contributed the same amount of time and financial support toward their husbands' professional licenses and subsequent goodwill. Yet, because of the organizational structure in which their husbands practice, one wife reaps the benefit of her contributions, in that the value of the goodwill is included in the marital estate, while the other does not.[55]

In Texas, given the unjust state of the law regarding the character of goodwill as property, it is unclear what treatment should be given educational degrees.[56] Considering *Finn* and its two-prong test, can we now subject professional degrees to a similar test to decide if the degree is property?[57] Some commentators analogize the intangible interests in educational degrees to that of goodwill.[58] Notwithstanding this analogy, it is probably not feasi-

---

55. *Compare* Nail v. Nail, 486 S.W.2d 761, 764 (Tex. 1972)(goodwill of sole practitioner not divisible at divorce) *and* Finn v. Finn, 658 S.W.2d 735, 742 (Tex. App.—Dallas 1983, writ ref'd n.r.e.)(goodwill of attorney's firm not divisible) *with* Trick v. Trick, 587 S.W.2d 771, 773-74 (Tex. Civ. App.—El Paso 1979, writ dism'd)(goodwill of medical association divisible marital property) *and* Geesbreght v. Geesbreght, 570 S.W.2d 427, 436 (Tex. Civ. App.—Fort Worth 1978, writ dism'd)(goodwill independent of individual doctor divisible).

56. *See* Frausto v. Frausto, 611 S.W.2d 656, 659 (Tex. Civ. App.—San Antonio 1980, writ dism'd w.o.j.)(degree not property).

57. *See Finn*, 658 S.W.2d at 740-41 (goodwill divisible property where independent of individual's ability and has commercial value).

58. *See generally* Castleberry, *Constitutional Limitations on the Division of Property Upon Divorce*, 10 ST. MARY'S L.J. 37, 58 (1978)(degree similar to goodwill); Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support*

ble to subject educational degrees to a *Finn*-like test because a degree represents knowledge that is not independent of the individual's ability. Although Texas and a majority of other jurisdictions[59] have maintained the position that a degree is not property, at least three other jurisdictions have determined that degrees are property.[60]

IV. OTHER JURISDICTIONS

Presently, Kentucky, Michigan, and New York deem professional degrees earned during marriage as property interests.[61] In *Inman v. Inman*,[62] the Kentucky Supreme Court held that a degree was a property interest entitling the contributing spouse to compensation.[63] In *Woodworth v. Woodworth*,[64] a Michigan court reasoned that a law degree acquired during marriage was the result of mutual effort and sacrifice and held that it was marital property divisible at divorce.[65] The most noted decision, however, characterizing ed-

---

Awards, 28 UCLA L. REV. 1181, 1214 (1981)(marital assets in degrees similar to goodwill of businesses and professional practices).

59. *See, e.g.*, Pyeatte v. Pyeatte, 661 P.2d 196, 207 (Ariz. Ct. App. 1982)(legal degree obtained during marriage not property); Wisner v. Wisner, 631 P.2d 115, 122 (Ariz. Ct. App. 1981)(medical license not property); *In re* Marriage of Sullivan, 184 Cal. Rptr. 796, 800 (Cal. Ct. App. 1982)(husband's medical degree held not to be property of any kind), *vacated*, 691 P.2d 1020, 1023 (Cal. 1984)(property settlements regarding contributions to education not final as of January 1, 1985 retroactively governed by California Civil Code section 4800.3); *In re* Marriage of Aufmuth, 152 Cal. Rptr. 668, 677 (Ct. App. 1979)(right to practice not community property); Todd v. Todd, 78 Cal. Rptr. 131, 135 (Ct. App. 1969)(education intangible property incapable of being valued); *In re* Marriage of Graham, 574 P.2d 75, 77 (Colo. 1978)(masters of business administration degree not property).

60. *See* Inman v. Inman, 648 S.W.2d 847, 849 (Ky. 1982)(degree held to be property); Woodworth v. Woodworth, 337 N.W.2d 332, 333 (Mich. Ct. App. 1983)(law degree earned during marriage marital asset); O'Brien v. O'Brien, 489 N.E.2d 712, 713 (N.Y. 1985)(medical license held property and wife entitled to equitable portion).

61. *See Inman*, 648 S.W.2d at 849 (contributions to medical degree reimbursable property interest); *Woodworth*, 337 N.W.2d at 333 (law degree is property); *O'Brien*, 489 N.E.2d at 713 (medical license is property).

62. 648 S.W.2d 847, 849 (Ky. 1982)(medical degree reimbursable property interest).

63. *See id.* at 852. While the issue of valuation was not before the court, the majority stated that if the issue were to be addressed, the proper formula would be "to measure the recovery by the amount of money the non-college going spouse contributed toward living expenses, the amount of money contributed for educational costs, and the potential for increase in future earning capacity made possible by the degree, thus not treating the degree as marital property." *Id.*

64. 337 N.W.2d 332, 333 (Mich. Ct. App. 1983).

65. *See id.* at 334 (law degree marital asset). In *Woodworth*, the couple was married in 1970, and in 1973, the husband entered law school. *See id.* at 333. The husband received his license in 1975, and began practicing as an attorney. The parties divorced in 1980, at which time the husband was a partner in a private law firm. In holding that the degree was a marital asset, the court analyzed leading cases from other jurisdictions that held that a degree does not fit within the strict definition of property. The court concluded that a degree does not have to

ucational degrees as property is *O'Brien v. O'Brien*.[66] In *O'Brien*, the New York Court of Appeals held that a medical license fell within the statutory definition of marital property, rendering the license divisible upon divorce.[67] These decisions, however, have been rendered in common-law, not community property, jurisdictions.[68]

---

fall under a strict definition to be considered a marital asset. *See id.* at 334-35. Further, the court reasoned that future earnings were not too speculative to value. *See id.* at 336. Subsequent Michigan appellate courts have followed the *Woodworth* holding. *See* Daniels v. Daniels, 418 N.W.2d 924, 927 (Mich. Ct. App. 1988)(dental degree is marital asset); Thomas v. Thomas, 417 N.W.2d 563, 565 (Mich. Ct. App. 1987)(law degree is marital asset with wife awarded future earnings), *vacated*, 432 N.W.2d 303 (Mich. 1988)(court remanded stating failure to award interest inequitable if lower court intended award to be in 1981 dollars as opposed to 1987 dollars).

66. 489 N.E.2d 712 (N.Y. 1985). On April 3, 1971, the O'Briens were married. *Id.* at 713. During this time both worked as teachers while the husband completed his last semester of college. *Id.* at 713-14. The couple moved to Mexico in September 1973, so the husband could enter medical school. *See id.* at 714. In December 1976, the O'Briens returned to New York where the husband completed his internship. In October 1980, two months after obtaining his medical license, the husband filed for divorce. At trial it was undisputed that the wife contributed her total earnings to the couple's living expenses and the husband's educational costs. The trial court reasoned that the degree was marital property and thus received into evidence expert testimony regarding its value. *See id.* The wife's expert valued the degree and license to practice medicine at $472,000. The trial court awarded the wife forty percent of the value of the license totaling $188,000 which the husband was ordered to pay over eleven years in annual installments. The Appellate Division relied on prior cases in which a degree was held not to be property, struck the trial court's order regarding future payments, and remanded the case. Subsequently the case was appealed to the state's highest court. *See id.* at 714-15.

67. *See id.* at 720. In reaching its decision, the court relied on a statute recognizing a supporting spouses contributions and on equitable principles that each spouse has a stake in marital assets. *See id.* at 717-18. The New York statute relied upon by the *O'Brien* court provided in pertinent part:

> In determining an equitable disposition . . . the court shall consider: . . . any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services as a spouse, parent, wage earner and homemaker, and to the career or career potential of the other party . . .

N.Y. DOM. REL. LAW § 236(B)(5)(d)(6) (McKinney 1986). Other New York courts have followed *O'Brien*. *See* Golub v. Golub, 527 N.Y.S.2d 946, 950 (N.Y. App. Div. 1988)(applying *O'Brien* increase in value of career of actress/model held marital property subject to distribution on divorce); Maloney v. Maloney, 524 N.Y.S.2d 758, 759-60 (N.Y. App. Div. 1988)(wife awarded 35% of value of husband's medical license); McGowan v. McGowan, 518 N.Y.S.2d 346, 347 (N.Y. Sup. Ct. 1987)(teaching certificate earned during marriage held marital asset). *See generally* Comment, O'Brien v. O'Brien: *A Professional Degree as Marital Property*, 29 ARIZ. L. REV. 353, 354 (1987)(analysis of *O'Brien* decision and status of degrees as property in Arizona); Comment, *Professional Licenses and Marital Dissolution in* O'Brien v. O'Brien: *Expectation Returns in the Marital Partnership*, 72 IOWA L. REV. 445, 449 (1987)(discussion of traditional and modern approaches regarding degrees).

68. *See, e.g.*, Inman v. Inman, 648 S.W.2d 847, 849 (Ky. 1982)(medical degree is marital

Courts in community property states, with the exception of those in Cali-

---

asset); Daniels v. Daniels, 418 N.W.2d 924, 927 (Mich. Ct. App. 1988)(dental degree is marital asset); Woodworth v. Woodworth, 337 N.W.2d 332, 333 (Mich. Ct. App. 1983)(law degree held marital asset); O'Brien v. O'Brien, 489 N.E.2d 712, 720 (N.Y. 1985)(medical degree is property); McGowan v. McGowan, 518 N.Y.S.2d 346, 347 (N.Y. Sup. Ct. 1987)(teaching certificate marital asset).

