Golden Gate University Law Review

Volume 15
Issue 3 *Women's Law Forum*

Article 3

January 1985

Half a Loaf is Better Than None: Sullivan Revisited

Bruce H. Rhodes

HALF A LOAF IS BETTER THAN NONE: *SULLIVAN* REVISITED

I. INTRODUCTION

Janet and Mark Sullivan married in September of 1967. Mark entered medical school the following year while Janet completed her undergraduate studies. For the next nine years of their ten year marriage, Mark attended medical school for four years, then completed his internship and his residency for five years. Janet provided support by working full time, and then part time when they moved to Oregon in 1972 for the benefit of Mark's career. She continued to work part time after their daughter was born in 1974.[1]

Janet and Mark separated in 1977 or 1978,[2] then Mark set up his practice in Orange County, California, with money borrowed from his mother. Assets acquired during the marriage consisted of used furniture and two automobiles with payments outstanding.[3] Mark, however, possessed his medical degree, and Janet's attempt to gain an interest in Mark's degree catapulted the Sullivan dissolution into the national spotlight. Courts in sister states awaited California's approach to what has become the most hotly contested issue in family law today.[4]

---

1. *In re* Marriage of Sullivan, 37 Cal. 3d 762, 765, 691 P.2d 1020, 1021-22, 209 Cal. Rptr. 354, 355-56 (1984). The California Supreme Court affirmed the trial court's judgment ordering the husband to pay the wife's costs and attorney fees, but reversed the trial court's judgment denying compensation for contributions to the husband's education and remanded the cause for further proceedings consistent with the views expressed in its opinion. *Id.* at 770, 691 P.2d at 1025, 209 Cal. Rptr. at 359. For a complete discussion of the court's opinion, *see infra* text accompanying notes 162-205.

2. *In re* Marriage of Sullivan, 184 Cal. Rptr. 796, 798 (Ct. App. 1982) (appellate decision omitted from the official reporter pursuant to CAL. R. CT. 976(d)), *aff'd* and *rev'd*, 37 Cal. 3d 762, 691 P.2d 1020, 209 Cal. Rptr. 354 (1984). Mark contended the date of separation was June 15, 1977, while Janet contended the date of separation was April 15, 1978. The court of appeal explained that Janet stipulated at trial that Mark's medical practice was his separate property because evidence indicated that the practice was set up after the separation, regardless of which date was used. *Sullivan*, 184 Cal. Rptr. at 798.

3. *In re* Marriage of Sullivan, 37 Cal. 3d 762, 766, 691 P.2d 1020, 1022, 209 Cal. Rptr. 354, 356 (1984).

4. Skolóff, *Equitable Distribution Update: Where Are We In 1984?*, in EQUITABLE

A. *The Issues*

The parties' situation in *In re Marriage of Sullivan*[5] is representative: "Typically, one spouse attains a degree while the other provides support; then a divorce occurs soon after graduation. Usually there are few assets immediately available, but one spouse leaves the marriage with an education and increased earning potential while the other spouse is given nothing for her efforts."[6] The working spouse has provided financial and emotional support, in addition, often, to taking on an additional measure of household chores. The supporting spouse usually expects that these present sacrifices will be rewarded by a more comfortable lifestyle in the future once the student spouse graduates and begins applying newly acquired professional skills. Because the true value of a degree is the potential for increased earning capacity, a conflict arises between equitable considerations and property division laws when, upon dissolution of the marriage, the supporting spouse seeks an interest in the degree. Although the degree has been earned through expenditures of community effort and money and should conceptually fall within the definition of community or marital property,[7] the future earnings which represent its true value are the separate property[8] of the professional spouse and are not reachable through a property division.

B. *Approaches*

The interest, if any, of the supporting spouse in the degree of the student spouse upon dissolution of the marriage has increasingly divided courts in both community property[9] and equi-

---

DISTRIBUTION: LITIGATION AND DISCOVERY TECHNIQUES 1, 3 (1984).

5. *In re* Marriage of Sullivan, 37 Cal. 3d 762, 691 P.2d 1020, 209 Cal. Rptr. 354 (1984). *See supra* text accompanying notes 1-3.

6. Comment, *A Property Theory of Future Earning Potential in Dissolution Proceedings*, 56 WASH. L. REV. 277, 282-83 (1981).

7. *See* CAL. CIV. CODE § 687 (West 1982). "Community property is property acquired by husband and wife, or either, during marriage, when not acquired as the separate property of either." *Id.*

8. *See* CAL. CIV. CODE § 5118 (West 1983). "The earnings and accumulations of a spouse . . . while living separate and apart from the other spouse, are the separate property of the other spouse." *Id. Accord* CAL. CIV. CODE § 5119 (West 1983). "After the rendition of a judgment decreeing legal separation of the parties, the earnings and accumulations of each party are the separate property of the party acquiring such earnings or accumulations." *Id.*

9. There are eight community property states: ARIZ. REV. STAT. ANN. § 25-318 (1976

table distribution[10] jurisdictions.[11] The approaches adopted by

& Supp. 1984); CAL. CIV. CODE § 4800 (West 1983 & Supp. 1985); IDAHO CODE § 32-713 (1983); LA. CIV. CODE ANN. art. 159 (West 1952 & Supp. 1985); NEV. REV. STAT. § 125.150 (1979); N.M. STAT. ANN. § 40-4-7 (1984); TEX. FAM. CODE ANN. § 3.63 (Vernon 1975 & Supp. 1985); WASH. REV. CODE ANN. § 26.09.080 (Supp. 1985). *See* 1 A. OLDFATHER, J. KOSEL, W. REPPY, JR., J. MCKNIGHT, W. DASILVA, H. LIPSEY, A. PAGANO & G. SKOLOFF, VALUATION & DISTRIBUTION OF MARITAL PROPERTY § 3.01, at 3 n.6 (1984) [hereinafter cited as VALUATION & DISTRIBUTION].

10. There are forty-one equitable distribution states: ALA. CODE § 30-2-51 (1983 & Supp. 1984); ALASKA STAT. § 25.24.160 (1983); ARK. STAT. ANN. § 34-1214 (1962 & Supp. 1983); COLO. REV. STAT. § 14-10-113 (1973 & Supp. 1984); CONN. GEN. STAT. ANN. § 46b-81 (West Supp. 1984); DEL. CODE ANN. tit. 13, § 1513 (1974); D.C. CODE ANN. § 16-910 (1981); GA. CODE ANN. § 19-5-13 (1982); HAWAII REV. STAT. § 580-47 (1976 & Supp. 1983); Marriage & Dissolution Act § 503, ILL. ANN. STAT. ch. 40, § 503 (Smith-Hurd 1980 & Supp. 1984-1985); IND. CODE § 31-1-11.5-11 (1980 & Supp. 1984); IOWA CODE § 598.21 (1981 & Supp. 1983); ME. REV. STAT. ANN. tit. 19, § 722-A (1981 & Supp. 1984); MD. FAM. LAW CODE ANN. § 8-205 (1984); MASS. GEN. LAWS ANN. ch. 208, § 34 (West 1958 & Supp. 1983); MICH. COMP. LAWS §§ 552.19, 552.401 (1967 & Supp. 1983); MINN. STAT. § 518.58 (1969 & Supp. 1985); MO. REV. STAT. § 452.330 (1977 & Supp. 1985); MONT. CODE ANN. § 40-4-202 (1983); NEB. REV. STAT. § 42-365 (1984); N.H. REV. STAT. ANN. § 458.19 (1983); N.J. REV. STAT. § 2A:34-23 (1970 & Supp. 1984); N.Y. DOM. REL. LAW § 236 Part B (McKinney 1977 & Supp. 1984-85); N.C. GEN. STAT. § 50-20 (1984); N.D. CENT. CODE § 14-05-24 (1981 & Supp. 1983); OHIO REV. CODE ANN. § 3105.18 (Page 1980 & Supp. 1984); OKLA. STAT. ANN. tit. 12, § 1278 (West 1961 & Supp. 1984); OR. REV. STAT. § 107-105 (1971 & Supp. 1984); PA. STAT. ANN. tit. 23, § 401 (Purdon Supp. 1984-85); R.I. GEN. LAWS § 15-5-16.1 (1981 & Supp. 1984); S.D. CODIFIED LAWS ANN. § 25-4-44 (1984); TENN. CODE ANN. § 36-821 (1984); UTAH CODE ANN. § 30-3-5 (1984); VT. STAT. ANN. tit. 15, § 751 (1974 & Supp. 1984); VA. CODE § 20-107.3 (1983 & Supp. 1984); W. VA. CODE § 48-2-32 (Supp. 1984); WIS. STAT. ANN. § 767.255 (West 1981 & Supp. 1984); WYO. STAT. § 20-2-114 (1982 & Supp. 1984). *See* VALUATION & DISTRIBUTION, *supra* note 9, § 3.01, at 2 n.2.

One state, Mississippi, is a title jurisdiction, in which property is distributed upon dissolution to the spouse in whose name title is placed, regardless of the contributions of each spouse in acquiring the property. However, Mississippi has indicated equitable distribution principles will be adopted in situations in which strict adherence to the title rules would produce inequitable results. *Id.* § 3.02, at 8.

The fundamental concepts underlying community property and equitable distribution are the same. Both systems are based on a modern view of marriage as an economic partnership of equals. There is a general presumption that any property acquired during the marriage is community or marital property. This general rule, however, is subject to the exception that any property acquired either prior to marriage or during marriage by gift or inheritance is the separate property of the acquiring spouse. Furthermore, each system classifies, as separate property, any property acquired during marriage by use of separate property.

While the systems are quite similar with respect to the acquisition of property, they are significantly different in the manner in which property is distributed upon divorce. Most equitable distribution states provide for distribution of property on an equitable basis, according to factors expressly stated in their respective statutes. On the other hand, three community property states—California, New Mexico, and Louisiana—require an equal distribution of the community property. The five remaining community property jurisdictions, Arizona, Idaho, Nevada, Texas, and Washington are hybrid; they provide for equitable distribution of the community property upon dissolution. *See generally id.* §§ 3.02, 3.05, 18.05, 20.02, 20.04 (basic principles of equitable distribution and community property).

courts or suggested by commentators fall generally into four categories: 1) deny any relief to the supporting spouse; 2) allow reimbursement for costs incurred; 3) allow for alimony either in lieu of or in addition to property divisions in appropriate cases; and 4) characterize the degree or the enhanced earning capacity of the degree holder as a marital asset subject to valuation and distribution.

Each approach has inherent drawbacks. Complete denial of

---

11. Except where otherwise indicated, the wife supported the husband who earned a degree in law, medicine, or business. *See, e.g.*, Pyeatte v. Pyeatte, 135 Ariz. 346, 661 P.2d 196 (Ct. App. 1982) (law degree); *In re* Marriage of Sullivan, 37 Cal. 3d 762, 691 P.2d 1020, 209 Cal. Rptr. 354 (1984) (law degree); *In re* Marriage of Graham, 194 Colo. 429, 574 P.2d 75 (1978) (master's degree in business administration); *In re* Marriage of McVey, 641 P.2d 300 (Colo. Ct. App. 1981) (graduate degree); Zahler v. Zahler, 8 FAM. L. REP. (BNA) 2694 (Conn. Super. Ct., Aug. 5, 1982) (medical degree); Wright v. Wright, 469 A.2d 803 (Del. Fam. Ct. 1983) (dental degree); Hughes v. Hughes, 438 So. 2d 146 (Fla. Dist. Ct. App. 1983) (two bachelor of science degrees); Severs v. Severs, 426 So. 2d 992 (Fla. Dist. Ct. App. 1983) (law degree); *In re* Marriage of Weinstein, 128 Ill. App. 3d 234, 470 N.E.2d 551 (1984) (osteopathy degree and license to practice surgery); *In re* Marriage of Goldstein, 97 Ill. App. 3d 1023, 423 N.E.2d 1201 (1981) (prior to marriage, couple lived together while husband attended medical school); *In re* Marriage of McManama, 272 Ind. 483, 399 N.E.2d 371 (1980) (law degree); Wilcox v. Wilcox, 173 Ind. App. 661, 365 N.E.2d 792 (1977) (doctorate degree in education); *In re* Marriage of Horstmann, 263 N.W.2d 885 (Iowa 1978) (master's degree and law degree); *In re* Marriage of Estlund, 344 N.W.2d 276 (Iowa Ct. App. 1983) (law degree); Inman v. Inman, 648 S.W.2d 847 (Ky. 1982) (dental degree); McGowan v. McGowan, 663 S.W.2d 219 (Ky. Ct. App. 1983) (dental degree); Leveck v. Leveck, 614 S.W.2d 710 (Ky. Ct. App. 1981) (medical degree); Reen v. Reen, 8 FAM. L. REP. (BNA) 2193 (Mass. P. and Fam. Ct., Dec. 23, 1981) (dental degree); Watling v. Watling, 127 Mich. App. 624, 339 N.W.2d 505 (1983) (dental degree); Woodworth v. Woodworth, 126 Mich. App. 258, 337 N.W.2d 332 (1983) (law degree); DeLa Rosa v. DeLa Rosa, 309 N.W.2d 755 (Minn. 1981) (medical degree); Scott v. Scott, 645 S.W.2d 193 (Mo. Ct. App. 1982) (law degree); Ruben v. Ruben, 461 A.2d 733 (N.H. 1983) (doctorate degree); Mahoney v. Mahoney, 91 N.J. 488, 453 A.2d 527 (1982) (master's degree in business administration); Lynn v. Lynn, 91 N.J. 510, 453 A.2d 539 (1982) (medical degree); Muckelroy v. Muckelroy, 84 N.M. 14, 498 P.2d 1357 (1972) (medical license); Lesman v. Lesman, 88 A.D.2d 153, 452 N.Y.S.2d 935 (N.Y. App. Div. 1982) (medical degree); O'Brien v. O'Brien, 114 Misc. 2d 233, 452 N.Y.S.2d 801 (N.Y. Sup. Ct. 1982) (medical degree); Lira v. Lira, 68 Ohio App. 2d 164, 428 N.E.2d 445 (1980) (medical degree); Hubbard v. Hubbard, 603 P.2d 747 (Okla. 1979) (medical degree); Adair v. Adair, 670 P.2d 1002 (Okla. Ct. App. 1983) (dental degree); Hodge v. Hodge, 486 A.2d 951 (Pa. Super. Ct. 1984) (medical degree); Wehrkamp v. Wehrkamp, 357 N.W.2d 264 (S.D. 1984) (dental degree); Saint-Pierre v. Saint-Pierre, 357 N.W. 2d 250 (S.D. 1984) (medical degree); Frausto v. Frausto, 611 S.W.2d 656 (Tex. Civ. App. 1980) (medical degree); Washburn v. Washburn, 101 Wash. 2d 168, 677 P.2d 152 (1984) (veterinary degree); Gillette v. Gillette, 101 Wash. 2d 168, 677 P.2d 152 (1984) (veterinary degree); Haugan v. Haugan, 117 Wis. 2d 200, 343 N.W.2d 796 (1984) (medical degree); Grosskopf v. Grosskopf, 677 P.2d 814 (Wyo. 1984) (master's degree in accounting).

relief is viewed as harsh[12] and grossly unjust.[13] Reimbursement is criticized as inadequate[14] because it allows only for costs and not the real value, the increased earning potential, of the degree.[15] Alimony awards are assailed as both unavailable[16] and discretionary.[17] Granting a share of enhanced earning capacity to the supporting spouse may be unfair to the degree-earning spouse[18] and is contrary to the fundamental concept that a spouse's earnings after separation or divorce are his or her own.[19]

C. *California's Approach*

Effective January, 1985, the California Legislature amended the property division and spousal support statutes[20] to provide a remedy to a working spouse who has supported a student spouse in attaining a professional degree.[21] After a delay of two years pending legislative action, the California Supreme Court finally addressed the issue presented in *In re Marriage of Sullivan*.[22] In remanding the case with instructions to apply the new statutes,

---

12. *E.g.*, Herring, *Dividing a Diploma in a Divorce*, 70 A.B.A. J. 84, 87 (1984).