The states that apply community property principles in dividing a marital estate are Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington. In Arizona, when disposing of spouses' property, "the court shall assign each spouse's sole and separate property to such spouse." *See* ARIZ. REV. STAT. ANN. § 25.318 (West 1976 & Supp. 1988)(disposition of property). Although the court cannot divest a spouse of separate property, the court can place a lien upon it. *See id.* § 25-318(c); *see also* Weaver v. Weaver, 643 P.2d 499, 500 (Ariz. 1982)(trial court has no jurisdiction to award spouse judgment for damage to separate property); Proffit v. Proffit, 462 P.2d 391, 393 (Ariz. 1969)(court cannot divest spouse of separate property). California is typical of the remaining community property states which have similar statutes defining the type of property over which a court can exercise its jurisdiction in divorce proceedings. *See* CAL. CIV. CODE § 4800(a) (Deering 1984 & Supp. 1988)(division of community estate). In California, the court must make an equal division of the parties community estate. *See id.* The phrase "community estate" includes community and quasi-community property. *See id.*; *see also In re* Paderewski, 564 F.2d 1353, 1357 (9th Cir. 1977)(property division must be equal); *In re* Davis, 137 Cal. Rptr. 265, 268 (Ct. App. 1977)(trial court authorized to divide community property equally); *In re* Marriage of Fink, 126 Cal. Rptr. 626, 631 (Ct. App. 1976)(court expressly authorized by statute to divide community property). *See generally* Roman, *The Division of Marital Property Before and After* In re Marriage of Buol *and* In re Marriage of Fabian, 16 SW. U.L. REV. 563, 565 (1986)(overview of dividing community property). In Idaho, the trial court retains discretion in dividing the community property. *See* IDAHO CODE § 32-712(1) (Michie 1983)(disposition of community property). This section provides that "community property must be assigned by the court in such proportions as the court, from all the facts of the case and condition of the parties, deems just . . . ." *Id.*; *see also* Beesley v. Beesley, 758 P.2d 695, 696 (Idaho 1988)(court authorized to use offset in making equitable division); Suter v. Suter, 546 P.2d 1169, 1174 (Idaho 1976)(post-separation earnings are community property subject to assignment by trial court). In Louisiana, the community is automatically dissolved upon separation from bed and board. *See* LA. CIV. CODE ANN. art. 155 (West 1952 & Supp. 1989)(dissolution of community). *See generally* Comment, *Judicial Dissolution of the Marital Community in Louisiana*, 49 TUL. L. REV. 167, 168 (1974)(analysis of right of partition); Note, *Reconciliation Trap: Civil Code Article 155*, 45 LA. L. REV. 163, 164 (1984)(effects of article 155 upon community property). In Nevada, courts are permitted to make an equitable division of the marital estate. *See* NEV. REV. STAT. § 125.150 (1987)(adjudication of property rights). In a divorce, a court must justly and equitably dispose of the parties' community and joint tenancy property. *See id.*; *see also* Campbell v. Campbell, 705 P.2d 154, 155 (Nev. 1985)(house held in joint tenancy subject to equal not equitable division); Canul v. Canul, 567 P.2d 476, 477 (Nev. 1977)(community property does not include property held by spouse for benefit of third party). New Mexico is one of three community property states that allow division of either community or separate property. *See* N.M. STAT. ANN. § 40-4-7 (Michie 1986)(division of property); *see also* NEV. REV. STAT. § 125.150(4) (1987)(court can award separate property of one spouse to other spouse for support); WASH. REV. CODE ANN. § 26.09.080 (West 1986)(court can award separate or community property to either spouse on divorce). In Texas, courts can only dispose of the parties marital estate. *See* TEX. FAM. CODE ANN. § 3.63 (Vernon 1975 & Supp. 1989)(division of property). The trial court in divorce proceeding is required to divide the estate of the parties in

fornia, are provided discretion in dividing the marital property of spouses.[69] In Arizona and Washington, the courts must divide joint tenancy and community property equitably.[70] Idaho courts have the authority to divide the

---

a just and right manner. *See id.* § 3.63(a). There is no requirement that property be divided equally. *See* Eikenhorst v. Eikenhorst, 746 S.W.2d 882, 889 (Tex. App.—Houston [1st Dist.] 1988, no writ)(division awarding wife 56% of community assets held valid); Conroy v. Conroy, 706 S.W.2d 745, 748 (Tex. App.—El Paso 1986, no writ)(disproportionate division of benefits as community upheld). While the court is not required to make an equal division of the community, it cannot divest spouses of their separate property. *See* Cameron v. Cameron, 641 S.W.2d 210, 213 (Tex. 1982)(divorce court cannot divest spouse of separate property); Cordell v. Cordell, 592 S.W.2d 84, 85 (Tex. Civ. App.—Texarkana 1979, no writ)(decree awarding $5,000 in future earnings which did not represent payment for existing community property held void as against public policy). *See generally* Holmes & Koons, *Division of Property at Divorce*, 39 BAYLOR L. REV. 977, 983-84 (1987)(abuse of discretion to divest individual of separate property); Comment, *The Division of Marital Property Upon Divorce and Quasi-Community Property Law in Texas: The Texas Legislature Amends Section 3.63 of the Family Code*, 23 S. TEX. L.J. 139, 151 (1982)(discussion of current section 3.63); Note, *Property Division Obligations and the Constitutional Prohibition of Imprisonment for Debt*, 58 TEX. L. REV. 1307, 1314 (1980)(property divisions constitutionally limited). In Washington, the trial courts are vested with express statutory jurisdiction to award either separate or community property in reaching an equitable result. *See* WASH. REV. CODE ANN. § 26.09.080 (West 1986)(disposition of liabilities and property). The Washington courts also have authority to assign to either spouse liabilities incurred during the marriage. *See id.*

69. *See* ARIZ. REV. STAT. ANN. § 25-318 (West 1976 & Supp. 1988)(in divorce proceeding court shall divide community property equitably); CAL. CIV. CODE § 4800 (Deering 1984 & Supp. 1988)(court shall make equal division of community estate); IDAHO CODE § 32-712 (Michie 1983)(community property assigned as court deems just); LA. CIV. CODE ANN. art. 155(a)(West 1952 & Supp. 1989)(separation of goods and effects); NEV. REV. STAT. § 125.150 (1987)(upon divorce, court shall make just and equitable disposition of community property); N.M. STAT. ANN. § 40-4-7(a) (Michie 1986)(just and proper division). Section 40-4-7(a) of the New Mexico statute provides in pertinent part that a "court may make and enforce by attachment or otherwise an order to restrain the use or disposition of the property of either party . . . as in its discretion may seem just and proper. . . ." *Id.*; *see also* TEX. FAM. CODE ANN. § 3.63 (Vernon 1975 & Supp. 1989)(court shall divide estate of parties in just and right manner); WASH. REV. CODE ANN. § 26.09.080 (West 1986)(court shall make equitable division). Section 26.09.080 of the Washington Code provides that "the court shall, without regard to marital misconduct, make such disposition of the property and the liabilities of the parties, either community or separate, as shall appear just and equitable . . . ." *Id.* Regardless of the terminology of the statutes, the courts are generally required to make an equitable division of the parties' property. *Compare* ARIZ. REV. STAT. ANN. § 25-318(A) (West Supp. 1988)(court shall divide community property equitably) *and* IDAHO CODE § 32-712 (Michie 1983)(just division of community property) *with* N.M. STAT. ANN. § 40-4-7(a) (Michie 1986)(just and proper disposition of marital estate) *and* TEX. FAM. CODE ANN. § 26.09.080 (Vernon Supp. 1989)(just and equitable disposition of marital property). *But see* CAL. CIV. CODE § 4800 (Deering Supp. 1988)(equal division of community).

70. ARIZ. REV. STAT. ANN. § 25.318(A) (West 1976 & Supp. 1988). This provision, although expressly excluding marital conduct as a factor in dividing community property, does allow the court to consider such factors as abnormal or excessive expenditures or concealment, destruction or fraudulent disposition of property. *See id.*

community property in a manner which the court deems just, based on the surrounding circumstances.[71] Nevada courts have the discretion to dispose of community and joint tenancy property in a manner that is just and equitable.[72] New Mexico allows its courts to divide and award community *and separate property* of the parties as is just and proper.[73] Courts in community property states may consider numerous factors in determining what is just

---

71. *See* IDAHO CODE § 32-712 (Michie 1983)(disposition of community property). In addition to considering the facts and circumstances of each case before the court, the trial judge must give due consideration to the following factors:

(a) Unless there are compelling reasons otherwise, there shall be substantially equal division in value, considering debts, between the spouses.

(b) Factors which may bear upon whether a division shall be equal, or the manner of division, include, but are not limited to:

(1) Duration of the marriage;

(2) Any antenuptial agreement . . .;

(3) The age, health, occupation, amount and source of income, vocational skills, employability, and liabilities of each spouse;

(4) The needs of each spouse;

(5) Whether the apportionment is in lieu of or in addition to maintenance;

(6) The present and potential earning capability of each party; and

(7) Retirement benefits, ...

Id.

72. *See* NEV. REV. STAT. § 125.150 (1987)(adjudication of property rights). Section 125.150 provides in part that

In granting a divorce, the court: (a) [m]ay award such alimony to the wife or to the husband . . . and (b) [s]hall make such disposition of: (1) [t]he community property of the parties . . . as appears just and equitable, having regard to the respective merits of the parties and to the condition in which they will be left by the divorce, and to the party through whom the property was acquired, and to the burdens, if any, imposed upon it, for the benefit of the children.

Id.

73. *See* N.M. STAT. ANN. § 40-4-7 (Michie 1986)(division of property). This statute states in part:

A. In any proceeding for the dissolution of marriage, division of property, disposition of children or alimony, the court may make and enforce by attachment or otherwise an order to restrain the use or disposition of the *property of either party* . . .

B. On final hearing, the court:

(1) may allow either party such a reasonable portion of the spouse's separate property, . . ., as alimony, as under the circumstances of the case may seem just and proper; . . .

Id. (emphasis added). This section is more liberal than statutes of other community property jurisdictions because it expressly allows the court to divest a spouse of his/her separate property. *Compare* ARIZ. REV. STAT. ANN. § 25-318(A) (West Supp. 1988)(court required to award each spouse his/her separate property) *and* IDAHO CODE § 32-712 (Michie 1983)(statute governs disposition of only community property) *and* TEX. FAM. CODE ANN. § 3.63 (Vernon Supp. 1989)(court shall divide only the parties' community estate) *with* NEV. REV. STAT. § 125.150(4) (1987)(court can award separate property for support) *and* N.M. STAT. ANN. § 40-4-7(a) (Michie 1986)(court may dispose of property of either party) *and* WASH. REV. CODE ANN. § 26.09.080 (West 1986)(court may divide separate or community property).

and equitable. These factors include, but are not limited to: abnormal or excessive expenditures;[74] duration of the marriage;[75] the condition of the parties after divorce;[76] age; health; employability; and the nature and extent of separate and community property.[77] In addition, a common factor considered by courts in community property states is future earning capacity.[78]

---

74. *See* ARIZ. REV. STAT. ANN. § 25-318(A) (West 1976 & Supp. 1988)(division of community property and other property held in common). In granting the court discretion to divide marital property equitably, the court can consider expenditures in addition to fraud, concealment, and destruction of community property. *See id.*; *see also* Martin v. Martin, 752 P.2d 1038, 1040 (Ariz. 1988)(court may consider abnormal or excessive spending in rendering equitable division); Miller v. Miller, 683 P.2d 319, 321 (Ariz. Ct. App. 1984)(trial court has discretion in dividing community property); Cockrill v. Cockrill, 676 P.2d 1130, 1132 (Ariz. Ct. App. 1983)(division of community by trial court will not be overturned unless abuse of discretion). *See generally* Effland, *Arizona Community Property Law: Time For Review and Revision*, 1982 ARIZ. ST. L.J. 1, 6 (general overview of problems with degree acquired during marriage); Comment, *Arizona Property Division Upon Marital Dissolution*, 1979 ARIZ. ST. L.J. 411, 412 (discussion of court's authority in dividing community property).

75. *See* IDAHO CODE § 32-712(1)(b)(1) (Michie 1983)(factors in dividing community property). In addition to length of the marriage the court may consider:

> . . .
> (2) Any antenuptial agreement of the parties . . . ;
> (3) The age, health, occupation, amount and source of income, vocational skills, employability, and liabilities of each spouse;
> (4) The needs of each spouse;
> (5) Whether the apportionment is in lieu of or in addition to maintenance;
> (6) The present and potential earning capability of each party; and
> (7) Retirement benefits . . . .

Id. § 32-712(1)(b); *see also* Bailey v. Bailey, 689 P.2d 216, 219 (Idaho Ct. App. 1984)(trial judge has discretion under section 32-712 to make an equal division based on factors).

76. *See* NEV. REV. STAT. § 125.150 (1987)(equitable division of property). Courts may consider the following factors in adjudicating the property rights of the parties: the merits of each party; their condition after divorce; who acquired the property; and respective burdens. *See id.* § 125.150(1)(b)(2).

77. *See* WASH. REV. CODE ANN. § 29.09.080 (West 1986)(court cannot consider marital misconduct). Additional factors considered by the courts are the extent and nature of separate property, the length of marriage, and the financial status of each spouse. *See id.*

78. *See* ARIZ. REV. STAT. ANN. § 25-318 (West 1986)(equitable property disposition includes spouses future earning capacity); *see also* Wisner v. Wisner, 631 P.2d 115, 122 (Ariz. Ct. App. 1981)(education and earning potential factors in making equitable distribution of community property). The parties ability to be self sufficient is also considered by community property jurisdictions in making the property division. *See* CAL. CIV. CODE § 4800.3 (Deering 1984 & Supp. 1988)(community has right to be reimbursed for educational expenses); IDAHO CODE § 32-172(1)(b)(6) (Michie 1983)(court may consider potential earning ability of each party); NEV. REV. STAT. § 125.150 (1987)(court can consider status of parties subsequent to divorce); TEX. FAM. CODE ANN. § 3.63 (Vernon 1975 & Supp. 1989)(court shall divide estate of parties); WASH. REV. CODE ANN. § 26.09.080 (West 1986)(disposition of liabilities and properties); *see also* Zamora v. Zamora, 611 S.W.2d 660, 662 (Tex. Civ. App.—Corpus Christi 1980, no writ)(relative earning capacity of each spouse factor in equitable division); Washburn v. Washburn, 677 P.2d 152, 159 (Wash. 1984)(court may consider future earning prospects);

The one asset most representative of future earning capacity is a professional/graduate degree. Regardless of whether courts of a jurisdiction characterize a degree earned during marriage as marital property, there still exists an issue as to the value of that degree when it is considered by a court as a factor in deciding the extent of marital property to which each spouse is entitled.[79]

V. METHODS USED IN VALUING DEGREES

Courts in both community property and common-law jurisdictions have addressed the issue of valuing an educational degree in divorce proceedings.[80] The result has been a number of theories and formulas providing no guidance for future adjudication.[81] In valuing degrees, courts have utilized formulas adopted by various courts[82] as well as those espoused by commentators.[83]

Fernau v. Fernau, 694 P.2d 1092, 1097 (Wash. Ct. App. 1985)(future earnings relevant factor in awarding support).

79. *See* Todd v. Todd, 78 Cal. Rptr. 131, 135 (Ct. App. 1969)(education incapable of being valued); O'Brien v. O'Brien, 489 N.E.2d 712, 714 (N.Y. 1985)(expert valued degree at $472,000). *See generally* Mullenix, *The Valuation of an Education Degree at Divorce*, 16 LOY. L.A.L. REV. 227, 259 (1983)(thorough analysis of valuing degrees).

80. *See, e.g.*, Wisner v. Wisner, 631 P.2d 115, 121 (Ariz. Ct. App. 1981)(value of education and medical license); *In re* Marriage of Aufmuth, 152 Cal. Rptr. 668, 677 (Ct. App. 1979)(education incapable of being valued because of its character); *In re* Marriage of Graham, 574 P.2d 75, 77 (Colo. 1978)(M.B.A. degree personal to holder and has no transferable value); *In re* Marriage of Horstmann, 263 N.W.2d 885, 891 (Iowa 1978)(law degree value reflected by future earning capacity).

81. *See* Lynn v. Lynn, 7 Fam. L. Rptr. (BNA) 3001, 3006 (N.J. Sup. Ct. 1980)(degree held property). In addressing the current state of the law regarding valuation the court stated:

> The attorneys and litigants in this state deserve and are entitled to no less than relative certainty and consistency . . . find[ing] that a non-licensed spouse in one case is entitled to such distribution and a non-licensed spouse in another case is not, is to substitute legal mumbo-jumbo for legal analysis and application.

Id. See generally Castleberry, *Constitutional Limitations on the Division of Property Upon Divorce*, 10 ST. MARY'S L.J. 37, 57 (1978)(even if degree is considered property there remains difficulty in valuing it); Kenderdine, *Contributions to Spouse's Education: The Search for Compensation When the Marriage Ends*, 5 OKLA. CITY U.L. REV. 409, 524-26 (1980)(both community and common-law jurisdictions face valuation problems); Krauskopf, *Recompense for Financing Spouse's Education: Legal Protection for the Marital Investor in Human Capital*, 28 U. KAN. L. REV. 379, 380 (1980)(discussion of various valuation theories employed by courts).

82. *See, e.g.*, *In re* Marriage of Sullivan, 184 Cal. Rptr. 796, 802 (Ct. App. 1982)(Kaufman, J., concurring)(enhanced earning capacity of spouse earning degree); *In re* Marriage of Graham, 574 P.2d 75, 77 (Colo. 1978)(expected future earnings resulting from degree); *In re* Marriage of De La Rosa, 309 N.W.2d 755, 759 (Minn. 1981)(application of cost analysis based on direct educational expenses).

83. *See, e.g.*, Krauskopf, *Recompense for Financing Spouse's Education: Legal Protection for the Marital Investor in Human Capital*, 28 U. KAN. L. REV. 379, 381-82 (1980)(proposal

In *O'Brien v. O'Brien*,[84] the New York Court of Appeals held that a medical degree was marital property, and reasoned that the value of a degree was "the enhanced earning capacity it affords the holder . . . ."[85] A New Jersey court, in *Lynn v. Lynn*,[86] reasoned that the value of a medical degree could be determined by taking the present value of the future interest, in essence discounting future earnings.[87] In Massachusetts, one court, in holding that an orthodontist's license was an asset, valued the degree at $800,000.[88] In *In re Marriage of Sullivan*,[89] a California court discussed four ways for valuing

---

that value of degree should derive from individual's labor); Kennedy & Thomas, *Putting a Value On: Education and Professional Goodwill*, 2 FAM. ADVOC. 3, 4 (1979)(courts could use general accounting or market value method); Mullenix, *The Valuation of an Educational Degree at Divorce*, 16 LOY. L.A.L. REV. 227, 274 (1983)(degree should be based on labor theory of value).