13. *E.g.*, Recent Developments, *Professional Degrees as Marital Property*, 6 HARV. WOMEN'S L.J. 208, 216 (1983).

14. *E.g.*, Woodworth v. Woodworth, 126 Mich. App. 258, 268, 337 N.W.2d 332, 337 (1983). The court held, rather, that the husband's law degree was marital property because it was the result of mutual sacrifice and effort by both parties. *Id.* at 261-62, 337 N.W.2d at 334. *See infra* text accompanying notes 60-65.

15. *E.g.*, Recent Developments, *supra* note 13, at 215.

16. *Id.* at 218.

17. *Id.*

18. *Id.* at 215-16.

19. CAL. CIV. CODE §§ 5118 (living separate and apart), 5119 (legal separation) (West 1983).

20. AB 3000 added § 4800.3 to the California Civil Code (1984 Cal. Stat. ch. 1661, § 2) (allows reimbursement for community contributions to education or training; assigns educational loans to spouse acquiring the education), amended § 4801(a)(1) of the California Civil Code (1984 Cal. Stat. ch. 1661, § 3) (includes as a factor in awarding spousal support the extent to which the supported spouse contributed to the attainment of the education, training, or license of the other spouse) and amended § 4800 of the California Civil Code (1984 Cal. Stat. ch. 1661, § 1) (recodified § 4800(b)(4) as § 4800.3(b)(2)). For the complete text of the statutes and an analysis, see *infra* notes 120-54 and accompanying text.

21. In all but one recent case examined, the student spouse was the husband and the supporting spouse was the wife. For the sake of consistency in this Comment, "supporting spouse" or "working spouse" will refer to the wife and "student spouse" or "professional spouse" will refer to the husband. In terms of applicable law, these terms are, of course, gender neutral.

22. *In re* Marriage of Sullivan, 37 Cal. 3d 762, 691 P.2d 1020, 209 Cal. Rptr. 354 (1984).

the court may have extended the remedy beyond well-settled principles of spousal support, contrary to clearly expressed legislative intent.[23]

If the supreme court did intend to extend the legislative remedy and the trial courts adhere to this interpretation, the law of spousal support will be disrupted, established standards will become confused and the resulting awards will be arbitrary, unpredictable and unfair. If the trial courts apply the new statutes literally, the remedy will remain inadequate; the community will be reimbursed neither for the time, effort and skills of the student spouse nor the fruits thereof, which by law are community property. Regardless of which tack the trial courts take in future cases, the outcome will be unacceptable.

After surveying how other jurisdictions have characterized and distributed a professional degree, this Comment will analyze the new California statutes, the supreme court's response and then outline a proposal to accomplish what the legislature originally intended: to reimburse the community for *all* community property expended to obtain a professional degree.

II. CHARACTERIZING A PROFESSIONAL DEGREE

A. *California: Is a Professional Degree or Education Community Property?*

Prior to the *Sullivan* cases,[24] California appellate courts de-

---

23. *Recommendation Relating to Reimbursement of Educational Expenses*, 17 CAL. L. REVISION COMM'N REP. 229 (1984) [hereinafter cited as *Recommendation*]. The California Law Revision Commission states: "While it would be possible to revise the basic support standards, the Commission deems it inadvisable to disrupt the established support scheme . . . ." *Id.* at 234. For a complete discussion of the relevant statutes and the underlying legislative intent, see *infra* text accompanying notes 120-37.

24. There were two decisions by the same court of appeal: *In re* Marriage of Sullivan, 8 FAM. L. REP. (BNA) 2165 (Cal. Ct. App. Jan. 8, 1982) (appellate decision omitted from the official reporter pursuant to CAL. R. CT. 976(d)), *modified*, 184 Cal. Rptr. 796 (Ct. App. Aug. 2, 1982), *aff'd* and *rev'd*, 37 Cal. 3d 762, 691 P.2d 1020, 209 Cal. Rptr. 354 (1984); and *In re* Marriage of Sullivan, 184 Cal. Rptr. 796 (Ct. App. Aug. 2, 1982), *aff'd* and *rev'd*, 37 Cal. 3d 762, 691 P.2d 1020, 209 Cal. Rptr. 354 (1984).

The court, in its first opinion, held that although the student spouse's degree was his separate property, the community had an interest in the degree. *Sullivan*, 8 FAM. L. REP. (BNA) at 2166. The court remanded the case to the trial court to determine the value of the community interest. The husband petitioned for rehearing, which the court granted.

On rehearing, the court noted there were no facts in evidence to support its original holding, but claimed this absence of evidence "presents no significant infirmity," as it is

nied any relief to a supporting spouse; they held that neither a legal education nor the right to practice law are community property.[25] In its first *Sullivan* opinion,[26] the court of appeal agreed with the *Todd* and *Aufmuth* courts that an education, degree and professional license acquired during marriage cannot be characterized as community property, but also held that a license to practice a profession is a valuable property right in which the community can have a financial interest.[27] The same court reversed itself only eight months later, holding that a medical education is neither community nor separate property.[28]

While the *Sullivan* appeal was pending before the California Supreme Court,[29] the state legislature resolved the issue by enacting AB 3000.[30] The legislative history explicitly states what can readily be inferred[31] from the statute: a professional educa-

---

"now our opinion" that "the starting premise [that is, the husband's degree is *separate property*] for the holding previously rendered is wrong." *Sullivan*, 184 Cal. Rptr. at 799.

25. Todd v. Todd, 272 Cal. App. 2d 786, 791, 78 Cal. Rptr. 131, 135 (1969) (neither husband's legal education nor his right to practice law was community property); *In re* Marriage of Aufmuth, 89 Cal. App. 3d 446, 461, 152 Cal. Rptr. 668, 677-78 (1979), *overruled on other grounds, In re* Marriage of Lucas, 27 Cal. 3d 808, 815, 614 P.2d 285, 289, 166 Cal. Rptr. 853, 857 (1980) (husband's legal education not community property).

26. *In re* Marriage of Sullivan, 8 FAM. L. REP. (BNA) 2165 (Cal. Ct. App. Jan. 8, 1982), *modified*, 184 Cal. Rptr. 796 (Ct. App. Aug 2, 1982), *aff'd* and *rev'd*, 37 Cal. 3d 762, 691 P.2d 1020, 209 Cal. Rptr. 354 (1984).

27. *Id.* at 2166. The court proposed three methods by which to value the community's interest in a professional education, degree, or license to practice:

> [1] [C]ompare the income of the holder of the professional license within a reasonable period after the acquisition of the license to the income of the same individual immediately before the acquisition.
>
> [2] [D]etermine the actual expenditure of community funds plus community hours to determine the amount of the community interest . . . .
>
> [3] [D]etermine the value of the loss of income to the community that resulted from one of the spouses attending professional school rather than being employed full time at a job for which such spouse was qualified without having the benefit of the professional education.

Id.

28. *In re* Marriage of Sullivan, 184 Cal. Rptr. 796, 800 (Ct. App. 1982), *aff'd* and *rev'd*, 37 Cal. 3d 762, 691 P.2d 1020, 209 Cal. Rptr. 354 (1984).

29. Rehearing granted Oct. 28, 1982.

30. 1984 Cal. Stat. ch. 1661, §§ 1-3.

31. Although the statutes do not state whether a degree is property, Justice Mosk reviews the provisions and concludes: "The only issue raised . . . is whether acquired knowledge and education are a species of property subject to monetary division. The Legislature has now answered that question in the negative." *In re* Marriage of Sullivan, 37 Cal. 3d 762, 770, 691 P.2d 1020, 1025, 209 Cal. Rptr. 354, 359 (1984) (Mosk, J., con-

tion, degree or license is not community property. "The Commission does not believe that it would be either practical or fair to classify the value of the education, degree, or license, or the enhanced earning capacity, as community property and to divide the value upon marriage dissolution."[32] Before analyzing the provisions and discussing the effect of the new statute, the legislature's conclusion that a degree is not property will be examined in context of California's community property laws and in light of the decisions in other equitable distribution and community property jurisdictions.

B. *Survey: Is a Professional Degree or Education Marital Property?*

Before an item can be characterized as marital or community property for distribution on dissolution, it must first be examined to determine whether it conforms to the particular jurisdiction's definition of property.[33] Traditional items of tangible property easily qualify as property and are readily characterized as marital or community property: real estate, furniture, and cars are common examples.[34] A more difficult question is presented in the case of intangible items or interests. The overall trend in jurisdictions is to expand the earlier notions of property to include intangibles.[35] Generally, intangibles such as pension benefits,[36] professional practices,[37] and goodwill[38] have been recognized as property and, subsequently, community or marital property. Whether a professional degree or license to practice

---

curring and dissenting).

32. *Recommendation, supra* note 23, at 234.

33. VALUATION & DISTRIBUTION, *supra* note 9, § 18.01, at 4.

34. *Id.* § 18.02, at 13.

35. *Id.* § 18.03 at 20. There are inconsistencies depending on the nature of the item in question and the idiosyncracies of the jurisdiction itself. *Id. See generally id.* §§ 18.01-18.03 (discussing the definitional problem of "property," and summarizing the status of several intangible items currently being considered by courts as property).

36. *E.g., In re* Marriage of Brown, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 663 (1976) (nonvested pension benefits were community property); Janssen v. Janssen, 331 N.W.2d 752 (Minn. 1983) (nonvested pension benefits were marital property).

37. *E.g.,* Hurley v. Hurley, 94 N.M. 641, 615 P.2d 256 (1980) (the value of a medical practice at the time of dissolution was community property); Stern v. Stern, 66 N.J. 339, 331 A.2d 374 (1978) (husband's interest in his law partnership was marital property).

38. *E.g., In re* Marriage of Lopez, 38 Cal. App. 3d 93, 113 Cal. Rptr. 58 (1974) (husband's goodwill in his law practice was community property); Dugan v. Dugan, 97 N.J. 423, 457 A.2d 1 (1983) (goodwill in professional corporation of husband/attorney was marital property).

should fall within the expanding definition of property will be explored below.

1. Majority View

Eighteen of the twenty-six jurisdictions that have considered the issue have held that the student spouse's degree is not marital property.[39] Four states have declined to rule specifically on the issue, but have allowed the degree to be considered in determining property distribution, maintenance, or some form of equitable reimbursement.[40] The remaining jurisdictions have held that the degree is marital property subject to valuation and distribution upon dissolution.[41]

---

39. Wisner v. Wisner, 129 Ariz. 333, 340, 631 P.2d 115, 122 (Ariz. Ct. App. 1981); Todd v. Todd, 272 Cal. App. 2d 786, 791, 78 Cal. Rptr. 131, 135 (1969); *In re* Marriage of Graham, 194 Colo. 429, 432, 574 P.2d 75, 77 (1978); Zahler v. Zahler, 8 FAM. L. REP. (BNA) 2694, 2694 (Conn. Super. Ct., Aug. 5, 1982) (holding by implication); Wright v. Wright, 469 A.2d 803, 806 (Del. Fam. Ct. 1983) (holding by implication); Hughes v. Hughes, 438 So. 2d 146, 150 (Fla. Dist. Ct. App. 1983); *In re* Marriage of Weinstein, 128 Ill. App. 3d 234, ____, 470 N.E.2d 551, 559 (1984); *In re* Marriage of Goldstein, 97 Ill. App. 3d 1023, 1027-28, 423 N.E.2d 1201, 1204 (1981) (future earning capacity flowing from husband's medical degree was not marital property); *In re* Marriage of McManama, 272 Ind. 483, 487, 399 N.E.2d 371, 373 (1980) (future income flowing from husband's law degree was not marital property); *In re* Marriage of Horstmann, 263 N.W.2d 885, 890 (Iowa 1978); Inman v. Inman, 648 S.W.2d 847, 852 (Ky. 1982); Ruben v. Ruben, 461 A.2d 733, 735 (N.H. 1983); Mahoney v. Mahoney, 91 N.J. 488, 495, 453 A.2d 527, 532 (1982); Muckelroy v. Muckelroy, 84 N.M. 14, 15, 498 P.2d 1357, 1358 (1972); Hubbard v. Hubbard, 603 P.2d 747, 750 (Okla. 1979); Hodge v. Hodge, 486 A.2d 951, 953 (Pa. Sup. Ct. 1984) (increased earning capacity flowing from husband's medical degree was not marital property); Wehrkamp v. Wehrkamp, 357 N.W.2d 264, 266 (S.D. 1984); Frausto v. Frausto, 611 S.W.2d 656, 659 (Tex. Civ. App. 1980); Grosskopf v. Grosskopf, 677 P.2d 814, 822 (Wyo. 1984).

40. DeLa Rosa v. DeLa Rosa, 309 N.W.2d 755, 759 (Minn. 1981) (granted wife an equitable restitutionary award for educational costs and living expenses); Scott v. Scott, 645 S.W.2d 193, 196-97 (Mo. Ct. App. 1982) (upheld lower court's $12,000 "property settlement" to wife); Lira v. Lira, 68 Ohio App. 2d 164, 167-68, 428 N.E.2d 445, 448 (1980) (ruled husband's medical degree as it affected his earning capacity was properly one element to be considered in awarding alimony); Washburn v. Washburn, 101 Wash. 2d 168, 178-79, 184, 677 P.2d 152, 158, 161 (1984) (reversed trial court for not considering the circumstances of the supporting spouse in either dividing property or awarding maintenance).

41. Reen v. Reen, 8 FAM. L. REP. (BNA) 2193, 2194 (Mass. P. and Fam. Ct., Dec. 23, 1981) (trial court); Woodworth v. Woodworth, 126 Mich. App. 258, 261-62, 337 N.W.2d 332, 334 (1983) (by implication), *contra* Watling v. Watling, 127 Mich. App. 624, 627-28, 339 N.W.2d 505, 507 (1983) (degree not marital property where the wife had shared in the benefits of the husband's degree for nineteen years and wife had her own advanced degree); O'Brien v. O'Brien, 114 Misc. 2d 233, 237, 452 N.Y.S.2d 801, 804 (N.Y. Sup. Ct., Westchester County 1982), *contra* Lesman v. Lesman, 88 A.D.2d 153, 157, 452 N.Y.S.2d 935, 938 (N.Y. App. Div. 1982) (appellate court); Haugan v. Haugan, 117 Wis. 2d 200, 207-08, 343 N.W.2d 796, 800 (1984) (by implication).