84. 489 N.E.2d 712, 713 (N.Y. 1985).

85. *Id.* at 718. The court valued the degree at $472,000 based on expert testimony. *See id.* at 714. The court reasoned that valuation based expert testimony in the instant case was no different from that elicited in a tort case to establish damages. *See id.* at 718.

86. 7 Fam. L. Rptr. (BNA) 3001, 3001 (N.J. Sup. Ct. 1980). In *Lynn*, the couple was married on June 6, 1971, at which time the husband was attending medical school. *Id.* During the marriage the wife worked as a literature biologist. The husband acquired his medical degree and license in May 1975. In June 1976 the couple divorced at which time the wife was earning approximately $71,000 and the husband $36,000. *Id.*

87. *See id.* The court made a factual finding to the effect "[t]here is no question in the court's mind, and I so find, that defendant's [wife] contribution, both financially and emotionally, to the furtherance of plaintiff's educational goals and his attainment of *his* dream — a license to practice medicine and surgery — was crucial, substantial and incontrovertible." *Id.* The court, analogizing valuation of an educational degree to establishing personal injury damages, concluded that a liberal definition of property must be applied. *See id.* at 3002. The value of the degree and license to practice was determined from testimony by a financial analyst that compared the earning capacity of an individual with a four-year college degree to that of an individual with a medical degree. *See id.* at 3007. The value of the degree may have been different had the husband produced an expert to testify. *See id.* In a more recent case, the New Jersey Supreme Court held that professional degrees and licenses were not marital property divisible upon divorce. *See* Mahoney v. Mahoney, 453 A.2d 527, 529 (N.J. 1982)(M.B.A. degree earned during marriage not property).

88. *See* Reen v. Reen, 8 Fam. L. Rptr. (BNA) 2193, 2193 (Mass. Prob. & Fam. Ct. 1981). The husband and wife married in 1968 at which time the wife worked as a nurse. *Id.* The wife supported the family and paid her husband's tuition for dental school during the course of the marriage. The husband graduated and thereafter engaged in an extramarital affair leading to divorce. At divorce the husband's income was approximately $80,000 while the wife's was $14,000. Over a period of nine years the court found that the wife contributed in excess of $120,000.00 towards the husband's undergraduate and graduate degrees. *See id.* The court apparently considered numerous factors but the reported opinion disclosed no set formula in valuing the degree at $800,000. *See id.* at 1053.

89. 184 Cal. Rptr. 796, 797 (Ct. App. 1982), *vacated*, 691 P.2d 1020, 1023 (Cal. 1984)(property settlement regarding contributions to education not final as of January 1, 1985, retroactively governed by section 4800.3 of California Civil Code).

an educational degree.[90] The first approach compared the degree holder's pre-degree income to post-degree earnings.[91] A second method calculated the number of hours worked by the degree holder and the amount of the community's income contributed to the education.[92] The third approach was based on the lost opportunity of the working spouse.[93] Finally, the court proposed that it could adopt the rationale applied when community funds are used in improving separate property of a spouse.[94] It is apparent that many of the above mentioned methods incorporate a great deal of speculation by relying upon expert testimony in anticipating future earnings. Other jurisdictions have instituted a more rational basis for reaching the value of a degree by applying a cost analysis.[95]

A. *Cost of Education Approach in Common-Law States*

The Supreme Court of Minnesota in *In re Marriage of De La Rosa*[96] held that the supporting spouse was entitled to be compensated only for direct educational costs paid by her.[97] In *Inman v. Inman*,[98] the Kentucky Supreme Court reasoned that the wife, who supported the family and paid for her husband's medical schooling, should receive compensation for educa-

---

90. *See id.* at 814-15 (Ziebarth, J., dissenting) (educational degrees professional licenses capable of being valued).

91. *See id.* (dissent asserted that this approach would be similar to measuring damages in wrongful death or tort cases).

92. *See id.* (only funds and time expended during marriage considered).

93. *See id.* (loss of income would be based on what student spouse could have earned if employed full-time).

94. *See id.* (theory of apportionment). In California, two methods of apportionment exist: the "Van Camp Method" and the "Periera Method." *See id.* The "Van Camp Method" is based on the reasonable value of a spouse's services while the "Periera Method" is based on a fair return on the contributing spouses investment in education. *Id.* at 815.

95. *See, e.g., In re* Marriage of Graham, 574 P.2d 75, 78 (Colo. 1978)(contributions made by spouse to education considered factor); Mahoney v. Mahoney, 453 A.2d 527, 535 (N.J. 1982)(reimbursement alimony for contributions to spouse's education); *In re* Marriage of Lundberg, 318 N.W.2d 918, 924 (Wis. 1982)(wife compensated based on costs incurred and lost opportunity).

96. 309 N.W.2d 755 (Minn. 1981). Pedro and Elena De La Rosa were married on July 8, 1972, at which time Pedro was completing his undergraduate degree while Elena worked full time. *See id.* at 756. In 1976, the couple moved from California to Minnesota in order for the husband to attend medical school. The couple separated after the husband's second year of medical school. During their marriage, the wife held a full time job and paid the bulk of living and educational expenses. *See id.* at 756-57.

97. *See id.* at 759 (value of education based on cost). In contesting the award by the trial court, the wife argued that the degree and present earning capacity were marital property and that the division should be made based on its present value. *See id.* at 758. The husband argued that absent a statutory provision permitting restitution, the trial court abused its discretion in awarding any amount to the wife. *See id.* at 757. The trial court in awarding the wife $29,000 for her contributions towards the husband's degree used the following formula:

tional expenses only.[99] In *Hubbard v. Hubbard*,[100] the Oklahoma Supreme Court adopted a cost analysis approach, similar to that in *Inman*, in valuing a degree.[101] Likewise, the Wisconsin Supreme Court, in *In re Marriage of Lundberg*,[102] valued a husband's medical degree based on costs incurred by the supporting spouse.[103] The Supreme Court of Iowa in *In re Marriage of*

---

respondent's [wife] financial contribution to community fund during college and medical school

less

petitioner's [husband] financial contribution to community fund during college and medical school excluding student loans and grants

equals

restitutionary award to respondent.

(41,000 − 11,331 = 29,669).

Id. at 757 n.4. The Supreme Court of Minnesota reduced the award to $11,400, reasoning that the wife should be granted restitution only for the husband's direct educational costs and living expenses. *See id.* at 759.

98. 648 S.W.2d 847 (Ky. 1982). In *Inman*, the couple was married for approximately seventeen years. *See id.* at 848. During this time the wife worked full time while the husband attended dental school and obtained a dental degree and license. *See id.*

99. *See id.* at 852. The Kentucky Supreme Court reversed the appellate court's determination that the degree was marital property. *See id.* at 848. Although the court did not hold the degree to be marital property, it did acknowledge that a spouse who supports another spouse through school should be compensated. *See id.* at 852. The Court's formula to determine the value of the degree was "the amount of money the non-college going spouse contributed toward living expenses, . . . educational costs, and the potential for increase in future earning capacity . . . ." *Id.*

100. 603 P.2d 747 (Okla. 1979). In lieu of a property division, the trial court awarded the wife $100,000 which the husband appealed as excessive. *See id.* at 749. The husband attended undergraduate and medical school during which time he was supported by his wife. The trial court concluded that the husband's net future earnings would amount to $250,000 of which the wife was entitled to forty percent. *See id.* at 750. The trial court also concluded that the wife had a vested property right in the husband's medical career. *See id.* at 749-50.

101. *See* Hubbard v. Hubbard, 603 P.2d 747, 752 (Okla. 1979)(supporting spouse has right to compensation for educational costs). In reversing the trial court in part, the court held that the wife had a right to be compensated for her contributions rather than a vested property right in the husband's future income. *Id.* Adopting a cost approach in valuing the wife's award, the court concluded that the wife was entitled to contributions made for educational costs, direct living expenses plus adjustments for inflation and reasonable interest. *Id.*

102. 318 N.W.2d 918 (Wis. 1982). While attending college in 1970, David and Judy Lundberg were married. *See id.* at 919. Receiving a Master's Degree in 1972, Judy started working as a high school teacher. Between 1972 and 1976, David attended medical school and received a medical degree. During David's tenure at medical school, he contributed roughly $6,600 while his wife contributed nearly $46,000 to living expenses. Tuition for medical school was approximately $7,000. *See id.* Prior to completing his residency in 1979, Judy filed for divorce. *See id.*

103. *See id.* at 924 (value of education based on cost). Under a state statute authorizing the trial court to make a fair and equitable property distribution, the court concluded that a $33,000 award was not an abuse of discretion. *See id.* The husband estimated the wife's con-

Horstmann[104] concluded that the supporting spouse should be reimbursed for costs expended on the husband's degree.[105] Although the extent of property awarded the respective spouses varies based on the facts and circumstances of each case, application of a cost analysis exhibits a better reasoned basis than expert testimony[106] in valuing educational degrees. The acceptance of the cost analysis approach is further evidenced by its codification by state legislatures.[107]

B. *Contributions to Education as a Factor in Property Divisions*

Presently, at least ten states have enacted statutes that expressly acknowledge the contributions made to a student spouse's education.[108] Indiana's

---

tributions to his education totaled $20,000, while the wife estimated her contributions at $35,000. *See id.*

104. 263 N.W.2d 885 (Iowa 1978). Randall and Donna Horstmann were married in October 1969, while attending a state university. *See id.* at 886. After graduating from college Randall obtained a master's degree and later, a law degree. Although Donna was unable to complete her college degree due to pregnancy, she worked while her husband attended law school. The trial court found that during the marriage Donna contributed $15,760 toward expenses and awarded her $18,000. *See id.* at 886, 888.