With the exception of Washington, which did not wish to address the "metaphysical question of whether a degree is property,"[42] four community property states[43] were in the group of eighteen that found that a degree was not marital property. The courts in Arizona,[44] California,[45] and Texas[46] reasoned that a degree is not property at all as it is personal to the holder[47] and cannot be assigned, transferred or conveyed.[48] The New Mexico Supreme Court stated that a degree is not marital property as it is not susceptible to joint ownership.[49]

2. Minority View

A few states have recently held that a degree is marital property. This new approach may be attributable to two causes: 1) a last resort to justify an award when the remedies of property distribution, maintenance, or unjust enrichment awards were not available;[50] and 2) a recognition that restitutionary awards are not equitable in that they do not take into consideration the benefit which a degree actually confers—increased earning power.[51]

---

42. Washburn v. Washburn, 101 Wash. 2d 168, 176, 677 P.2d 152, 157 (1984).

43. Wisner v. Wisner, 129 Ariz. 333, 340, 641 P.2d 115, 122 (Ariz. Ct. App. 1981); Todd v. Todd, 272 Cal. App. 2d 786, 791, 78 Cal. Rptr. 131, 135 (1969); Muckelroy v. Muckelroy, 84 N.M. 14, 15, 498 P.2d 1357, 1358 (1972); Frausto v. Frausto, 611 S.W.2d 656, 659 (Tex. Civ. App. 1980). The remaining three community property states—Idaho, Louisiana, and Nevada—have not considered the issue.

44. Wisner v. Wisner, 129 Ariz. 333, 631 P.2d 115 (Ariz. Ct. App. 1981).

45. Todd v. Todd, 272 Cal. App. 2d 786, 78 Cal. Rptr. 131 (1969).

46. Frausto v. Frausto, 611 S.W.2d 656 (Tex. Civ. App. 1980).

47. Todd v. Todd, 272 Cal. App. 2d 786, 791, 78 Cal. Rptr. 131, 134-35 (1969) (citing Franklin v. Franklin, 67 Cal. App. 2d 717, 725, 155 P.2d 637, 641 (1945)).

48. Wisner v. Wisner, 129 Ariz. 333, 339-40, 631 P.2d 115, 122 (Ariz. Ct. App. 1981); Frausto v. Frausto, 611 S.W.2d 656, 659 (Tex. Civ. App. 1980).

49. Muckelroy v. Muckelroy, 84 N.M. 14, 15, 498 P.2d 1357, 1358 (1972).

50. *In re* Marriage of Weinstein, 128 Ill. App. 3d 234, ____, 470 N.E.2d 551, 559 (1984). *See, e.g.*, Haugan v. Haugan, 117 Wis. 2d 200, 207, 343 N.W.2d 796, 800 (1984) (no property to distribute, because the couple's income was used for education and living expenses); Woodworth v. Woodworth, 126 Mich. App. 258, 267, 337 N.W.2d 332, 337 (1983) (maintenance unavailable where the supporting spouse had demonstrated ability for self-support); Washburn v. Washburn, 101 Wash. 2d 168, 176, 677 P.2d 152, 156-57 (1984) (unjust enrichment award not appropriate where consideration of fault in a dissolution was prohibited).

51. Woodworth v. Woodworth, 126 Mich. App. 258, 268, 337 N.W.2d 332, 337 (1983). *See also* Washburn v. Washburn, 101 Wash. 2d 168, 179-80, 677 P.2d 152, 159 (1984) (restitution was only one of several factors a trial court must consider in compensating the supporting spouse for contributions to a professional education).

a. *Wisconsin: A Professional Degree is Marital Property*

The broadest remedy to date was created last year by the Wisconsin Supreme Court. In *Haugan v. Haugan*,[52] the court concluded that " 'in a sense,' the degree 'is the most significant asset of the marriage' and 'it is only fair' that the supporting spouse be compensated for costs and opportunities foregone while the student spouse was in school."[53] Noting that "compensation may be accomplished under the statutes through maintenance payments, property division, or both,"[54] the court suggested several approaches to value each spouse's contribution to the degree; a restitutionary "cost value" approach,[55] an "opportunity cost" approach,[56] an "enhanced earning capacity" approach,[57] and a "labor theory" approach.[58] The court stressed

52. Haugan v. Haugan, 117 Wis. 2d 200, 343 N.W.2d 796 (1984). Patricia and Gordon Haugan were married on Aug. 4, 1973. Gordon attended medical school in South Dakota and Minnesota for four years, then pursued his residency in Chicago for three years. Patricia provided the sole support for the couple while Gordon was in medical school. Each made approximately equal contributions during Gordon's residency. The couple bought a house in Wisconsin early in 1980 and Patricia resigned her teaching position, anticipating that Gordon would soon complete his residency and begin his practice. However, the Haugans separated on May 13, 1980, two months before Gordon completed his residency. At the time of the dissolution, there were, in effect, no marital assets; the couple's liabilities ($126,176) exceeded their assets ($124,133). *Id.* at 202-04, 343 N.W.2d at 798-99.

53. *Id.* at 207, 343 N.W.2d at 800 (citing Lundberg v. Lundberg, 107 Wis. 2d 1, 14, 318 N.W.2d 918, 924 (1982)).

54. *Haugan*, 117 Wis. 2d at 208, 343 N.W.2d at 800.

55. *Id.* at 211, 343 N.W.2d at 802. The cost value approach calculates the value of the supporting spouse's contributions of money for education and living expenses, as well as homemaking services rendered during the marriage. *Id.* The wife introduced evidence that her contribution (not including homemaking services) under this approach was $13,000, or $28,500 indexed for inflation. *Id.* at 213, 343 N.W.2d at 803.

56. *Id.* The opportunity cost approach calculates the value of the income sacrificed because the student spouse attended school rather than accepting employment. The wife introduced evidence that the husband's sacrificed income was $45,000, or $69,000 indexed for inflation. *Id.*

57. *Id.* The enhanced earning capacity approach calculates the present value of the student spouse's enhanced earning capacity flowing from his degree. The wife introduced evidence that one half interest under this theory was $133,000. *Id.* at 213-14, 343 N.W.2d at 803.

58. *Id.* at 214, 343 N.W.2d at 803. The modified labor theory approach calculates the value of the supporting spouse's contribution at one half of the student spouse's enhanced yearly earning power for as many years as the supporting spouse worked to support the student. The court estimated the wife's contribution under this theory was $45,500. *Id. See generally* Mullenix, *The Valuation of an Educational Degree at Divorce*, 16 LOY. L.A.L. REV. 227, 274-83 (1983) (labor theory introduced as a basis for a proposal to value a professional degree). The theory, as originally proposed, would award

that the approaches suggested were not exclusive and advised the trial courts: "Each case must be decided on its own facts. The guiding principles for the trial court are fairness and justice."[59]

b. *Michigan: A Professional Degree is Marital Property . . . Sometimes*

In *Woodworth v. Woodworth*,[60] the Court of Appeals of Michigan, an equitable distribution state, held that a law degree is marital property subject to distribution.[61] The court rejected an alimony award as too tenuous and most likely unavailable.[62] The court similarly rejected restitution as an "inadequate" remedy under the circumstances of the case: "[t]reating the degree as such a gift [instead of an investment] would unjustly enrich the degree holder to the extent that the degree's value exceeds its cost."[63] The court also declined to rule specifically whether the degree is "property" per se; that issue being "beside the point."[64] The focus of the court should be, instead, "on the most equitable solution to dissolving the marriage and dividing among the respective parties what they have."[65]

The scope of the *Woodworth* decision was narrowed only two months later when the same court ruled in *Watling v.*

---

the supporting spouse "fifty percent of the professional spouse's actual income, for the same period of time it took for that spouse to acquire the degree or license." *Id.* at 279 (footnote omitted). The variation adopted by the Wisconsin Supreme Court differs from the original proposal in that it allows only for the *enhanced* yearly earning power, not the *total* yearly earning power, of the student spouse to be included in the calculation. *Haugan*, 117 Wis. 2d at 214, 343 N.W.2d at 803.

59. *Haugan*, 117 Wis. 2d at 214, 343 N.W.2d at 803.

60. Woodworth v. Woodworth, 126 Mich. App. 258, 337 N.W.2d 332 (1983). Michael and Ann Woodworth were married in 1970, separated in 1980, and were divorced in 1982. Michael attended law school from 1973 to 1976, and thereafter passed the bar exam. Ann worked in various positions for the first seven years of their marriage. *Id.* at 259-60, 337 N.W.2d at 333. The court did not indicate the source from which Michael's education was funded, and it did not describe the assets, if any, owned by the couple.

61. *Id.* at 261-62, 337 N.W.2d at 334.

62. *Id.* at 267, 337 N.W.2d at 337.

63. *Id.* at 268, 337 N.W.2d at 337.

64. *Id.* at 263, 337 N.W.2d at 335.

65. *Id.* The court noted that the trial court had valued Michael's degree at $20,000, but had not described how that value was reached. The appellate court remanded the case to the trial court to revalue the degree based on three factors: 1) the length of the marriage after the degree was obtained, 2) the sources and extent of the student spouse's support, and 3) the overall division of marital property. *Id.* at 269, 337 N.W.2d at 337.

Watling[66] that a wife was not entitled to a portion of the value of her husband's dental degree upon divorce.[67] The court reiterated its stated policy of seeking an equitable solution under the facts of each case.[68] The court noted four facts which it believed justified the trial court's denial to the wife of an interest in her spouse's degree: 1) the wife also had an advanced degree to which the husband had reciprocally contributed; 2) the wife had already been compensated as she shared in the benefits of the degree for nineteen years; 3) the husband's current salary was to a large extent a result of his experience and work since he acquired his degree; and 4) the wife supported the husband in school for one year only.[69]

c. *Washington: The Professional Degree as a Factor*

In *Washburn v. Washburn*,[70] the Supreme Court of Washington held that in dividing property and awarding maintenance, a relevant and necessary factor was that a community has not realized the benefits from the earning potential of a degree which was financed by the supporting spouse.[71] Although Washington is technically a community property state, its statutes mandate equitable distribution of property.[72] The *Washburn*

---

66. Watling v. Watling, 127 Mich. App. 624, 339 N.W.2d 505 (1983). Charles and Sally Watling were married in June, 1960. Charles completed dental school one year after the marriage. Sally provided for the couple's living expenses for that year, but did not contribute any money for educational expenses. The couple separated in 1980, nearly twenty years after they were married. Sally received her master of science degree in education eleven months later. *Id.* at 625, 339 N.W.2d at 506.

67. *Id.* at 627, 339 N.W.2d at 507.

68. *Id.*

69. *Id.* at 627-28, 339 N.W.2d at 507.

70. Washburn v. Washburn, 101 Wash. 2d 168, 677 P.2d 152 (1984). Marigail and Gerald Washburn were married in 1971 while both were juniors in undergraduate school. Gerald attended veterinary school from 1974 through 1978, while Marigail supported the couple by working full time. After completing a one year internship after graduation from veterinary school, Gerald began practice as a veterinarian in 1979. One and a half years later the couple separated, and were divorced shortly thereafter. There were practically no marital assets. *Id.* at 170-71, 677 P.2d at 154.

71. *Id.* at 178, 677 P.2d at 158. One justice dissented, claiming that considering earning capacity as a *factor* was inadequate, and stated: "I would characterize this interest as a marital asset in the context of increased earning capacity subject to distribution." *Id.* at 184, 677 P.2d at 161 (Rosellini, J., dissenting).

72. *Id.* at 176-77, 677 P.2d at 157 (citing WASH. REV. CODE § 26.09.080 (1974) which states, in part: "[I]n a proceeding for disposition of property following dissolution . . . , the court shall . . . make such disposition of the property and liabilities of the parties,

court did not consider the "metaphysical" question of whether a degree is property.[73] Rather, the court relied on its "broad discretionary power"[74] to distribute property and award maintenance by considering the economic circumstances of each party.[75] The court rejected unjust enrichment as a remedy not because it was inadequate,[76] but because determining whether an enrichment was unjust would require statutorily prohibited inquiry into fault within the marriage.[77] Accordingly, the *Washburn* court characterized the trial court's "restitutionary" award as maintenance.[78]

C. *Failure to Characterize as Property Does Not Bar Relief*

The failure of most courts to characterize a degree as property or marital property has not necessarily controlled the result. There is general agreement that the supporting spouse is entitled to *some* form of relief, in spite of the apparent divergence in the decisions from state to state on whether a degree is marital property.[79] There is a developing majority consensus which per-

---

either community or separate, as shall appear just and equitable after considering all relevant factors . . .").

73. *Id.* at 176, 677 P.2d at 157.

74. *Id.* at 179, 677 P.2d at 158.

75. *Id.* at 179-80, 677 P.2d at 159. The court directed the trial court to consider four factors, among others, in determining a proper amount of compensation for the supporting spouse by means of property division and maintenance: 1) the amount of community funds expended for direct educational cost; 2) the foregone earnings of the student spouse; 3) any career opportunity given up by the supporting spouse; and 4) the future earning prospects of each spouse, including the enhanced earning potential of the student spouse. *Id.*

76. Woodworth v. Woodworth, 126 Mich. App. 258, 268, 337 N.W.2d 332, 337 (1983).

77. *Washburn*, 101 Wash. 2d at 176, 677 P.2d at 156-57.

78. *Id.* at 182, 677 P.2d at 160.