105. *See id.* at 891 (contributing spouse has right of reimbursement for funds expended on education). Relying on the Colorado Supreme Court's decision in *Graham v. Graham*, the court held that although the law degree was not marital property, the future earnings resulting from the degree were a divisible asset. *See id.*; *see also In re* Marriage of Graham, 574 P.2d 75, 77 (Colo. 1978)(M.B.A. degree not property). While the court did not apply a structured formula in valuing the degree it concluded that "[t]he evidence establishes the cost of the education." *Horstmann*, 263 N.W.2d at 891.

106. *See, e.g., In re* Marriage of De La Rosa, 309 N.W.2d 755, 759 (Minn. 1981)(strict cost analysis in valuing degree) O'Brien v. O'Brien, 489 N.E.2d 712, 714 (N.Y. 1985)(medical degree valued based on expert testimony estimating future earnings); Daniels v. Daniels, 185 N.E.2d 773, 775 (Ohio Ct. App. 1961)(value of education based on testimony of plaintiff's mother who relied on world almanac). *See generally* Comment, *Professional Education as a Divisible Asset in Marriage Dissolution*, 64 IOWA L. REV. 705, 710-11 (1979)(discusses *Daniels* and recognition of future earnings as asset).

107. *See* CAL. CIV. CODE § 4800.3 (Deering Supp. 1988)(enacted to permit reimbursement for educational expenses); IND. CODE ANN. § 31-1-11.5-11(d) (Burns 1987 & Supp. 1988)(money judgment for financial contribution to spouses education); WIS. STAT. ANN. § 767.255(5) (West 1981)(contributions to education relevant factor in making property division).

108. *See* CAL. CIV. CODE § 4800.3(a) (Deering Supp. 1988)(reimbursement for community contributions to spouse's education); FLA. STAT. ANN. § 61.08(2)(f) (West 1985 & Supp. 1989)(factors allowed in awarding alimony); GA. CODE ANN. § 19-6-5(a) (Michie 1982)(education factor in awarding alimony); IND. CODE ANN. § 31-1-11.5-11(d) (Burns 1987 & Supp. 1988)(money judgment for contributions to lab fees, books and tuition only); IOWA CODE ANN. § 598.21(1)(e) (West 1981 & Supp. 1988)(marital estate divided after court considers contributions to education); NEB. REV. STAT. § 42-365 (1988)(educational opportunities one factor in awarding alimony and dividing marital estate); N.Y. DOM. REL. § 236(B)(5)(d)(6) (McKinney 1986)(contributions to career or career potential of spouse factor in dividing mari-

statute specifically allows one spouse to obtain a judgment in the amount contributed to the student spouse's degree.[109] Unlike Indiana's statute, the Wisconsin provision, along with those of Florida, Georgia, Iowa, Nebraska, New York, North Carolina, and Pennsylvania are more general, expressly permitting the court to consider the supporting spouse's contributions toward the student spouse's degree as a factor in dividing the parties' property.[110] California, a community property state, has adopted a moderate

---

tal property); N.C. GEN. STAT. § 50-20(c)(7) (1987)(contributions to education or career factor in making equitable division of spouses property); PA. STAT. ANN. tit. 23, § 401(d)(4) (Purdon Supp. 1988)(contributions to education factor in division of marital property); WIS. STAT. ANN. § 767.255(5) (West 1981)(court may alter equal division where one spouse contributes to earning capacity, training or education of other spouse).

109. *See* IND. CODE ANN. § 31-1-11.5-11 (Burns 1987 & Supp. 1988)(judgment allowed for educational expenses directly attributable to spouse's degree). This statute provides:

> When the court finds there is little or no marital property, it may award either spouse a money judgment not limited to the property existing at the time of final separation. However, this award may be made only for the financial contribution of one (1) spouse toward tuition, books, and laboratory fees for the higher education of the other spouse.

Id. § 31-1-11.5-11(d). Under this statute, courts have been liberal in dividing the marital property of parties. *See* Porter v. Porter, 526 N.E.2d 219, 225-26 (Ind. Ct. App. 1988)(marital division upheld which included husband's goodwill of medical practice in valuing parties property). *See generally* Reed, *Family Law Survey*, 21 IND. L. REV. 159, 160 (1988)(summary and analysis of section 31-1-11.5-11).

110. *See* WIS. STAT. ANN. § 767.255 (West 1981)(recognizes contributions to education). The general body of Wisconsin's statute creates a presumption that property will be divided equally. *See id.* However, the court can alter its division after considering: "[t]he contribution by one party to the education, training or increased earning power of the other [spouse]; . . . [and] [t]he earning capacity of each party . . . ." *Id.* Under this statute, the trial court retains discretion in making property division. *See* Schwartz v. Linders, 426 N.W.2d 97, 99 (Wis. Ct. App. 1988)(court should consider parties respective needs). Texas law does not preclude the consideration of an education degree as a factor in dividing the parties' estate. *See* Frausto v. Frausto, 611 S.W.2d 656, 659 (Tex. Civ. App.—San Antonio 1980, writ dism'd w.o.j.). Like the Wisconsin statutory provision, the laws of Iowa, New York, North Carolina and Pennsylvania consider education as a factor when dividing marital property. *See* IOWA CODE ANN. § 598.21(1)(e) (West 1981 & Supp. 1988)(equitable division after considering contributions to education); N.Y. DOM. REL. LAW § 236(B)(5)(d)(6) (McKinney 1986)(court shall consider indirect or direct contributions to a spouse's career or career potential); N.C. GEN. STAT. § 50-20(c)(7) (1987)(where equal division not fair court shall make equitable division considering indirect or direct contributions to education or career); PA. STAT. ANN. tit. 23, § 401(d)(4) (Purdon Supp. 1988)(upon request court shall equitably divide marital property after considering contributions to education).

Florida, Georgia and Nebraska use contributions to a spouse's education as a factor in awarding alimony. *See* FLA. STAT. ANN. § 61.08(2)(f) (West 1985 & Supp. 1989)(permissible factors in awarding alimony). Section 61.03 provides in pertinent part:

> (1) In a proceeding for dissolution of marriage, the court may grant alimony to either party . . . .
>
> (2) In determining a proper award of alimony or maintenance, the court shall consider all relevant economic factors, including but not limited to:

alternative allowing for reimbursement.[111]

VI. EDUCATIONAL DEGREES UNDER CALIFORNIA'S COMMUNITY PROPERTY SCHEME

The California Civil Code defines community property as that property acquired during marriage other than separate property.[112] Separate property is that property acquired by either spouse before marriage, or by gift, devise, or descent during marriage.[113] California courts, like courts in other states, have refused to characterize educational degrees as property.[114] In

---

(f) The contribution of each party to the marriage, including, . . . education, and career building of the other party.

Id. Pursuant to statutory authority, Georgia courts also consider contributions to education in awarding alimony. *See* GA. CODE ANN. § 19-6-5(a) (Michie 1982)(education factor in awarding alimony); *see also* Moon v. Moon, 229 S.E.2d 440, 442 (Ga. 1976)(wife's career potential considered in property settlement). Section 19-6-5 provides:

(a) The finder of fact may grant permanent alimony to either party, . . . [t]he following shall be considered in determining the amount of alimony, if any, to be awarded:

(5) Where applicable, the time necessary for either party to acquire sufficient education or training . . .

(6) The contribution of each party to the marriage, including, but not limited to, . . . education, and career building of the other party . . .

GA. CODE ANN. § 19-6-5(a) (Michie 1982). In Nebraska, educational opportunities may be used as a factor in awarding alimony and dividing the parties property. *See* NEB. REV. STAT. § 42-365 (1988)(alimony and division of property). Section 42-365 provides that "[t]he court may order payment of . . . alimony and division of property as may be reasonable, having regard for . . . the contributions to . . . and interruption of personal careers or educational opportunities . . . . " *Id.*

111. *See* CAL. CIV. CODE § 4800.3 (Deering Supp. 1988)(reimbursement for educational expenses). *Compare* IND. CODE ANN. § 31-1-11.5-11(d) (Burns 1987 & Supp. 1988)(money judgment for contributions to education) *with* WIS. STAT. ANN. § 767.255(5) (West 1981)(contributions to education considered as factor).

112. *See* CAL. CIV. CODE § 687 (Deering 1971)(definition of community property). Property is something that a person is capable of possessing and using exclusively. *See id.* § 654 (definition of property); *see also* Estate of Fowler, 182 Cal. Rptr. 64, 66 (Ct. App. 1982)(property represents any valuable interest or right subject to protection by law). *See generally* Reppy, *Community and Separate Interests in Pensions and Social Security Benefits After Marriage of Brown and ERISA*, 25 UCLA L. REV. 417, 420 (1978)(community property interests in benefits); Comment, *The Division of the Family Residence Acquired with a Mixture of Separate and Community Funds*, 70 CALIF. L. REV. 1263, 1281 (1982)(realty and improvements as community property); Comment, *Educational Degrees at Divorce: Toward an Educated Dissolution*, 59 S. CAL. L. REV. 1351, 1367 (1986)(analysis of degrees as property).