79. Sixteen of the eighteen jurisdictions that have held a professional degree is not property (*see supra* note 39) have allowed for relief in varying forms. *See, e.g.*, Pyeatte v. Pyeatte, 135 Ariz. 346, 354, 661 P.2d 196, 204 (Ariz. Ct. App. 1982) (restitutionary award was appropriate to prevent unjust enrichment); *In re* Marriage of Aufmuth, 89 Cal. App. 3d 446, 461, 152 Cal. Rptr. 668, 677 (1979) (wife had realized value of husband's degree through other assets, the product of his degree, awarded to her in the property division; husband's earning capacity was considered in awarding spousal and child support); *In re* Marriage of Graham, 194 Colo. 429, 433, 574 P.2d 75, 78 (1978) (court may consider contribution to an education in dividing marital property, or in awarding maintenance when a need had been demonstrated); Zahler v. Zahler, 8 FAM. L. REP. (BNA) 2694, 2695 (Conn. Super. Ct., Aug. 5, 1982) (wife awarded lump-sum alimony); Hughes v. Hughes, 438 So. 2d 146, 150 (Fla. Dist. Ct. App. 1983) (court should consider husband's education in dividing other assets equitably and determining the propriety and/or amount of conventional alimony); *In re* Marriage of Weinstein, 128 Ill. App. 3d 234, ____, 470 N.E.2d

mits compensation on three alternative grounds: (1) distribution of marital assets and liabilities, (2) some form of maintenance or alimony, or (3) an equitable monetary award to the supporting spouse based on unjust enrichment or some other equitable principle.[80]

The first alternative has been applied in most of the equitable distribution states, whose statutes include the relative earning capacity of the parties as a factor to be considered in distributing marital property.[81] Thus, even though a court may find that a degree does not qualify as marital property, it has the power to look to the concomitant earning potential of the degree, recognize that this asset must follow the degree holder and offset the degree's potential value by awarding other assets to the supporting spouse. This is usually the approach taken when

---

551, 559-60 (1984) (degree was a relevant factor in distributing other marital property, or granting maintenance; a trial court also possesses inherent equitable authority to grant an award to prevent unjust enrichment); Wilcox v. Wilcox, 173 Ind. App. 661, 666, 365 N.E.2d 792, 796 (1977) (no abuse of discretion by trial court in awarding the wife substantially all the marital assets); *In re* Marriage of Horstmann, 263 N.W.2d 885, 891 (Iowa 1978) (court may consider the future earning capacity of the student spouse in distributing assets and in determining the propriety and amount of alimony); Inman v. Inman, 648 S.W.2d 847, 852 (Ky. 1982) (dictum: would allow recovery for the costs of the education and living expenses, and the potential for increase in future earnings made possible by the degree); Ruben v. Ruben, 461 A.2d 733, 734 (N.H. 1983) (contributions of a supporting spouse toward a degree may be considered in allocating property); Mahoney v. Mahoney, 91 N.J. 488, 502-04, 453 A.2d 527, 535-37 (1982) (compensation was allowable by reimbursement alimony, rehabilitative alimony, conventional alimony or through equitable distribution of marital assets); Hubbard v. Hubbard, 603 P.2d 747, 751-52 (Okla. 1979) (cash award in lieu of property settlement required to prevent unjust enrichment; under proper circumstances, marital assets could be divided to work equity); Hodge v. Hodge, 486 A.2d 951, 953-54 (Pa. Sup. Ct. 1984) (trial court properly considered wife's contributions to education in awarding alimony); Saint-Pierre v. Saint-Pierre, 357 N.W.2d 250, 262 (S.D. 1984) (reimbursement or rehabilitative alimony may be awarded to compensate supporting spouse); Frausto v. Frausto, 611 S.W.2d 656, 659 (Tex. Civ. App. 1980) (court had wide discretion in dividing property and may consider the differences in earning capacity, education and ability of the parties); Grosskopf v. Grosskopf, 677 P.2d 814, 822-23 (Wyo. 1984) (upheld disproportionate distribution of property in wife's favor; indicated that where there was no marital property to divide, a restitutionary award would be equitable).

80. *In re* Marriage of Weinstein, 128 Ill. App. 3d 234, ____, 470 N.E.2d 551, 557 (1984). *See infra* notes 82-88.

81. *See* Note, *Property Division and Alimony Awards: A Survey of Statutory Limitations on Judicial Discretion*, 50 FORDHAM L. REV. 415, 439 n.170 (1981) for a list of factors included in property distribution statutes and the frequency of the use of each factor. The most frequently used factor is the economic circumstances of the parties including the amount and sources of income; the sixth most frequently used factor is the occupation and vocational skills of the parties. *Id.*

the couple has accumulated substantial marital assets as a result of the earnings of the professional spouse.[82]

If earning capacity is not a factor in property distribution statutes, it is often a factor in maintenance or alimony statutes.[83] The second alternative, then, allows for a monetary award to the supporting spouse in alimony or maintenance in lieu of or in addition to the property distribution[84] to offset either the cost of the degree or the increased earning power of the student spouse.[85] The goal of the first two alternatives, property distribution and alimony awards, is to offset the value of the degree. They differ significantly in that property distribution accomplishes the offset with existing property, while alimony or maintenance awards are generally paid by the student spouse with income earned in the future.

The third alternative allows a separate monetary award to be made to the supporting spouse as compensation for the student spouse's educational costs and living expenses.[86] The award is usually based on a theory of unjust enrichment and is adopted

---

82. *See, e.g.*, Wilcox v. Wilcox, 173 Ind. App. 661, 662, 365 N.E.2d 792, 794 (1977) (wife awarded all the marital assets, which were valued at $42,000); *In re* Marriage of Estlund, 344 N.W.2d 276, 280 (Iowa Ct. App. 1983) (wife awarded "many of the parties' personal assets," and husband awarded his law degree, the only income-producing asset); Scott v. Scott, 645 S.W.2d 193, 195 (Mo. Ct. App. 1982) (wife received 79.4% of the marital assets); Grosskopf v. Grosskopf, 677 P.2d 814, 823 (wife awarded over $36,000 in cash, and husband obligated with $8,000 in debts).

83. *See* Note, *supra* note 81, at 428 n.96. Sixteen of the thirty states that list specific factors include the earning capacity of each party as a factor. *Id.*

84. *See, e.g.*, Mahoney v. Mahoney, 91 N.J. 488, 504, 453 A.2d 527, 535-36 (1982) (allowed reimbursement alimony only if there are no substantial marital assets to divide); Saint-Pierre v. Saint-Pierre, 357 N.W.2d 250, 260, 262 (S.D. 1984) (judicially created remedy of reimbursement or rehabilitative alimony was allowed, notwithstanding a division of marital assets); Washburn v. Washburn, 101 Wash. 2d 168, 179, 677 P.2d 152, 158 (1984) (maintenance may be awarded in lieu of or in addition to a property settlement).

85. *See, e.g.*, Mahoney v. Mahoney, 91 N.J. 488, 504, 453 A.2d 527, 536 (1982) (degree holder's earning capacity may be considered in awarding conventional alimony); Saint-Pierre v. Saint-Pierre, 357 N.W.2d 250, 260 (S.D. 1984) (supporting spouse may be compensated for contributions to the education and the enhanced earning capacity flowing therefrom); Washburn v. Washburn, 101 Wash. 2d 168, 179-80, 677 P.2d 152, 159 (1984) (supporting spouse may be compensated for educational costs and the earning potential of the student spouse).

86. *In re* Marriage of Weinstein, 128 Ill. App. 3d 234, ___, 470, N.E.2d 551, 558 (1984). *See, e.g.*, DeLa Rosa v. DeLa Rosa, 309 N.W.2d 755, 759 (Minn. 1981); Hubbard v. Hubbard, 603 P.2d 747, 751 (Okla. 1979); Grosskopf v. Grosskopf, 677 P.2d 814, 823 (Wyo. 1984).

when the first two alternatives are either not available[87] or would not produce an equitable distribution.[88]

The courts in equitable distribution jurisdictions have considerable leeway in characterizing and valuing marital assets. Three available options are to offset the value of a degree with either other marital assets or by maintenance awards, or grant a separate money award grounded in equity. In those few jurisdictions which have recently held a degree to be marital property,[89] the courts retain flexibility to characterize a degree as marital property subject to division in one case and, in the next, not consider the degree at all.[90] When the case requires a valuation of the degree, the courts are free to arrive at a value which will produce an equitable result, whether the purpose in determining value is to offset other assets or maintenance awards, fashion an equitable monetary award or openly distribute a degree as property. The aggregate results of the cases indicate that the rule is not "equitable distribution," but rather "equitable characterization"[91] or "equitable valuation,"[92] depending on the require-

87. *See, e.g.*, DeLa Rosa v. DeLa Rosa, 309 N.W.2d 755, 757 (Minn. 1981) (no marital assets to divide, and wife was self-supporting and therefore not entitled to maintenance); Grosskopf v. Grosskopf, 677 P.2d 814, 822-23 (Wyo. 1984) (equitable relief for the cost of the degree may be appropriate in cases where there are no marital assets).

88. *See, e.g*, Hubbard v. Hubbard, 603 P.2d 747, 749 (Okla. 1979) (marital property was "insubstantial"); Grosskopf v. Grosskopf, 677 P.2d 814, 823 (Wyo. 1984) (equitable relief may be proper in cases presenting the two extremes of no marital property and substantial marital property).

89. *E.g.*, Woodworth v. Woodworth, 126 Mich. App. 258, 337 N.W.2d 332 (1983); Haugan v. Haugan, 117 Wis. 2d 200, 343 N.W.2d 796 (1984).

90. "One court, spurred by equitable concerns, has gone so far as to find that a professional degree falls within the traditional definition of property only in those cases where divorce occurs early in the marriage, and there is little acquired property." Recent Developments, *supra* note 13, at 214.

91. *See, e.g.*, Woodworth v. Woodworth, 126 Mich. App. 258, 259-62, 337 N.W.2d 332, 333-34 (1983) (a Michigan appellate court held the degree was marital property where marriage lasted only five years after husband earned the degree). *But see* Watling v. Watling, 127 Mich. App. 624, 627-28, 339 N.W.2d 505, 507 (1983) (same court held degree was *not* marital property in light of circumstances of parties: parties married only one year while husband in dental school; wife had shared in benefits of degree for 20 years; wife had own advanced degree; and, husband's current income was due more to his experience acquired during practice rather than to what he learned during education).

Compare Inman v. Inman, 578 S.W.2d 266, 269 (Ky. Ct. App. 1979) (a Kentucky appellate court held a degree was marital property but only in "certain circumstances:" little or no marital property accumulated whose division would work equity; no reciprocal aid in helping other spouse obtain a degree; marriage was short and therefore non-license holder had not benefited financially from the professional spouse's earning capacity) *with* Leveck v. Leveck, 614 S.W.2d 710, 712 (Ky. Ct. App. 1981) (same court held a

ments of the case.

D. *The Results in Other Jurisdictions Justify the California Position*

California courts do not have the flexibility demonstrated by courts in equitable jurisdiction and hybrid community property/equitable distribution jurisdictions to look at all the circumstances of the parties to determine what would be a fair property division and then characterize and value assets accordingly. Unlike Wisconsin,[93] Michigan,[94] and Washington,[95] characterization of an asset is the decisive issue in California property division: if an asset is community property, it is automatically subject to valuation and equal distribution;[96] if it

---

medical degree and license to practice were *not* property, and explained that an equitable result was able to be reached where there were no substantial marital assets yet the wife was found to be eligible for maintenance and was also awarded $10,000 in the form of lump sum maintenance as compensation for her contribution to the husband's education).

The Kentucky Supreme Court later resolved the issue by holding, in Inman v. Inman, 648 S.W.2d 847 (Ky. 1982) [hereinafter, *Inman II*], that a degree was not marital property. *Id.* at 852. In dictum, however, the court allowed for compensation under the Kentucky property division statute to the wife based on educational costs, living expenses, and the "potential for increase in future earning capacity made possible by the degree." *Id. But see* McGowan v. McGowan, 663 S.W.2d 219 (Ky. Ct. App. 1983), in which a Kentucky appellate court would not adhere to the dictum set forth in *Inman II* that a spouse who had worked and financially contributed to the other spouse's acquisition of a professional degree should automatically receive a monetary award based on a prescribed formula. *Id.* at 223.

92. *E.g.*, Haugan v. Haugan, 117 Wis. 2d 200, 343 N.W.2d 796 (1984). The Wisconsin Supreme Court held a degree was a marital asset and proposed four approaches (*see supra* notes 55-58) to value the supporting spouse's contribution. *Id.* at 800, 802-03. The court instructed the trial courts to exercise their "broad discretion" in rendering a fundamentally fair and equitable decision in each case, based on its facts. *Id.* at 802. Applying the court's suggested formulas, the trial court could have awarded the wife from $28,560 to $133,000: $28,560 for "cost value;" $69,800 for "opportunity costs;" $133,000 for "enhanced earning capacity;" or $45,500 for "labor theory." *Id* at 802-03.

Compare In re Marriage of Horstmann, 263 N.W.2d 885, 891 (Iowa 1978) (Supreme Court of Iowa held that the enhanced earning capacity was marital property and upheld the trial court's award of $18,000 to the wife as a "property distribution," where there were no other marital assets, and $18,000 was found to approximate the cost of the education) *with In re* Marriage of Estlund, 344 N.W.2d 276, 280-81 (Iowa Ct. App. 1983) (an Iowa appellate court upheld as equitable the trial court's property division in which the family home, subject to existing indebtedness, as well as "many of the parties' personal assets" were awarded to the wife, and the husband was awarded his law degree).

93. *See supra* notes 52-59 and accompanying text.

94. *See supra* notes 60-69 and accompanying text.

95. *See supra* notes 70-78 and accompanying text.

96. *See* CAL. CIV. CODE § 4800 (West 1983 & Supp. 1985). "[T]he court shall . . . divide the community property and the quasi-community property of the parties

is separate property or not legally defined as property, it is not subject to division.[97] Thus, if a precedent were set that a degree or its concomitant earning capacity was community property, it would necessarily have to be so in all subsequent cases, regardless of the circumstances.

While the case law of other jurisdictions has only limited applicability in California, the experience of those courts support the position of the legislature not to characterize a degree and the enhanced earning capacity of its holder as community property. One of the fundamental concepts of the statutes in equitable distribution as well as community property states is that all property acquired—including income earned—after divorce or separation is the separate property of the parties.[98] Awards based on future earnings are contrary to the spirit of the statutes.[99] The reluctance of the equitable distribution jurisdictions to contradict this basic principle by placing a value on future earnings is evident in their choice of remedies as well as the amount of their awards. In the cases in which there are no substantial marital assets, courts making lump sum alimony awards rarely value the degree over $20,000.[100] Many courts choose awards of reimbursement or restitution for costs incurred, thus not valuing the future earnings at all.[101] There remain, also,

---

equally." *Id.*

97. *See* CAL. CIV. CODE § 5110 (West 1983 & Supp. 1985). "Except as provided in Sections 5107 [wife's separate property], 5108 [husband's separate property], and 5126 [personal injury damage awards], all real property situated in this state and all personal property . . . is community property . . . ." *Id.*

98. *See, e.g.*, CAL. CIV. CODE §§ 5118, 5119 (West 1983) (earnings and accumulations of a spouse while living separate from the other spouse, or after a judgment decreeing legal separation, are the separate property of the earning spouse); Marriage & Dissolution Act § 503, ILL. ANN. STAT. ch. 40, § 503(a)(3), (b) (Smith-Hurd 1980 & Supp. 1983) (property acquired by a spouse after a judgment of legal separation is "non-marital" property; but property acquired between the time when spouses are living separately and when a judgment of dissolution is entered is presumed to be "marital property").