113. *See* CAL. CIV. CODE § 5107 (Deering 1984)(definition of wife's separate property); *id.* § 5108 (definition of husband's separate property). Property acquired after separation is also characterized as separate property. *See id.* § 5119. *See generally* Note, *Characterization of Property in California When Period of Acquisition Overlaps Creation or Termination of Marital Community*, 17 HAST. L.J. 815, 822 (1966)(discusses characterization and division of marital property).

114. *See, e.g., In re* Marriage of Slivka, 228 Cal. Rptr. 76, 80-81 (Ct. App. 1986)(educa-

Todd v. Todd,[115] the first decision in a trilogy of California cases, the court reasoned that a professional education was an intangible property interest and held that a degree was not subject to division in divorce proceedings.[116] A decade later, the California Court of Appeals in *In re Marriage of Aufmuth*,[117] held that a law degree was not marital property, recognizing the inherent problems with valuing an education.[118] Continuing the trend, the court in *In re Marriage of Sullivan*,[119] held that a degree was not community property, relying on the rationale that an education carried with it no traditional characteristics of property.[120] Although California has been reluctant to expand the definition of community property to include a de-

---

tional degree is not marital property but supporting spouse may seek reimbursement for expenses contributed); *In re* Marriage of Graham, 574 P.2d 75, 77 (Colo. 1978)(master's degree in business not property); Stern v. Stern, 331 A.2d 257, 260 (N.J. 1975)(attorney's earning capacity not property); Frausto v. Frausto, 611 S.W.2d 656, 657 (Tex. Civ. App.—San Antonio 1980, writ dism'd w.o.j.)(medical degree not property).

115. 78 Cal. Rptr. 131 (Ct. App. 1969). Husband and wife married in January 1947, and remained married until December 1964, at which time they separated. *Id.* at 133. During the marriage, the husband completed high school, college, and finally law school in June 1951. *Id.* at 134. Throughout this time, the wife worked full time contributing to his educational expenses and their living costs. *Id.* At trial, the wife asserted that her husband's education was a community asset and should be considered part of the parties' estate. The experts testified as to the value of an education in general and as to the value of the husband's education. In valuing the husband's education the expert apparently considered his health, life expectancy and average annual earnings. Experts testified that the education was valued at $308,000. *Id.*

116. *See id.* at 135. Relying on a previous California case, the *Todd* court reasoned that an educational degree is a property right intangible in nature which cannot be monetarily valued. *See id.* (relying on *Franklin v. Franklin*); *see also* Franklin v. Franklin, 155 P.2d 637, 641 (Cal. Ct. App. 1945)(right to practice medicine not community property)

117. 152 Cal. Rptr. 668 (Ct. App. 1979), *overruled on other grounds sub nom.*, *In re* Marriage of Lucas, 614 P.2d 285, 286 (Cal. 1980). The parties were married in August 1967, at which time the wife was employed as a school teacher while the husband was attending law school. *Id.* at 672. The couple separated in September 1975, and filed for divorce. The wife argued that her husband's education was a community asset subject to equal distribution. *Id.* at 677.

118. *Id.* In distinguishing an education from other forms of property, the court stated "that the word 'property', as used in the statutes relating to community property, does not encompass every property right acquired . . . during marriage . . . ." *Id.* (citing *Franklin v. Franklin*, 155 P.2d 637, 639 (Cal. Ct. App. 1945)).

119. 184 Cal. Rptr. 796 (Ct. App. 1982), *vacated*, 691 P.2d 1020, 1023 (Cal. 1984).

120. *See id.* at 800 (medical degree has neither exchange or transferable value because it is personal to holder). The court, reconsidering an earlier opinion, expressly stated that a medical degree was not community property. *Id.* The court relied on an earlier California appellate court decision which held that property must be capable of transfer, ownership, and survival. *Id.*; *see also* Franklin v. Franklin, 155 P.2d 637, 641 (Cal. Ct. App. 1945). *See generally* Comment, *Half a Loaf Is Better Than None: Sullivan Revisited*, 15 GOLDEN GATE U.L. REV. 527, 532 (1985)(analysis of *Sullivan* and California's approach to characterizing degrees); Note, *Sullivan: The Final Decision*, 12 W. ST. U.L. REV. 937, 938 (1985)(various remedies available to recoup investment in education of spouse).

gree, it is the only *community property* state to enact legislation acknowledging that a degree is a marital asset.[121]

VII. CALIFORNIA'S STATUTORY RIGHT OF REIMBURSEMENT FOR EDUCATIONAL COSTS

Section 4800.3 of the California Civil Code provides that "[t]he community shall be reimbursed for community contributions to education or training of a party that substantially enhances the earning capacity of the party."[122] The statute further provides that the amounts reimbursed will

---

121. *See* CAL. CIV. CODE § 4800.3 (Deering Supp. 1988)(reimbursement for education); *see also* Bassett, *Repealing Quasi-Community Property: A Proposal to Readopt a Unitary Marital Property Scheme*, 22 U.S.F.L. REV. 463, 499 (1988)(review of section 4800); Comment, *Community Reimbursement for a Professional Degree Upon Dissolution*, 22 SAN DIEGO L. REV. 1275, 1286 (1985)(commentary on implications of section 4800.3).

122. CAL. CIV. CODE § 4800.3(1) (Deering Supp. 1988). This section provides in full:

§ 4800.3. [Reimbursement for community contributions to education or training]

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

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

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

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

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

(1) The community has substantially benefited from the education, training, or loan incurred for the education or training of the party. There is a rebuttable presumption, affecting the burden of proof, that the community has not substantially benefited from community contributions to the education or training made less than 10 years before the commencement of the proceeding, and that the community has substantially benefited from community contributions to the education or training made more than 10 years before the commencement of the proceeding.

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

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

(d) Reimbursement for community contributions and assignment of loans pursuant to this section is the exclusive remedy of the community or a party for the education or training and any resulting enhancement of the earning capacity of a party. However, nothing in this subdivision shall limit consideration of the effect of the education, training,

include interest.[123] The statute has two other significant clauses: one providing for a rebuttable presumption based on the length of the marriage;[124] the other designating this section as an exclusive remedy.[125]

The California legislature, in enacting section 4800.3, recognized the disparities that arise when a marriage is dissolved immediately or soon after a student spouse obtains a degree, as opposed to a marriage that is dissolved many years after the student spouse has obtained a degree.[126] Under subsection (c)(1) of section 4800.3, there is a rebuttable presumption that the community has not substantially benefited as a result of one spouse obtaining a degree when the marriage is dissolved within ten years following acquisition of the degree.[127] To the contrary, where the marriage is dissolved more than ten years following a spouse's acquisition of a degree, there exists a rebuttable presumption that the community has received substantial benefits.[128] Furthermore, to avoid any ambiguous application of this provision in divorce proceedings, subsection (d) states "this section is the exclusive remedy

---

or enhancement, or the amount reimbursed pursuant to this section, on the circumstances of the parties for the purpose of an order for support pursuant to Section 4801.

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

123. *See id.* § 4800.3(b)(1) (remedy provision granting reimbursement). Interest on the loan will accrue at the end of each year community funds are expended. *Id.* § 4800.3, Comment.

124. *See id.* § 4800.3(c)(1) (presumption that community has benefited from education based on length of marriage).

125. *See id.* § 4800.3(d) (reimbursement exclusive remedy regarding contributions to education and claims to future earnings in property divisions incident to divorce).

126. *See id.* § 4800.3(c)(1) (presumption that community has benefited). The California Law Revision Commission's explanation of subsection (c)(1) states in pertinent part:

> Subdivision (c) is intended to permit the court to avoid the requirements of this section in an appropriate case. For example, if one party receives a medical education, degree, and license at community expense, but the marriage endures for some time with a high standard of living and substantial accumulation of community assets attributable to the medical training . . .

Id. § 4800.3 Comment. *See generally* Comment, *The Professional Education Earned During Marriage: The Case for Spousal Support*, 16 PAC. L.J. 981, 993 (1985)(analysis of contributions to education prior to enactment of section 4800.3); Note, *Domestic Relations; Community Property—Education*, 16 PAC. L.J. 643, 643-44 (1985)(summary of California's 1984 legislative enactments).

127. *See* CAL. CIV. CODE § 4800.3(c)(1) (Deering Supp. 1988)(presumption community not benefited). This provision further promotes the state's interest in promoting the equitable distribution of marital assets. *See In re* Marriage of Slivka, 228 Cal. Rptr. 76, 79 (Ct. App. 1986)(retroactive application of section 4800.3 held constitutional).

128. *See* CAL. CIV. CODE § 4800.3(c)(1) (Deering Supp. 1988)(presumption community received substantial benefits from acquisition of degree). This provision avoids a spouse from taking advantage of the equitable remedies made available where that spouse has enjoyed the material assets earned over a period of time by the degreed spouse. *See id.* § 4800.3 (California Law Revision Commission Comment).

of the community or a party for the education or training and any resulting enhancement of the earning capacity of a party."[129] Although the retroactive application of California Civil Code section 4800 has been, as a whole, the center of much controversy since its enactment,[130] application of section 4800.3, to date, has been construed and upheld by an appellate court[131] and the Supreme Court of California.[132]

VIII. A PROPOSAL FOR TEXAS

The underlying policy of community property recognizes that property acquired during marriage is the product of both the husband and wife.[133] Texas courts are given express authority to divide the marital estate of a husband and wife in a manner that is just and right.[134] Texas presently acknowledges that realty purchased with community funds,[135] wages earned,[136] and retirement benefits accrued[137] during marriage are commu-

---

129. *Id.* § 4800.3(d) (reimbursement exclusive remedy); *see also* Comment, *Reimbursement of Community Contributions to a Spouse's Education Upon Divorce: California Civil Code Section 4800.3*, 12 PEPPERDINE L. REV. 1115, 1122 (1985)(section 4800.3(d) precludes parties pursuit of other remedies).