99. Herring, *supra* note 12, at 87.

100. *See, e.g.*, Leveck v. Leveck, 614 S.W.2d 710, 714 (Ky. Ct. App. 1981) (upheld trial court's award of $10,000 in lump sum maintenance); Moss v. Moss, 80 Mich. App. 693, 695, 264 N.W.2d 97, 98 (1978) (trial court's award of $15,000 alimony in gross "fairly represents the wife's contribution to the acquisition" of the husband's degree); Scott v. Scott, 645 S.W.2d 193, 196-97 (Mo. Ct. App. 1982) (upheld trial court's "property settlement" in the amount of $12,000, citing with favor other courts' use of lump sum alimony awards to compensate the supporting spouse); Daniels v. Daniels, 185 N.E.2d 773, 775 (Ohio Ct. App. 1961) (trial court correct to consider husband's medical education in awarding $24,000 alimony to wife).

101. *See, e.g.*, DeLa Rosa v. DeLa Rosa, 309 N.W.2d 755, 759 (Minn. 1981) (awarded

those courts which deny any relief and do not value either the degree or the future earnings of its holder. The equitable distribution system has been criticized for producing both inconsistent, unpredictable results and promoting judge or forum shopping.[102] "[M]any courts have failed to recognize that once a degree is deemed property, it must be treated as property in all cases to avoid . . . 'doctrinal chaos' . . . ."[103]

The resistance to valuing and distributing future earnings would be greater in California, where the courts have no flexibility to award other than one-half of the value of the degree to the supporting spouse.[104] Forced to value and distribute future earnings of a degree, courts could conceivably circumvent the equal division requirement by undervaluing the degree in appropriate circumstances, producing, however, the undesirable consequence of injecting an "equitable valuation" facet into California's community property system despite the equal distribution requirement. The end result would be a situation similar to that of equitable distribution jurisdictions: inconsistent and unpredictable awards, supported by rationales and justifications which camouflage the true basis for the awards.

E. *The "Goodwill" Analogy*

There is an inherent conflict between awards based on future earning capacity and the statutory directive that future earnings are separate property. California courts have confronted this dilemma in the context of cases involving goodwill.[105] Because the value of goodwill is the present value of ex-

---

wife restitutionary award of $11,400 representing living costs and direct educational expenses); Hubbard v. Hubbard, 603 P.2d 747, 752 (Okla. 1979) (to prevent unjust enrichment, wife should be awarded, on remand, the amount of her contributions toward husband's "direct support and school and professional training expenses, plus reasonable interest and adjustment for inflation"); Grosskopf v. Grosskopf, 677 P.2d 814, 822-23 (Wyo. 1984) (court suggested an equitable award to the supporting spouse which would afford an opportunity to obtain the same degree as the student spouse, or in the alternative, a sum of money equal to that benefit).

102. Herring, *supra* note 12, at 87.

103. Recent Developments, *supra* note 13, at 214 (footnote omitted).

104. Bruch, *The Definition and Division of Marital Property in California: Towards Parity and Simplicity*, 33 HASTINGS L.J. 769, 854 (1982).

105. Goodwill is that intangible asset of a business or professional practice representing the value of the business, above and beyond its inventory and accounts receivable, which is the product of its clientele and reputation. *Id.* at 810.

pected future patronage based on past performance,[106] the danger exists that any award may reach future earnings of the professional spouse.

California courts have frequently considered goodwill valuation questions in recent years,[107] but arrived at "alarmingly disparate valuations of practices that would at least appear similar."[108] Some commentators dismiss this fluctuation as judicial "confusion."[109] The variations are more probably due to resistance by courts to valuing and distributing what is, in effect, future earnings.[110]

If the variations in goodwill cases are due to resistance by California courts to valuing the future earnings of a business, these courts are likely to more strongly resist valuing future income from a degree. When valuing goodwill the court is at least basing its calculations on past results. Proponents of characterizing a degree as property assert that a degree is analogous to goodwill insofar as the value of the degree rests in the expectation of future income resulting from the skills acquired by past efforts. In the case of a degree, however, there is no evidence of past earnings by which to predict the future earnings. The only solution would be for the court to look at how well the profes-

---

106. *In re* Marriage of Rives, 130 Cal. App. 3d 138, 149-50, 181 Cal. Rptr. 572, 577-78 (1982) (error to value the goodwill of queen bee business on a "potential income approach").

107. Bruch, *supra* note 104, at 810.

108. *Id.* at 810 n.159, citing Todd v. Todd, 272 Cal. App. 2d 786, 78 Cal. Rptr. 131 (1969) ("law practice's goodwill valued at $1,000 when annual net income was $23,412"); Golden v. Golden, 270 Cal. App. 2d 401, 75 Cal. Rptr. 735 (1969) ("medical practice's goodwill valued at $32,500 when net annual income was approximately $45,000").

109. Bruch, *supra* note 104, at 810. *See also* Lurvey, *Professional Goodwill on Marital Dissolution: Is it Property or Another Name for Alimony?*, 52 CAL. ST. B.J. 27, 27 (1977) (addressing the "growing confusion" in valuing professional goodwill).

110. One appellate court allowed goodwill but warned that the value of professional goodwill "should be determined with *considerable care and caution*, since it is a unique situation in which the continuing practitioner is *judicially forced to buy an intangible asset at a judicially determined value and compelled to pay a former spouse her share in tangible assets.*" *In re* Marriage of Lopez, 38 Cal. App. 3d 93, 110, 113 Cal. Rptr. 58, 68 (3d Dist. 1974) (emphasis in original). Other courts have been more adamant, stating that because it is impermissible to classify post-separation earnings as community property, the value of goodwill must be established without reference to the potential or continuing net income of the professional practitioner. *See, e.g., In re* Marriage of Rives, 130 Cal. App. 3d 138, 150, 181 Cal. Rptr. 572, 578 (3d Dist. 1982); *In re* Marriage of Foster, 42 Cal. App. 3d 577, 582, 117 Cal. Rptr. 49, 52 (1st Dist. 1974); *In re* Marriage of Fortier, 34 Cal. App. 3d 384, 388, 109 Cal. Rptr. 915, 918 (2d Dist. 1973).

sional did in school, and attempt to extrapolate success in practice. These calculations are completely speculative whereas valuations of goodwill are grounded in fact.

Some courts which have held a degree to be marital property point out that precisely this type of speculative calculation is used in wrongful death and personal injury cases.[111] In wrongful death and personal injury cases, however, fault has been assigned to a tortfeasor or wrongdoer. The "cost" of the damage has been delegated to the tortfeasor as a matter of public policy; it is more fair to speculate as to damages than not to compensate the aggrieved party at all.[112] Under California law, there is no consideration of fault in a dissolution proceeding; there are no victims, no tortfeasors. If the rationale of fault for holding the tortfeasor liable to the injured party does not exist in dissolution cases, there is likewise no basis to speculate as to feature earnings.

F. *The "Pension Benefits" Analogy*

Several commentators[113] have suggested that, in addition to goodwill, the recognition of unvested pension benefits as divisible community property[114] is precedent for the proposition that a degree and the future earnings it may generate are community property. However, the future earnings of a degree as an asset are distinguishable from future benefits as an asset. "[P]ension benefits represent a form of deferred compensation for services rendered . . . ."[115] At the time of separation, the spouse who is not the named beneficiary of the pension is entitled to a share of the pension equal to the proportion of the length of the marriage to the total number of years required to obtain the pension.

---

111. *E.g.*, Woodworth v. Woodworth, 126 Mich. App. 258, 266-67, 337 N.W.2d 332, 336 (1983).

112. W. PROSSER, HANDBOOK OF THE LAW OF TORTS §§ 4, 121 (3d ed. 1964).

113. *E.g.*, Krauskopf, *Recompense for Financing Spouse's Education: Legal Protection for the Marital Investor in Human Capital*, 28 U. KAN. L. REV. 379, 412 (1980); Mullenix, *supra* note 58, at 254-56.

114. *In re* Marriage of Brown, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976). Robert Brown had accumulated, during the 24 year marriage, 72 of 78 "points" required by his employer's pension plan to qualify for benefits. He needed to work only three more years to acquire the remaining six points. The trial court had held that because Robert's rights in the retirement pension had not yet vested, the value of the benefits were not community property. *Id.* at 841-44, 544 P.2d at 562-63, 126 Cal. Rptr. at 634-35.

115. *Id.* at 845, 544 P.2d at 565, 126 Cal. Rptr. at 637.

Whatever that proportion is, all the work from which the benefits are derived has already been completed. The asset owned at this point by the community is a guaranteed fixed amount in the future.[116] In contradistinction, a degree is valueless unless used; to make use of the degree, its holder must work to derive the income. There is no deferred compensation granted to a person merely because he or she holds a degree.

G. *The Student Spouse*

Finally, the position of the professional spouse is often overlooked in the debate of whether to characterize a degree as community property. Valuing the future earnings of a degree holder would create an unjust burden on the professional spouse.[117] The method often suggested is to predict the lifetime earnings of the professional spouse, subtract from it the earnings that spouse probably would have earned without the degree, and award half of the resulting sum to the other spouse.[118] Consider the implications and gross inequity of this solution; in exchange for three to seven years of support,[119] a potentially large debt is assigned to the professional spouse based on speculation as to what an "average" professional might earn. As the degrees currently at issue often yield higher than average salaries, the professional would not only be compelled to maintain the projected standard imposed upon him or her, but would have to do so for life. If he or she chose to change careers, starting in a lower income position would exacerbate his or her debt. In short, making this determination at the outset of a career would effectively lock the professional in that career for his or her life. This comes

---

116. *See, e.g., In re* Marriage of Brown, 15 Cal. 3d 838, 846, 544 P.2d 561, 565, 126 Cal. Rptr. 633, 637 (1976) (quoting Kern v. City of Long Beach, 29 Cal. 2d 848, 855, 179 P.2d 799, 803 (1947)); *In re* Marriage of Weinstein, 128 Ill. App. 3d 234, ____, 470 N.E.2d 551, 565 (1984). The non-beneficiary spouse has a one-half community interest in this asset.

117. [T]o give the working spouse an interest in half the student spouse's increased earnings for the remainder to the student spouse's life because of the relatively brief period of education and training received during marriage is not only a windfall to the working spouse but in effect a permanent mortgage on the student spouse's future.

Recommendation, supra note 23, at 234.

118. *E.g.*, Haugan v. Haugan, 117 Wis. 2d 200, 213, 343 N.W.2d 796, 803 (1984); Bruch, *supra* note 104, at 817 n.190.

119. A student spouse might require three years of support to acquire a law degree, or four to seven years of support to acquire a medical degree and training.

dangerously close to an infringement on the constitutional prohibition on involuntary servitude.

H. *The Legislature's Decision was Sound*

The California Legislature acted wisely not to characterize a degree or the enhanced earning capacity which results from a degree as community property, attempt to value this asset and then divide it equally. Although this solution has been adopted by a few courts in equitable distribution jurisdictions, the California courts do not have the leeway of those courts to vary the value of the degree to fit the equities called for by the facts of individual cases. Regardless, it is contrary to established principles of community property to award the future earnings of one spouse to the other, except in the case of alimony. The underlying principle of the community property system is that property acquired after separation is the separate property of each spouse.

Although the statutory concept of property has been expanded by case law to define as community property such intangible items as pension benefits and goodwill, the earning capacity of a degree should not be included within this expansion. Future earnings are distinguishable from future benefits. Goodwill cases should likewise not be cited as precedent for the theory that future earnings from a degree may be valued and distributed. The goodwill exception is contrary to community property principles. The cases involving goodwill have produced a wide disparity in judgments, indicating theoretical and practical weaknesses. One mistake does not justify the adoption of another. Last, but certainly not least, it is unfair to the professional spouse to grant the working spouse an interest in his or her future earnings. As the legislature has recognized, there are better alternatives which are fair to both spouses.

III. AB 3000: REIMBURSEMENT FOR EDUCATIONAL COSTS

In adopting AB 3000[120] the legislature believed it had

120. AB 3000 added § 4800.3 to the California Civil Code (1984 Cal. Stat. ch. 1661, § 2) and amended § 4801 of the California Civil Code (1984 Cal. Stat. ch. 1661, § 3). Section 4800.3 of the California Civil Code states:

(a) As used in this section, "community contributions to edu-

cation 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, 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.

CAL. CIV. CODE § 4800.3 (West Supp. 1985).

Section 4801 of the California Civil Code provides in pertinent part:

(a) In any judgment decreeing the dissolution of a marriage or a legal separation of the parties, the court may order a party to pay for the support of the other party any amount, and for

found an "equitable solution"[121] to the *Sullivan* problem. The new legislation essentially grants relief in three ways: 1) it adds section 4800.3 to the Civil Code to allow for reimbursement to the community for community contributions to the education of one of the parties, subject to several conditions; 2) it allows for educational loans to be assigned to the party receiving the education;[122] and 3) it amends section 4801(a)(1) of the Civil Code governing spousal support to allow for consideration, with respect to each spouse's earning capacity, of the extent to which the "supported spouse"[123] contributed to the education or training of the professional spouse. The particular aspects and the underlying legislative intent of each of these provisions will be discussed in full below.[124]

The legislature selected reimbursement as a practical compromise to the various suggested solutions to the *Sullivan* problem.[125] The Law Review Commission (hereinafter, "the Commis-

---

> any period of time, as the court may deem just and reasonable. In making the award, the court shall consider all of the following circumstances of the respective parties:
> (1) The earning capacity of each spouse, taking into account the extent to which the supported spouse's present and future earning capacity is impaired by periods of unemployment that were incurred during the marriage to permit the supported spouse to devote time to domestic duties and the extent to which the supported spouse contributed to the attainment of an education, training, or a license by the other spouse.

CAL. CIV. CODE § 4801 (West 1983 & Supp. 1985).

121. *Recommendation, supra* note 23, at 235. The legislature originally proposed Assembly Bill 525. AB 525 (1983-84). AB 525 would have granted the supporting spouse a percentage of the professional spouse's future income—the percentage to be calculated based on the spouse's proportionate contribution to the acquisition of the degree. The bill was sharply criticized as being directly contrary to the principle that post-separation earnings are separate property and as unconstitutionally imposing involuntary servitude on the professional spouse. *Community Property Issues Presented in Sullivan v. Sullivan: Hearings on AB 525 Before the Assembly Committee on Judiciary*, 93, 133-34 (1983) (testimony of Kathleen A. Eggleston, representing American Futurists for the Education of Women).

122. CAL. CIV. CODE § 4800.3(2) (West Supp. 1985) (replacing CAL. CIV. CODE § 4800(b)(4) (1978)). *See supra* note 120 for the text of the statute.

123. Note that "supported spouse," as used in the code, refers to the spouse eligible for spousal support, who has been referred to throughout this Comment as the "supporting spouse."

124. Because the Law Revision Commission published no comments on § 4801(a)(1) of the California Civil Code and the change is minor, this provision will be discussed in context of the supreme court's decision in *In re* Marriage of Sullivan, 37 Cal. 3d 762, 691 P.2d 1020, 209 Cal. Rptr. 354 (1984). *See infra* notes 172-98 and accompanying text.