130. *See, e.g.*, *In re* Marriage of Guthrie, 236 Cal. Rptr. 583, 585-86 (Ct. App. 1987)(retroactive effect on community home); *In re* Marriage of Slivka, 228 Cal. Rptr. 76, 79 (Ct. App. 1986)(community contributions to education); *In re* Marriage of Howard, 228 Cal. Rptr. 813, 817 (Ct. App. 1986)(marital home). *See generally* Bassett, *Repealing Quasi-Community Property: A Proposal to Readopt a Unitary Marital Property Scheme*, 22 U.S.F.L. REV. 463, 490 (1988)(constitutionality of retroactive application of section 4800).

131. *See Slivka*, 228 Cal. Rptr. at 79 (retroactive application of section 4800.3 allowing reimbursement for contributions to educational expenses).

132. *See In re* Marriage of Sullivan, 691 P.2d 1020, 1023 (Cal. 1984)(denial of reimbursement for educational expenses incurred during marriage reversed).

133. *See* TEX. CONST. art. XVI, § 15 (1876, amended 1987)(definition of community by exclusion); TEX. FAM. CODE ANN. § 5.01(b) (Vernon 1975)(property acquired during marriage by *either* spouse is community); TEX. FAM. CODE ANN. § 5.02 (Vernon 1975 & Supp. 1989)(property in possession of *either* spouse at divorce or during marriage presumed community property). *See generally* Castleberry, *Constitutional Limitations on Division of Property Upon Divorce*, 10 ST. MARY'S L.J. 37, 55 (1978)(purpose of community property); Vaughn, *Policy of Community Property and Interspousal Transactions*, 19 BAYLOR L. REV. 20, 25 (1967)(discussion of community property policy considerations).

134. *See* TEX. FAM. CODE ANN. § 3.63 (Vernon 1975 & Supp. 1989)(division of community property).

135. *See id.* § 5.01(b) (Vernon 1975)(*all* property earned or acquired during marriage deemed community property); *see also* Alexander v. Alexander, 373 S.W.2d 800, 804-05 (Tex. Civ. App.—Corpus Christi 1963, no writ)(realty acquired during marriage held community property); Hitchcock v. Cassel, 275 S.W.2d 205, 206-07 (Tex. Civ. App.—Austin 1955, writ ref'd n.r.e.)(real property purchased during marriage by wife community property).

136. *See* TEX. FAM. CODE ANN. § 5.01(b) (Vernon 1975)(community property defined); *see also* Cearley v. Cearley, 544 S.W.2d 661, 662 (Tex. 1976)(income of either spouse during marriage is community property); Maben v. Maben, 574 S.W.2d 229, 232 (Tex. Civ. App.—Fort Worth 1978, no writ)(salary of either spouse community property). *See generally* Mc-

nity property. Moreover, the courts have extended the application of the definition of community property to include, in certain circumstances, a property interest in the nature of goodwill.[138]

Based on *Frausto v. Frausto*,[139] an educational degree earned during marriage in Texas is not property and, therefore, is not part of the divisible marital estate.[140] To characterize a degree earned during marriage as community property is indeed extreme.[141] Although Texas courts may consider the education of a spouse as a factor in dividing the estate,[142] equity demands recognition of an educational degree as a marital asset. At a minimum, Texas

---

Knight, *Family Law: Husband and Wife*, 34 SW. L.J. 115, 126 (1980)(property obtained during marriage presumed community).

137. *See Cearley*, 544 S.W.2d at 662. Robert Cearley served in the United States Air Force for 19 years, 18 of which he was married. *Id.* In a subsequent divorce proceeding the trial court granted the wife an interest in her husband's retirement benefits. In determining the wife's interest, the court emphasized that benefits earned during marriage were community property and subject to division in divorce proceeding. *Id.*; *see also* Busby v. Busby, 457 S.W.2d 551, 554 (Tex. 1970)(benefits classified as compensation and when earned during marriage constitute community property); Herring v. Blakeley, 385 S.W.2d 843, 846 (Tex. 1965)(benefits derived from contributions to profit-sharing plan during marriage held community property). *See generally* McKnight, *Title I. Husband and Wife, Texas Family Code Symposium*, 13 TEX. TECH L. REV. 611, 735 (1982)(analysis of Texas Family Code section 5.01 community property); Comment, *An Interdisciplinary Analysis of the Division of Pension Benefits in Divorce and Post-Judgment Partition Actions: Cures for the Inequities in* Berry v. Berry, 37 BAYLOR L. REV. 107, 128-29 (1985)(nature of benefits as community property).

138. *See, e.g.*, Eikenhorst v. Eikenhorst, 746 S.W.2d 882, 889 (Tex. App.—Houston [1st Dist.] 1988, no writ)(goodwill of medical association community asset); Finn v. Finn, 658 S.W.2d 735, 741 (Tex. App.—Dallas 1983, writ ref'd n.r.e.)(commercial value of goodwill community property); Geesbreght v. Geesbreght, 570 S.W.2d 427, 433 (Tex. Civ. App.—Fort Worth 1978, writ dism'd)(goodwill of medical corporation). *See generally* Heard, Strieber & Orsinger, *Characterization of Marital Property*, 39 BAYLOR L. REV. 909, 930 (1987)(goodwill in professional corporations); Koons & Holmes, *Division of Property at Divorce*, 39 BAYLOR L. REV. 977, 997 (1987)(discussion of goodwill in sole practitioner's practice, professional partnerships and associations).

139. 611 S.W.2d 656 (Tex. Civ. App.—San Antonio 1980, writ dism'd w.o.j.).

140. *Id.* at 659.

141. *See* O'Brien v. O'Brien, 489 N.E.2d 712, 714, 716 (N.Y. 1985)(medical degree earned during marriage held property with subsequent award to wife of $188,000 in future earnings). The characterization of a degree and career potential as property has been taken to the extreme in some instances. *See* Golub v. Golub, 527 N.Y.S.2d 946, 950 (N.Y. App. Div. 1988)(application of *O'Brien* decision to any career). In *Golub*, a New York court held that the increased value of a model/actress' career that occurred during marriage was marital property entitling husband to share in the increase. *Id.*

142. *See* Murff v. Murff, 615 S.W.2d 696, 699 (Tex. 1981)(education factor considered by trial court in making just and right property division); Cooper v. Cooper, 513 S.W.2d 229, 233-34 (Tex. Civ. App.—Houston [1st Dist.] 1974, no writ)(court considered husband's education and medical degree in dividing parties' community estate).

should grant spouses a statutory right of reimbursement.[143]

A statutory right of reimbursement applied to educational degrees would be an extension of current law allowing reimbursement where separate property is improved by community contributions.[144] To avoid ambiguity and disparity in valuing the degree, a cost approach should be adopted.[145] Courts presently determine the value of an education from expert testimony or estimations by the judge or parties.[146] However, the value of an education can be established in a reliable and efficient manner based on a cost of education analysis.[147] This method of valuation is more reliable because the

---

143. *See* CAL. CIV. CODE § 4800.3 (Deering Supp. 1988)(statutory right of reimbursement for education).

144. *See* Penick v. Penick, 32 Tex. Sup. Ct. J. 143, 144 (Dec. 14, 1988)(right of reimbursement and offset); Anderson v. Gilliland, 684 S.W.2d 673, 675 (Tex. 1985)(reimbursement for improvements). The Texas Supreme Court in *Anderson* stated that the amount "for reimbursement for funds expended by an estate for improvements to another estate is to be measured by the enhancement in value to the benefited estate." *Id.* Other Texas appellate courts have also recognized a right of reimbursement. *See* Allen v. Allen, 704 S.W.2d 600, 606 (Tex. App.—Fort Worth 1986, no writ)(reimbursement where community funds improved separate property); Hilton v. Hilton, 678 S.W.2d 645, 648 (Tex. App.—Houston [14th Dist.] 1984, no writ)(funds reimbursed when applied to indebtedness); Snider v. Snider, 613 S.W.2d 8, 9 (Tex. Civ. App.—Dallas 1981, no writ)(improvements to homestead reimbursable); *see also* Weekley, *Reimbursement Between Separate and Community Estates—The Current Texas View*, 39 BAYLOR L. REV. 945, 947 (1987)(analysis of reimbursement and case law). *See generally* Koons & Holmes, *Division of Property at Divorce*, 39 BAYLOR L. REV. 977, 1026 (1987)(effect of reimbursement on division of property); Note, *Marital Property—Division of Property Upon Divorce—Community Entitled to Reimbursement for Enhanced Value of Separately Owned Corporate Stock*, 16 ST. MARY'S L.J. 277, 278 (1984)(history of reimbursement and analysis of *Jensen v. Jensen*, 665 S.W.2d 107 (Tex. 1984)).