125. *Recommendation, supra* note 23, at 233-35.

sion") did not believe it either fair or practical to classify the value of an education, degree, license or the resulting enhanced earning capacity as community property.[126] They rejected the "plain inequity" of denying any relief to the working spouse.[127] The Commission also deemed it inadvisable to disrupt the established scheme of spousal support to remedy the discrepancy in the earning capacities of the parties.[128]

A. *The Statutory Provisions*

The heart of the legislation is California Civil Code section 4800.3(b)(1), which states that a community shall be reimbursed for community contributions to the education of a party that substantially enhances the earning capacity of that party. The rationale for reimbursement is that it puts the parties on "equal footing" by giving the "working spouse the same amount the student spouse was given for the education."[129] While "community contributions" are ambiguously referred to as "payments" in subdivision (a), the Commission has defined them as "money actually contributed for payment of tuition, fees, books, supplies, etc."[130] Furthermore, the contribution must "substantially enhance" the student spouse's earning capacity. If the enhancement is only marginal, there is no right to reimbursement because the basis of that right, the community contributed funds for the economic benefit of the student spouse, fails.[131] On the other hand, if the enhancement is substantial, the interest of the supporting spouse is protected because reimbursement is required regardless of whether the student spouse utilizes his or her enhanced earning capacity.[132]

California Civil Code section 4800.3(b)(2) assigns to the

126. *Id.* at 234.

127. *Id.* at 233.

128. *Id.* at 234.

129. *Id.* at 235.

130. *Id.* at 235 n.7. Note that the student spouse's contributions of time and effort are not included as a community expenditure. *See also infra* notes 145-54 and accompanying text for critique of statute.

131. *Recommendation, supra* note 23, at 235. The more appropriate basis is that the community contributed funds for the economic benefit of the community, not the student spouse. *See* Krauskopf, *supra* note 113, at 386-88.

132. The student spouse may not utilize his or her training in two situations: 1) where the student spouse attempts to circumvent reimbursement; or 2) where the student spouse makes a legitimate alternate career choice.

party receiving the education any loans incurred during marriage for that education. This provision merely replaces former section 4800(b)(4) of the Civil Code.

Subdivision (c) of the California Civil Code section 4800.3 injects a degree of flexibility into the statute by allowing that the reimbursement or assignment be modified as is just under the circumstances of each case, particularly with respect to three instances: 1) where the community has substantially benefited from the education; 2) where the education of one party is offset by the education of the other party; and 3) where the education received by a party reduces that party's need for spousal support. The first limitation contemplates a lengthy marriage and the assumption that the community has benefited from its initial expenditure in one spouse's education through the income which has been derived from the education over a period of time.[133] This premise is also the basis for a rebuttable presumption that a community has already substantially benefited if the marriage has lasted ten years after the expenditure. This limitation is designed to "achieve simplicity and justice in the ordinary case" in light of the problems of proof and computation of expenditures.[134] The second limitation applies when each spouse has been educated at the community's expense; "[t]here is in effect an offset and it makes little sense to require each to reimburse the other."[135] The third specified limitation eliminates reimbursement if the party who has been the homemaker in a lengthy marriage obtains an education at the community's expense shortly before dissolution. The Commission states that reimbursement would, in this case, be inequitable and notes that the education received will usually reduce the spousal support award to the educated party.[136]

The Commission recognized that the parties may have discussed their financial conditions and expectations and come to an agreement as to their respective responsibilities. If there is such an agreement it should supersede the statutory reimbursement right, but only if it is in writing; the requirement of a writing is intended to "avoid unmeritorious litigation and to ensure

133. *Recommendation, supra* note 23, at 236.
134. *Id.* at 237.
135. *Id.* at 236.
136. *Id.*

certainty."[137]

B. *Critique*

1. Favorable Provisions

In its favor, the new statute does grant the community reimbursement for costs. This approach is consistent with the general trend of courts nationwide to allow some type of remedy regardless of whether the degree is classified as property. It is also consistent with the only other community property state—Arizona—to grant a definitive amount of relief.[138] In limiting the remedy to reimbursement only,[139] the bill will produce, in most cases, consistent and predictable results.

The requirement that the earning capacity be substantially enhanced is a well-reasoned limitation. As the Commission has noted, the working spouse's expectation in future benefits which provide the basis for reimbursement is not present when, for example, the student spouse's advanced degree is a Ph.D. in Sanskrit Literature.[140]

The three qualifications on reimbursement are also supportable. Section 4800.3(c)(1) creates, in effect, a ten year statute of limitation on reimbursement, subject to a rebuttable presumption that the community has not substantially benefited from the education in that ten year span. Michigan, one of the few jurisdictions that held a degree to be marital property in one case,[141] limited the effect in a subsequent decision[142] denying relief where the degree was acquired nineteen years prior to the divorce. The rationale of the *Watling* court in Michigan was the same as that behind the California legislation; after a certain length of time the community has substantially benefited from the degree and has, therefore, no remaining interest in the de-

137. *Id.* at 237-38.

138. Pyeatte v. Pyeatte, 135 Ariz. 346, 357, 661 P.2d 196, 207 (Ariz. Ct. App. 1982) (in granting wife, who supported husband while in law school, restitution to prevent unjust enrichment of husband, the appellate court limited the award to her financial contribution for husband's living expenses and direct educational costs).

139. "Reimbursement for community contribution . . . is the exclusive remedy of the community or a party." CAL. CIV. CODE § 4800.3(d) (West Supp. 1985).

140. Recent Developments, *supra* note 13, at 215 n.40.

141. Woodworth v. Woodworth, 126 Mich. App. 258, 261-62, 337 N.W.2d 334 (1983).

142. Watling v. Watling, 127 Mich. App. 624, 627, 339 N.W.2d 505, 507 (1983).

gree.[143] While the *Watling* court was concerned with valuing a degree throughout a career, the California legislation is valuing only the costs of the education. Because the reimbursement interest will be less, quantitatively, than an interest in the value of a degree as represented by the total earnings it generates, the Legislature reasonably concluded that a ten year limitation on reimbursement is appropriate.

California Civil Code section 4800.3(c)(2) allows that the reimbursement be reduced or eliminated in the event that the "student" spouse reciprocates by supporting the "working" spouse while he or she likewise acquires an education.[144] This provision appears to be intuitively fair so long as the enhancement of each spouse's earning capacity is roughly the same. California Civil Code section 4800.3(c)(3) provides for an offset in a different manner: the homemaker spouse's contributions of household duties are "paid back" by an education which allows him or her to be self-supporting. The Commission points out that it would not make sense to force the spouse who received the education to reimburse the community when the obligation for spousal support has been either reduced or eliminated by virtue of the education of the other spouse. This provision also seems fair if the non-homemaker spouse's prior earning capacity is not diminished or destroyed as a result of him or her taking over the household duties from the homemaker spouse turned student.

2. An Inadequate Remedy

Despite its strengths the new statute suffers from several flaws. A minor flaw is subdivision (e) of California Civil Code section 4800.3, which requires that any agreement of the parties

---

143. *Compare* Watling v. Watling, 127 Mich. App. 624, 627, 339 N.W.2d 505, 507 (1983) (wife already compensated for her contribution to degree by sharing in benefits of degree for nineteen years) *with* CAL. CIV. CODE § 4800.3(c)(1) (West Supp. 1985) (rebuttable presumption that community has substantially benefited from contributions to the degree made ten years prior to the dissolution proceeding). *See also* Comment, *The Interest of the Community in a Professional Education*, 10 CAL. W.L. REV. 590 (1974). The author advocates characterizing a degree or education as community property and proposes a formula using a factor which has the effect of progressively decreasing the value of the degree over a career. The justification is that the degree is most valuable at the outset of a career, but as the practitioner gains more experience his income is attributable more to his acquired skills than his education. *Id.* at 609-10.

144. CAL. CIV. CODE § 4800.3(c)(2) (West Supp. 1985).

contrary to reimbursement be in writing. This provision is harsh since it bars a variety of conceivable arrangements. As a practical matter, few couples would tend to memorialize such an agreement. Written agreements are also undesirable as a matter of public policy. "[A] rule [characterizing a degree as community property] would force the student spouse and working spouse to arrive at a fair determination of their rights by means of a marital agreement and might encourage a dissolution of the marriage."[145] The same objection applies in the case of spouses arriving at an agreement contrary to reimbursement.

The reimbursement statute is seriously flawed in two ways: 1) it requires only that the community—not the working spouse—be reimbursed, and 2) it fails to reimburse the community for the time and effort expended by the student spouse.

The costs of an education consist of the money spent by the working spouse for educational and living expenses, and the time spent studying by the student spouse.[146] In many cases, the total income of the working spouse will be needed for the education and living costs. In a sense, both spouses are working full-time to acquire the degree, and their contributions are equal. If the educational expenses and the living expenses are also roughly equal,[147] the reimbursement statute returns to the community one-quarter of the total community contribution to the education and, consequently, returns to the working spouse one-

145. *Recommendation, supra* note 23, at 234-35.

146. Several commentators have pointed out that there are two other "costs:" the "opportunity cost," which represents the foregone opportunity of the working spouse, and the "lost wages" which the student spouse would have earned if he or she were not in school. *See, e.g.*, Bruch, *supra* note 104, at 818; Krauskopf, *supra* note 113, at 384-88.

These costs should not be included in attempting to value the costs of an education. They represent income which might have been earned if conditions were otherwise. These costs are speculative and should be deemed abandoned by the couple. Parks, *Cost as the Measure of the Community's Interest in a Spouse's Education*, 9 COMM. PROP. J. 110, 115-16 (1982). Consider that if the student obtained a degree, but chose not to practice in the field or failed trying to practice, the community (assuming the couple has stayed together) would have no claim to reimbursement, and would have to absorb the loss.

147. In most cases, educational cost is less than living expenses. For example, the total "cost of education" (living expenses plus direct educational costs such as tuition and books) at Golden Gate University School of Law was about $18,000 for the 1984-85 school year. Financial Aid Office, Golden Gate University. Of that total cost, tuition and fees are estimated to be about $7,000 and books and supplies to be about $400. The "direct educational cost," then, is approximately $7,500.

eighth of the total community contribution.[148] The Commission claims that "[t]his solution in effect gives the working spouse the same amount the student spouse was given for the education."[149] At best, the working spouse is receiving only half the *expenses* given the student spouse.

The reimbursement statute fails to consider the time which the student spouse contributes to the degree. Instead, it allows reimbursement only for "money actually contributed."[150] One of the fundamental principles of community property is that the "time, effort and skills" of both parties in a marriage are community property.[151] The legislature has recognized that community expenditures should be reimbursed, yet ignores the time and effort of the student, roughly one-half of the community expenditure. Claims that attempting to value the student's time and effort would be difficult and impractical[152] cannot justify denying the community relief altogether for this portion of the educational expenditure.

Thus, the statute and the underlying legislative intent are internally inconsistent. One basic community property principle is strictly adhered to in requiring that the working spouse recoup only one-half of costs through reimbursement to the *community*, yet another basic community property principle is ignored by excluding the time and effort of the student spouse as a compensable community property cost. Either a statutory exception must be made to the former provision or the latter provision must be followed to effect a truly "equitable solu-

148. Working spouse's contribution (educational expenses (¼ + living expenses (¼)) = ½ of total contribution. "Full time hours" spent by student spouse also = ½ of total contribution. Statute requires educational costs (or, roughly ¼ of total contribution) be reimbursed to community, in which supporting spouse has a ½ interest; thus: ¼ (educational expenses) x ½ (spouse's community interest) = ⅛ of total community contribution and is the share ultimately reimbursed to the supporting spouse.

149. *Recommendation, supra* note 23, at 235.

150. *Id.* at 235 n.7.

151. Somps v. Somps, 250 Cal. App. 2d 328, 332-33, 58 Cal. Rptr. 304, 307 (1967) (quoting Strohm v. Strohm, 182 Cal. App. 2d 53, 62, 5 Cal. Rptr. 884, 889 (1960)). *See also* CAL. CIV. CODE § 687 (West 1982) (property acquired by husband or wife or both during marriage is community property).

152. *Recommendation, supra* note 23, at 234. While the Law Revision Commission was referring to difficulty in valuing the degree itself, the value of the student spouse's time expended to acquire the degree can only be realistically measured with reference to the value of the degree. *See infra* notes 200-20 and accompanying text.

tion."[153] Reimbursement to the working spouse directly for all educational costs and, perhaps, all or a portion of the living expenses might be considered.[154] As it currently stands, however, the reimbursement statute provides an inadequate remedy and should represent only an initial approach—not a final solution—to a complex problem.

IV. THE SUPREME COURT'S DECISION IN *SULLIVAN*

A. *The Majority Opinion*

The California Supreme Court, in *Sullivan*,[155] stated that it granted a hearing to address the issue raised by Janet: "whether a spouse, who has made economic sacrifices to enable the other spouse to obtain an education, is entitled to compensation upon dissolution of the marriage."[156] The court explained that the legislature had intervened by amending the property division and spousal support statutes,[157] and remanded the case to the trial court to be decided according to these new statutes.[158]

The court spent an inordinate amount of time discussing the trial court's order to Mark to bear the attorney fees and costs. The court stated that a trial court should consider "the respective needs and incomes of the parties,"[159] including " 'the [paying spouse's] ability to earn, rather than his [or her] current earnings.' "[160] The court affirmed the lower court's award of at-

153. *Recommendation, supra* note 23, at 235.

154. Jurisdictions which allow reimbursement or restitution include all or a portion of the student spouse's living expenses as a compensable cost. *See, e.g.*, Pyeatte v. Pyeatte, 135 Ariz. 346, 357, 661 P.2d 196, 207 (Ariz. Ct. App. 1982) (citing DeLa Rosa v. DeLa Rosa, 309 N.W.2d 755, 759 (Minn. 1981)) (award should include compensation for direct educational costs and student spouse's living expenses); Grosskopf v. Grosskopf, 677 P.2d 814, 823 (Wyo. 1984) (award should afford the supporting spouse an opportunity to obtain the same advanced degree under the same circumstances).

155. *In re* Marriage of Sullivan, 37 Cal. 3d 762, 691 P.2d 1020, 209 Cal. Rptr. 354 (1984).

156. *Id.* at 766, 691 P.2d at 1022, 209 Cal. Rptr. at 356. Janet Sullivan had appealed from the judgment of the trial court denying her an interest in her husband's degree. *Id.* at 765 n.1, 691 P.2d at 1022 n.1, 209 Cal. Rptr. at 356 n.1.

157. *Id.* at 766-67, 691 P.2d at 1022-23, 209 Cal. Rptr. at 356-57. *See supra* note 120, for the text of the statutes.

158. *Sullivan*, 37 Cal. 3d at 768, 691 P.2d at 1023, 209 Cal. Rptr. at 357.

159. *Id.*, 691 P.2d at 1024, 209 Cal. Rptr. at 358.