145. *See, e.g.*, Inman v. Inman, 648 S.W.2d 847, 852 (Ky. 1982)(living and educational costs used to determine value of degree); *In re* Marriage of De La Rosa, 309 N.W.2d 755, 759 (Minn. 1981)(supporting spouse awarded direct educational costs); Hubbard v. Hubbard, 603 P.2d 747, 749 (Okla. 1979)(spouse compensated for costs of education); *see also* CAL. CIV. CODE § 4800.3 (Deering Supp. 1988)(reimbursement for costs incurred for education). *See generally* Erickson, *Spousal Support Toward the Realization of Educational Goals: How the Law Can Ensure Reciprocity*, 1978 WIS. L. REV. 947, 971-77 (value of degree based on contributions to tuition, fees, books); Krauskopf, *Classifying Marital and Separate Property—Combinations and Increase in Value of Separate Property*, 89 W. VA. L. REV. 997, 1009 (1987)(cost based on full value); Krauskopf, *Recompense for Financing Spouse's Education: Legal Protection for the Marital Investor in Human Capital*, 28 U. KAN. L. REV. 379, 390 (1980)(opportunity cost theory).

146. *See, e.g.*, Daniels v. Daniels, 185 N.E.2d 773, 775 (Ohio Ct. App. 1961)(value of education based on testimony of plaintiff's mother who relied on world almanac); O'Brien v. O'Brien, 489 N.E.2d 712, 714 (N.Y. 1985)(expert valued degree at $472,000); *In re* Marriage of Lundberg, 318 N.W.2d 918, 924 (Wis. 1982)(husband and wife estimated value of degree based on their contributions).

147. *See Inman*, 648 S.W.2d at 852 (value of medical degree based on costs); *Lundberg*, 318 N.W.2d at 924 (value of medical education based on cost). *See generally* Erickson, *Spousal Support Toward the Realization of Educational Goals: How the Law Can Ensure Reci-*

actual costs of education are liquidated and not subject to speculation. Furthermore, a cost approach simply requires the tendering of receipts to establish the amount of funds contributed by the community. Judicial economy is also served by dispensing with expert testimony which is time consuming to the court and costly to the parties.

A statutory right of reimbursement, if adopted, would compensate spouses for the contributions made during marriage to the other spouse's education. In a divorce proceeding under Texas law, a spouse's education *may* be considered in the property division but only as a factor in making a just and right distribution of the parties estate.[148] Thus, the value placed upon the education, and whether in fact the education is considered as a factor, is wholly within the discretion of the trial court.[149] Absent an abuse of that discretion, the property division will stand.[150] Enactment of a statutory right of reimbursement incorporating a cost approach of valuation would guarantee a consistent measure of value when considering education in property divisions. California Civil Code section 4800.3 is a foundation upon which to base a statutory right of reimbursement in Texas.[151]

Texas' statutory right of reimbursement should track California's provision and incorporate language to the following effect:

> § 3.634 Reimbursement for Community Contributions to Higher Education
>
> (a) As used in this section, "contributions" means community funds paid toward the education of a spouse having obtained a degree at an

---

procity, 1978 WIS. L. REV. 947, 971-77 (value of education based on contributions to fees, books and tuition).

148. *See, e.g.*, Murff v. Murff, 615 S.W.2d 696, 699 (Tex. 1981)(education as factor in property division); Rafidi v. Rafidi, 718 S.W.2d 43, 44-45 (Tex. App.—Dallas 1986, no writ)(court considered husband's three college degrees as factor in awarding wife majority of community estate); Coote v. Coote, 592 S.W.2d 52, 54 (Tex. Civ. App.—Fort Worth 1979, writ ref'd n.r.e.)(one factor considered by trial court was education); Cooper v. Cooper, 513 S.W.2d 229, 233-34 (Tex. Civ. App.—Houston [1st Dist.] 1974, no writ)(husband's medical degree considered by court in making unequal property division).

149. *See* Young v. Young, 609 S.W.2d 758, 760-61 (Tex. 1980)(court not required to consider factors in property division); Cockerham v. Cockerham, 527 S.W.2d 162, 173 (Tex. 1975)(trial court has discretion to divide spouses estate in just and right manner).

150. *See, e.g.*, *Murff*, 615 S.W.2d at 698 (trial court's division corrected only where abuse of discretion); Hedtke v. Hedtke, 112 Tex. 404, 411, 248 S.W. 21, 23 (1923)(abuse of discretion where property division manifestly unjust and unfair); Haley v. Haley, 713 S.W.2d 801, 803 (Tex. App.—Houston [1st Dist.] 1986, no writ)(abuse of discretion where division not based on evidence); Huls v. Huls, 616 S.W.2d 312, 317 (Tex. Civ. App.—Houston [1st Dist.] 1981, no writ)(wife awarded 85% and husband awarded 15% of community estate *not* abuse of discretion).

151. *See* CAL. CIV. CODE § 4800.3 (Deering Supp. 1988)(reimbursement for contributions to educational expenses).

institution of higher learning or for the repayment of a loan incurred for higher education.

(b) An "institution of higher learning" means any private or public college or university, or any medical, law, veterinary or graduate school.

(c) In a suit for divorce or annulment, subject to limitations provided in this section:

(1) The community shall be reimbursed for community contributions to the education of a spouse who has obtained at least a bachelor's degree. The amount reimbursed shall be with interest at the legal rate, accruing from the end of the calendar year in which the contributions were made.[152]

(2) The community shall be reimbursed in an amount equal to the amount of community funds paid toward direct educational costs. Direct educational costs exclusively include: tuition, books, parking, laboratory fees, photocopying, room and board if the student spouse resides or resided in a place other than with his spouse in their marital residence, student activity fees, graduation fees, or miscellaneous fees charged by the institution of higher learning.

(3) A loan incurred during marriage for the education of a spouse shall not be included among the liabilities of the community estate for the purpose of division. A loan incurred for education shall be assigned to the spouse benefited by the education as his/her separate debt.

(4) In the event more than 10 years have expired since the spouse acquired the degree, this section shall not apply and the community will have no right to reimbursement for contributions to education.[153]

---

152. *See id.* § 4800.3(b)(1). Section 4800.3(b)(1) premises the right of reimbursement on the condition that the earning capacity of the spouse who has received the degree has been substantially enhanced. *See id.* A corollary to section 4800.3(b)(1) is 4800.3(c)(1) which provides a presumption that the community has or has not substantially benefited. *See id.* § 4800.3(c)(1). Unlike California's statute, the proposed provision avoids an inquiry into whether the earning capacity of a spouse has been substantially enhanced or whether the community has substantially benefited from a spouse's education. *Compare* proposed statute § 3.634(c)(1) & (4) (proposed right of reimbursement regardless if earning capacity enhanced) *with* CAL. CIV. CODE § 4800.3(b)(1) & (c)(1) (Deering Supp. 1988)(community reimbursed if spouse's earning capacity substantially enhanced). *See also* Comment, *Educational Degrees at Divorce: Toward an Educated Dissolution*, 59 S. CAL. L. REV. 1351, 1370-80 (1986) (analysis of section 4800.3); Comment, *Reimbursement of Community Contributions to a Spouse's Education Upon Divorce: California Civil Code Section 4800.3*, 12 PEPPERDINE L. REV. 1115, 1120-22 (1985)(meaning of "substantial enhancement" subject to judicial construction.

153. Subsection (c)(4) of the proposed statute establishes a specified time period during which the remedy of reimbursement is available. Although (c)(4) of the proposed statute is based on section 4800.3(c)(1) of the California Civil Code, the proposed provision does not

(5) Reimbursement for community contributions to education or loans for education pursuant to this section shall be the exclusive remedy of the community for any and all funds contributed to the education or payment of loans for direct educational costs of a spouse.
(6) In the event the parties have entered into an express written agreement between one another prior to, during marriage, or incident to divorce, this section is subject to such agreement.[154]

IX. CONCLUSION

Texas, like California, holds that an educational degree earned during marriage is not community property. The San Antonio Court of Appeals, in rendering the *Frausto* decision, relied on the rationale of the Texas Supreme Court and California courts. The community property schemes of Texas and California are very similar. One area, however, in which the law of these jurisdictions diverge regards the division of community property. Texas implements equitable division while California adheres to equal division of the marital estate. Notwithstanding this difference, it would be both feasible and advisable to enact a statute in Texas similar to that of California Civil Code section 4800.3.

Enactment of a statutory right of reimbursement in Texas will provide consistency in valuing educational degrees and equity in rightfully compensating spouses for funds expended on higher education. Establishing the value of an educational degree based on its cost will avoid reliance on expert testimony which may be speculative. Granting a right of reimbursement will further avoid unjust enrichment and acknowledge that a degree earned during marriage is a marital asset. Finally, Texas' enactment of a statutory right of reimbursement for educational costs will be consistent with the

---

incorporate a presumption that the community has or has not substantially benefited. *See* CAL. CIV. CODE § 4800.3(c)(1) (Deering Supp. 1988).

154. *See id.* The proposed statute addresses three specific situations in which a supporting spouse may be compensated for contributions made to the other spouse's education. *Id.* These contributions may be in the form of actual funds expended during the marriage in payment of tuition or repayment during marriage of loans incurred for the educational degree. Additionally, the statute gives the trial judge specific authority to award to the spouse receiving the educational degree the student loan debt remaining upon dissolution of the marriage. In the event that the debt for education is not paid by the degreed recipient who was awarded the debt and the creditor who holds the promise of repayment chooses to collect from the supporting spouse, the statute provides the supporting spouse a right of reimbursement for funds actually paid. This specific right of reimbursement foresees the situation after the divorce and property settlement that requires the divorced spouse to pay on a community debt incurred during the marriage upon which he or she remains liable. *See id.* §§ 4800.3(a)(2), 4800(c)(3) (guidelines for awarding community debt).

Texas courts' existing duty to divide the marital estate of a husband and wife in a manner deemed "just and right."