160. *Id.* at 769, 691 P.2d at 1025, 209 Cal. Rptr. at 358 (quoting Meagher v. Meagher, 190 Cal. App. 2d 62, 64, 11 Cal. Rptr. 650, 651 (1961)) (brackets in original).

torney fees and costs,[161] after concluding that the trial court could have reasonably inferred that Mark's income from his "burgeoning" medical practice would increase and enable him to pay the attorney fees and costs.[162]

B. *The Concurring and Dissenting Opinion*

The court instructed the trial court to "make the findings necessary to determine whether and in what amount reimbursement and/or support should be awarded under [the] provisions,"[163] and reversed the judgment "denying any compensation for contributions to [the] education."[164] Justice Mosk expressed a valid concern in his concurring and dissenting opinion that this and other "calculated" references to "compensation,"[165] instead of "reimbursement," would "mislead the bench and bar" and were, therefore, inappropriate.[166] He explained:

> At no place in the relevant legislation does the word "compensation" appear. With clarity and precision, the Legislature referred instead to "reimbursement." The terms are not synonymous; there is a significant distinction that extends beyond mere semantics. Reimbursement implies *re*payment of a debt or obligation; that is what the Legislature obviously contemplated. Compensation, on the other hand, may be payment in any sum for any lawful purpose; the Legislature also obviously did not intend to give such a blank check to trial courts.[167]

Justice Mosk pointed out that the issue of spousal support was not before the supreme court,[168] and admonished the trial courts to not impermissibly expand the statutory remedy by making

---

161. *Id.* at 770, 691 P.2d at 1025, 209 Cal. Rptr. at 359.

162. *Id.* at 769, 691 P.2d at 1024, 209 Cal. Rptr. at 358.

163. *Id.* at 768, 691 P.2d at 1023, 209 Cal. Rptr. at 357.

164. *Id.*

165. The majority opinion made repeated references to "compensation." *Id.* at 765, 766, 768, 770, 691 P.2d at 1021, 1022, 1023, 1025, 209 Cal. Rptr. at 355, 356, 357, 359.

166. *In re* Marriage of Sullivan, 37 Cal. 3d 762, 770, 691 P.2d 1020, 1025, 209 Cal. Rptr. 354, 359 (1984) (Mosk, J., concurring and dissenting).

167. *Id.* Justice Mosk also noted that the majority opinion does not make clear that "compensation" is not to be made to the supporting spouse *as an individual.* Rather, it is "reimbursement" that is due the *community*, in which both husband and wife have an equal interest. *Id.*

168. *Id.*

either property awards contrary to the intent of the legislature,[169] or awards "of any sums for any purpose" other than the "exclusive remedy" of reimbursement granted by the statute.[170]

C. *Critique*

Justice Mosk accurately stated that the court was trying to expand the remedy granted by the legislature. He was also correct, however, in observing that reimbursement is a precise and finite remedy; the community is limited to money spent for educational costs only. Thus, the court cannot have been referring to the reimbursement statute when it suggested that the working spouse be compensated. Although Justice Mosk's concern with the court's use of "compensation" is justified, the focus of his criticism is misdirected when he suggests the majority was attempting to expand the reimbursement remedy to include "compensation" not contemplated by the *reimbursement* statute.

The spousal support statute is not so limited; the amendment requires the court to consider "the extent to which the supported spouse contributed to the attainment of an education, training, or a license by the other spouse."[171] The court remanded the case to the trial court to determine the rights of the parties with respect to *both* the new reimbursement provision and the amended spousal support provision. Contrary to Justice Mosk's assertion, spousal support was an issue in this case and afforded the court a flexible means by which to compensate the working spouse.

1. A Modified Basis for Spousal Support

The court discussed spousal support directly only to the extent that it instructed the trial court to apply the amended spousal support statute to the case on remand.[172] However, the court discussed the basis for awarding attorney fees and court costs at great length.[173] The court relied on language from

169. *Id.* at 771, 691 P.2d at 1026, 209 Cal. Rptr. at 360. *See infra* text accompanying note 199.

170. *Sullivan*, 37 Cal. 3d at 771, 691 P.2d at 1026, 209 Cal. Rptr. at 360.

171. CAL. CIV. CODE § 4801(a)(1) (West 1983 & Supp. 1985).

172. *Sullivan*, 37 Cal. 3d at 768, 691 P.2d at 1023, 209 Cal. Rptr. at 357.

173. *Id.* at 768-69, 691 P.2d at 1024, 209 Cal. Rptr. at 358.

spousal support cases for its proposition that attorney fees can be based, in part, on the future ability of one spouse to pay.[174] If the court was willing to accept spousal support cases as precedent for attorney fees cases, it may then accept as good authority the use of attorney fees cases, including *Sullivan*, in subsequent spousal support cases. Therefore, the discussion on attorney fees in *Sullivan* may affect the trial court's ruling on spousal support on remand.

The court affirmed the trial court's award of attorney fees and costs and concluded that the trial court did not abuse its discretion by inferring that Mark had the ability to pay these costs based on his expected increase in income.[175] Hereby, the court created a rule which will allow the trial courts to look to the future income of a party when determining the ability to pay for legal costs. The authorities cited by the court, however, do not support this proposition.

The court relied primarily on two spousal support cases: *Meagher v. Meagher*[176] and *Estes v. Estes*.[177] In determining the "respective needs and incomes of the parties,"[178] the supreme court stated that "the trial court is not restricted in its assessment of ability to pay to a consideration of salary alone, but may

---

174. *Id. See infra* notes 176-86 and accompanying text.

175. *Sullivan*, 37 Cal. 3d at 769, 691 P.2d at 1024, 209 Cal. Rptr. at 358.

176. Meagher v. Meagher, 190 Cal. App. 2d 62, 11 Cal. Rptr. 650 (1961). For nearly two years prior to the couple's separation, the husband had earned $2,083 per month working for a family owned corporation. He terminated that employment almost immediately after the separation and took a position which paid $624.05 per month at a firm his family was planning to purchase. He was 41 years old and in good health. *Id.* at 63, 11 Cal. Rptr. at 650-51.

The husband appealed the trial court's order directing him to pay his wife and minor children $750 per month as temporary alimony and support. *Id.* at 62, 11 Cal. Rptr. at 650. The appellate court upheld the award, and noted that the trial court acted within its discretion to evaluate "the peculiar coincidence of salary reduction . . . and marital separation." *Id.* at 64, 11 Cal. Rptr. at 651.

177. Estes v. Estes, 158 Cal. App. 2d 94, 322 P.2d 238 (1958). The husband appealed the trial court's order requiring support payments to his wife, allegedly in excess of his income, and enjoining him from disposing of any community or separate property except in the due course of business or for the necessities of life. *Id.* at 95-96, 322 P.2d at 239-40. The husband had assets worth $410,000, including his corporate business and family home. The appellate court noted that the husband had the ability to pay the support by selling his assets. Support payments were one "necessity of life" contemplated by the trial court's injunction. *Id.* at 97, 322 P.2d at 240.

178. *In re* Marriage of Sullivan, 37 Cal. 3d 762, 768, 691 P.2d 1020, 1024, 209 Cal. Rptr. 358 (1984).

consider all the evidence concerning the parties' income, assets and abilities."[179] The reference to "abilities" was not, in the cited case, *Estes*, to future ability to earn income. It referred to the present ability of the husband to sell stock and corporate assets in his name by means of a clause in the court order that he may sell these assets for "the necessities of life," including support payments.[180]

The *Sullivan* court also held the trial court's finding that "respondent's [husband's] burgeoning medical practice would continue to flourish and that his income would increase dramatically"[181] was a reasonable inference, and stated:

> "[T]he cases have frequently and uniformly held that the court may base its decision on the [paying spouse's] ability to earn, rather than his [or her] current earnings . . ." for the simple reason that *in cases such as this* current earnings give a grossly distorted view of the paying spouse's financial ability.[182]

The court's reference to "cases such as this" was taken out of context. The court in the cited case, *Meagher*, was referring to circumstances in which the husband was "one who . . . engaged in a seasonal industry or whose earnings had widely fluctuated."[183] In *Meagher*, the court was looking to the husband's past ability to earn a living to establish what he is presently able to pay, rather than looking to his ability to earn in the future to establish what he can presently pay.[184] Furthermore, the supporting cases cited by the court in *Meagher*[185] were mostly cases in which the husband had voluntarily quit working or taken a decrease in pay to ostensibly avoid alimony payments.[186]

---

179. *Id.*

180. Estes v. Estes, 158 Cal. App. 2d 94, 97, 322 P.2d 238, 240 (1958).

181. *Sullivan*, 37 Cal. 3d at 769, 691 P.2d at 1024, 209 Cal. Rptr. at 358.

182. *Id.*, 691 P.2d at 1025, 209 Cal. Rptr. at 359 (quoting Meagher v. Meagher, 190 Cal. App. 2d 62, 64, 11 Cal. Rptr. 650, 651 (1961)) (brackets in original; emphasis added).

183. *Meagher*, 190 Cal. App. 2d at 64, 11 Cal. Rptr. at 651.

184. *Id. But cf. In re* Marriage of Sullivan, 37 Cal. 3d 762, 769, 691 P.2d 1020, 1024-25, 209 Cal. Rptr. 354, 358-59 (husband's future ability to earn examined whether he can presently pay attorney fees).

185. *Meagher*, 190 Cal. App. 2d at 64, 11 Cal. Rptr. at 651-52 (citing Pencovic v. Pencovic, 45 Cal. 2d 97, 100, 287 P.2d 501, 502-03 (1955); Hall v. Hall, 42 Cal. 2d 435, 442, 267 P.2d 249, 253 (1954); Webber v. Webber, 33 Cal. 2d 153, 160, 199 P.2d 934, 939 (1948); Elliott v. Elliott, 162 Cal. App. 2d 350, 357, 328 P.2d 291, 296 (1958)).

186. Pencovic v. Pencovic, 45 Cal. 2d 97, 100-02, 287 P.2d 501, 502-04 (1955); Web-

The *Sullivan* court used this new "future ability to pay" standard to uphold the trial court's award of attorney fees and costs. Both parties' financial statements indicated that their monthly expenses exceeded their monthly incomes by "several hundred dollars" (wife)[187] and "over $800" (husband).[188] Under traditional standards, neither party would be entitled to attorney fees or costs as neither had the ability to pay. Applying the new test, however, the court was willing to infer that the husband would be able to pay in the future if his income continued to increase.[189]

The new standard sets a disturbing precedent for spousal support awards. It may, as well, influence the decision of the trial court to award spousal support in *Sullivan* on remand. Attorney fees and court costs awards are based on "the respective needs and incomes of the parties."[190] Similarly, spousal support is based on the "circumstances of the parties,"[191] that is, their respective needs and abilities to pay,[192] and other statutorily enumerated factors.[193] Generally, the spouses' "ability to earn"

---

ber v. Webber, 33 Cal. 2d 153, 160, 199 P.2d 934, 939 (1948).

Although *Elliott* and *Hall*, the remaining cases cited, do not involve a husband who was attempting to avoid making alimony payments, they certainly do not support the proposition that future earnings may be considered in an award of alimony. In *Elliott*, the appellate court affirmed the support award, citing *Webber*, 33 Cal. 2d at 160, 199 P.2d at 939, and noting that the husband had earnings and income from various sources. Elliott v. Elliott, 162 Cal. App. 2d 350, 356-57, 328 P.2d 291, 296 (1958). In *Hall*, the supreme court held the trial court had abused its discretion in awarding support to the wife, where the husband's income after he paid the support would not be sufficient for his living expenses. Hall v. Hall, 42 Cal. 2d 435, 442, 167 P.2d 249, 253 (1954).

187. *Sullivan*, 37 Cal. 3d at 769, 691 P.2d at 1024, 209 Cal. Rptr. at 358.

188. *Id.*

189. *Id.*

190. *Id.* at 768.

191. CAL. CIV. CODE § 4801(a) (West 1983 & Supp. 1985).

192. *See* CAL. CIV. CODE § 4801 (West 1983 & Supp. 1985); W. HOGOBOOM & D. KING, FAMILY LAW ¶ 6:79 (student ed. 1984).

193. Section 4801(a) of the California Civil Code provides, in pertinent part:

> (a) In any judgment decreeing the dissolution of a marriage or a legal separation of the parties, the court may order a party to pay for the support of the other party any amount, and for any period of time, as the court may deem just and reasonable. In making the award, the court shall consider all of the following circumstances of the respective parties:
> (1) The earning capacity of each spouse, taking into account the extent to which the supported spouse's present and future earning capacity is impaired by periods of unemployment that were incurred during the marriage to permit the supported

is based on present income absent "evidence of attempts to avoid financial responsibilities by deliberately suppressing income."[194] Furthermore, while "need" is not a threshold factor and must be considered with respect to all the statutory factors,[195] "a support award would be inappropriate where the applicant spouse is capable of self-support."[196]

If the trial court applied the statutory considerations in the traditional manner to the Sullivans, neither party was likely to be eligible for support.[197] Even with the amendment to California Civil Code section 4801(a)(1), the outcome would probably be the same. The amended subdivision bears on the spouse's ability to become self-supporting.[198] A spouse who has put the other spouse through graduate school has probably already

---

spouse to devote time to domestic duties and the extent to which the supported spouse contributed to the attainment of an education, training, or a license by the other spouse.
(2) The needs of each party.
(3) The obligations and assets, including the separate property, of each.
(4) The duration of the marriage.
(5) The ability of the supported spouse to engage in gainful employment without interfering with the interests of dependent children in the custody of the spouse.
(6) The time required for the supported spouse to acquire appropriate education, training, and employment.
(7) The age and health of the parties.
(8) The standard of living of the parties.
(9) Any other factors which it deems just and equitable.

CAL. CIV. CODE § 4801(a)(1)-(9) (West 1983 & Supp. 1985).

194. W. HOGOBOOM & D. KING, FAMILY LAW ¶ 6:89 (student ed. 1984).

195. *Id.* ¶ 6:92.1.

196. *Id.* ¶ 6:93.

197. "[B]ecause [Janet] Sullivan could not show a present need, she did not receive any spousal support . . . ." *In re* Marriage of Sullivan, 184 Cal. Rptr. 796, 824 (Ct. App. Aug. 2, 1982) (Ziebarth, J., concurring and dissenting), *aff'd* and *rev'd*, 37 Cal. 3d 762, 691 P.2d 1020, 209 Cal. Rptr. 354 (1984). Although, at present, Janet may be in "need," as her monthly expenses exceed her income by "several hundred dollars," Mark does not have a present ability to pay, as his expenses also exceed his income, by $800. *See In re* Marriage of Sullivan, 37 Cal. 3d 762, 769, 691 P.2d 1020, 1024, 209 Cal. Rptr. 354, 358 (1984).

In addition, the remaining statutory factors, taken collectively, militate against a support award: the marriage was relatively short (seven years); Janet Sullivan is capable of engaging in gainful employment (she was earning $26,000 annually at the time of dissolution, according to the appellate court in its first *Sullivan* opinion); both parties are relatively young and in good health; the couple's standard of living was modest during marriage, as most of Janet Sullivan's income was put toward medical school and living expenses. *See* CAL. CIV. CODE § 4801(a)(4)-(8) (West 1983 & Supp. 1985).

198. W. HOGOBOOM & D. KING, FAMILY LAW ¶ 6:88 (student ed. 1984).

demonstrated he or she is capable of self-support.

2. The Modified Standard is Undesirable

If the trial court follows the lead of the California Supreme Court and applies the new "future ability to earn" standard, the court could likely find that the working spouse is eligible for spousal support when the opposite conclusion would be reached if it applied traditional spousal support standards. This is contrary to the clear intent of the legislature:

> Ordinarily, discrepancies in the earning capacities of the parties are remedied by spousal support. In many cases, however, the working spouse does not qualify for support because his or her earnings, while substantially lower than the student spouse's future earnings, are nonetheless sufficient for self-support. *While it would be possible to revise the basic support standards, the Commission deems it inadvisable to disrupt the established support scheme in order to deal with this circumscribed problem.*[199]

In addition to being contrary to legislative intent, the new standard is unfair to the spouse charged with the spousal support. If an award is based on expected future income, the professional spouse may be compelled to pay support even though current expenses significantly exceed income. This increases his or her present debt. In addition, the professional spouse will not be able to recover the "excess" support he or she has paid due to miscalculation, if the professional's actual income does not meet projected income, or if he or she decides to pursue a lower paying career. These potential problems are better resolved by the current scheme of spousal support, which allows the court to modify an award in the future or to retain jurisdiction to award support in the future if the paying spouse's income actually increases significantly.

The supreme court's apparent revision in *Sullivan* of the standards for spousal support is a rejection of the remedy created by the legislature. The amended spousal support statute is ineffective, leaving the supporting spouse in the same position

199. *Recommendation, supra* note 23, at 234 (emphasis added).

he or she was in prior to the amendment; that is, he or she has demonstrated the ability for self-support and is likely ineligible for spousal support. The supporting spouse therefore must look to the reimbursement statute for relief. However, the reimbursement statute is inadequate. It ignores the community contributions of the student spouse's time and effort and reimburses the community only for money expended for education. The court was compelled to rectify the inequity to the supporting spouse by expansively interpreting the spousal support statute because the remedy provided by the reimbursement statute is so limited. The proposal outlined below would grant an additional measure of reimbursement to the working spouse and reduce the need for compensation through a new standard of spousal support.

V. PROPOSAL

The objective of this proposal is to reimburse the community for time and effort expended by the student spouse, rather than granting to the supporting spouse a proprietary interest in the degree or the earning potential of its holder. The appellate court, in its first *Sullivan* opinion,[200] laid the groundwork for a fair and practical solution which fully comports with California law.

A. *A Professional Degree is the Student Spouse's Separate Property*

A degree or right to practice is a valuable property right.[201] By its nature, a degree or right to practice must be the separate property of the possessor.[202] It is conferred upon a person who has achieved a certain level of expertise and can be used only by the holder. Although the degree must necessarily follow its holder, the community interest should be protected to the extent that community assets and efforts were used to attain the

200. *In re* Marriage of Sullivan, 8 FAM. L. REP. (BNA) 2165 (Cal. Ct. App. Jan. 8, 1982), *modified*, 184 Cal. Rptr. 796 (Ct. App. Aug. 2, 1982), *aff'd* and *rev'd*, 37 Cal. 3d 762, 691 P.2d 1020, 209 Cal. Rptr. 354 (1984).

201. *E.g.*, *In re* Riccardi, 182 Cal. 675, 679, 189 P. 694, 695 (1920) (right to practice law was a valuable property right); Hewitt v. Board of Medical Examiners, 148 Cal. 590, 592, 84 P. 39, 40 (1906) (right to practice medicine was a valuable property right).

202. *In re* Marriage of Sullivan, 8 FAM. L. REP. (BNA) 2165, 2166 (Cal. Ct. App. Jan. 8, 1982), *modified*, 184 Cal. Rptr. 796 (Ct. App. Aug. 2, 1982), *aff'd* and *rev'd*, 37 Cal. 3d 762, 691 P.2d 1020, 209 Cal. Rptr. 354 (1984).

degree.[203] The appellate court, in its first *Sullivan* opinion, attempted to determine the community interest in the student spouse's separate degree by applying the line of cases concerning profits from separately owned businesses.[204] The cases considering the community interest in separately owned businesses are not truly analogous to the community interest in a separately possessed degree. The former is based on the assumption that there are profits which must be distributed. In the case of a de-

---

203. *See generally* Comment, *supra* note 143. The author suggests that two elements be considered to determine whether a professional education is community property:

> First, whether an education is capable of such a general conceptual classification, insofar as it possesses certain attributes common to other recognized forms of property; and second, does protection of the community's interest in that which is acquired during marriage require an education be deemed property? The weight given each of these considerations will vary with individual situations, but neither should be considered to the exclusion of the other.

Id. at 599 (citations omitted). The author answers both elements affirmatively. *Id.* at 600-02.

This Comment takes the contrary view with respect to the first element (*see supra* notes 105-16 and accompanying text), and agrees, in part, with the second. The community's interest can be adequately protected by deeming the degree *separate* property, subject to reimbursement to the community.

204. *See In re* Marriage of Sullivan, 8 FAM. L. REP. (BNA) 2165, 2166 (Cal. Ct. App. Jan. 8, 1982), *modified*, 184 Cal. Rptr. 796 (Ct. App. Aug. 2, 1982), *aff'd* and *rev'd*, 37 Cal. 3d 762, 691 P.2d 1020, 209 Cal. Rptr. 354 (1984). *See also In re* Marriage of Sullivan, 184 Cal. Rptr. 796, 814-15 (Ct. App. Aug. 2, 1982) (Ziebarth, J., concurring in part and dissenting in part), *aff'd* and *rev'd*, 37 Cal. 3d 762, 691 P.2d 1020, 209 Cal. Rptr. 354 (1984). Justice Ziebarth, who wrote the opinion for the court in the first *Sullivan* decision, adopts much of that prior opinion for his dissent in the second *Sullivan* decision. Thus, those portions of the first appellate court decision in *Sullivan* which have been deleted from the text as reported in *Sullivan*, 8 FAM. L. REP. (BNA) at 2165, are accurately reiterated in Justice Ziebarth's dissent.

Specifically, Justice Ziebarth suggests the cases which determine the community interest in the profits of a separately owned business be applied to a professional degree. *Sullivan*, 184 Cal. Rptr. at 814-15. Justice Ziebarth cites, in particular, two cases: Pereira v. Pereira, 156 Cal. 1, 103 P. 488 (1909); Van Camp v. Van Camp, 53 Cal. App. 17, 199 P. 885 (1921). In both cases, the respective courts were confronted with the problem of determining what amount of the profits of one of the spouse's separate business is due to the personal efforts of that spouse (the efforts which are community property) as opposed to his or her capital investment (which is separate property because it was owned by the spouse prior to marriage). The "*Pereira* Method" of apportionment allocates a fair return on the investment to the spouse who owns the separate business and allocates the excess profit to the community. *Sullivan*, 184 Cal. Rptr. at 815 (citing *Pereira*, 156 Cal. at 7, 103 P. at 490-91). The "*Van Camp* Method" of apportionment requires a determination of the reasonable value of the spouse's services, allocates that amount as community property, and treats the balance as the separate property of the spouse who owns the business. *Sullivan*, 184 Cal. Rptr. at 815 (citing *Van Camp*, 53 Cal. App. at 24-25, 199 P. at 888).

gree followed by a divorce, there are no profits as yet to distribute.

B. *Reimburse the Community for Improvements to the Student Spouse's Property*

A more appropriate analogy is suggested by the cases dealing with community funds used to improve the separate real property of one of the spouses.[205] The remedy granted in such instances is one based on equitable principles of unjust enrichment and allows either reimbursement for the amount expended or the value added.[206] Although the remedy granted in these cases is generally based on fault or a breach of fiduciary duty,[207] equitable relief may be granted on the sole basis that a party has been unjustly enriched.[208]

---

205. *See, e.g., In re* Marriage of Warren, 28 Cal. App. 3d 777, 782-83, 104 Cal. Rptr. 860, 864 (1972) (the husband was entitled to community reimbursement of $38,000 where that amount in community funds was used to improve the wife's separate property, even though the value of the property at the time of trial was $33,952).

206. *See id.* at 782, 104 Cal. Rptr. at 863-64. *See also* D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 4.5 (1973).

207. *See, e.g., In re* Marriage of Warren, 28 Cal. App. 3d 777, 782, 104 Cal. Rptr. 860, 863 (1972).

208. *See, e.g.*, Kossian v. American National Insurance Co., 254 Cal. App. 2d 647, 650-51, 62 Cal. Rptr. 225, 227-28 (1967) (where plaintiff was engaged to haul debris and plaintiff's employer went bankrupt, the court found an equitable obligation imposed by law on the defendant insurance company to reimburse the plaintiff for work performed to prevent the unjust enrichment of defendant). *See generally* 1 B. WITKIN, SUMMARY OF CALIFORNIA LAW § 42 (8th ed. 1973) (restitution may be based on unjust enrichment alone).

Two commentators have addressed the question of whether the *Sullivan* situation can be remedied in the context of a breach of a fiduciary duty, and have come to opposite conclusions. *Compare* Krauskopf, *supra* note 113, at 392 (remedy available) *with* Comment, *supra* note 150, at 594 (remedy not available). A more appropriate basis for relief is suggested by RESTATEMENT OF THE LAW OF RESTITUTION § 58 (1937) (gifts made in reliance on a relation):

> A person who has conferred a benefit upon another, manifesting that he does not expect compensation therefore, is not entitled to restitution merely because his expectation that an existing relation will continue or that a future relation will come into existence is not realized, unless the conferring of the benefit is conditioned thereon.
>
> *Comment*:
>
> a. The rule stated in this Section is applicable to a husband or wife who make gifts to the other spouse in the expectation that the relation will continue . . . .
>
> b. *Conditional gifts.* The gift may be conditional upon the continuance or creation of a relation, and if conditional the donor is entitled to its return if the relation terminates or is

The remedy was created by courts which recognized the inherent inequity of denying relief to the community simply because the improvement became affixed to the separate property[209] and severing the improvement was impractical. Likewise, an education cannot be returned and the time and money used to obtain it refunded. The holder has sole possession of it for life.

The community should have returned to it both money and time expended to acquire the student spouse's separate property, through reimbursement for either the amount expended or the value of the benefit conferred. The new statute reimburses the community for the community funds actually spent. As previously noted, there is no similar provision to protect the community's interest in the student spouse's time and effort. Because the expended amount of this unique asset cannot be readily quantified, as can money paid for tuition, the benefit conferred by the student's efforts must be identified and valued in order to reimburse the community.

C. *Valuing the Benefit Conferred*

The benefit conferred is the increase in the student spouse's earning capacity which results from the degree. Calculating the value of this benefit admittedly poses a problem. The appellate court, in its first *Sullivan* opinion, suggested a comparison between the income of the degree holder after the acquisition of the license to the income of the same individual immediately before the acquisition.[210] This comparison has been criticized as representing only the value of the right to practice.[211] If this

---

not entered into. *The condition* may be stated in specific words or it *may be inferred from the circumstances.*

Id. (emphasis added). Clearly, the supporting spouse would not make the financial and emotional sacrifices if he or she knew of the divorce beforehand.

Due to the unique problems presented by attempting to fit a degree within existing provisions, it may be more practical and realistic to proceed under general restitutionary principles: "A person who has been unjustly enriched at the expense of another is required to make restitution to the other." *Id.* at § 1.

209. *See In re* Marriage of Warren, 28 Cal. App. 3d 777, 781-82, 104 Cal. Rptr. 860, 863 (1972) (citing Provost v. Provost, 102 Cal. App. 775, 781, 783 P. 842, 844 (1929)).

210. *In re* Marriage of Sullivan, 8 FAM. L. REP. (BNA) 2165, 2166 (Cal. Ct. App. Jan. 8, 1982), *modified*, 184 Cal. Rptr. 796 (Ct. App. Aug. 2, 1982), *aff'd* and *rev'd*, 37 Cal. 3d 762, 691 P.2d 1020, 209 Cal. Rptr. 354 (1984).

211. Bruch, *supra* note 104, at 818 n.190.

comparison were expanded to measure the difference between the income of the degree holder after the acquisition of the license to the income of the same individual immediately before starting his professional education, the value of the degree and right to practice could be accurately measured.

This theory could be further refined. The appellate court in *Sullivan* suggested that the comparison be made for a "reasonable period."[212] Because the goal is to reimburse the community for time and effort expended in the years it took to acquire the degree, the period should be a factor equal to the number of years the working spouse supported the student spouse. For a law degree this would be three years, for a medical degree and specialization it would be four to seven years. The value of the student spouse's income before and after obtaining the professional degree would be based on the facts of each case, but the following guidelines would apply.[213]

The pre-education income would be the income of the student spouse immediately prior to the professional education. If he or she went directly from undergraduate school to graduate school, an average income for a person of the student spouse's education thus far could be estimated: the average income of a college graduate or minimum wage at the absolute least.

If the professional spouse is in his or her first position and the trial is within that first year of employment, the upper income figure would equal the starting salary.[214] If the couple separates, the professional starts his first job, and the trial does not

---

212. *Sullivan*, 8 FAM. L. REP. (BNA) at 2166.

213. The salaries used for the examples in notes 214-16, *infra*, are from a survey, *Tenth Annual Attorney Salary Survey*, conducted by David J. White & Associates, a Chicago legal placement firm. Habeeb, *New Report on Salaries in San Francisco Law Offices*, The Recorder, Nov. 11, 1984, at 1, col. 4. The average annual starting salary of a college graduate will be estimated at $15,000 for the purpose of these illustrative examples.

214. The average starting salary for an attorney in a non-patent law firm in San Francisco is $29,000. Habeeb, *supra* note 213. Assume the student spouse's salary with only a college degree would have been $15,000. Because the supporting spouse has provided three years of support to the student spouse while in law school, the factor is three (3).

Thus, the community would be reimbursed for $42,000: ($29,000 - $15,000) x 3 = $42,000. The supporting spouse has a one-half community interest in this amount, and would receive $21,000.

take place until more than a year later, the upper income figure should still be the starting salary. Any increase in earnings between the starting year salary and the subsequent annual salary at trial two or three years later is the result of the spouse's own post-marital work and should not be included in valuation.[215] If, on the other hand, the student obtains his degree and license, starts to work, and the separation occurs several years thereafter, the upper income level will be the present salary at the time of separation. This would include the starting salary and increases since then because the supporting spouse contributed his or her efforts during marriage in obtaining that wage increase.[216]

The community's interest calculated pursuant to the above guidelines is the difference between the lower and the upper income figures multiplied by a factor equal to the number of years the working spouse supported the student spouse. The supporting spouse is awarded one-half of this amount.[217]

The trial court should be instructed to retain jurisdiction in this matter for a period of five years.[218] The professional spouse could then circumvent the valuation only by foregoing his or her earning potential for five years. The economic consequences of such action should prevent most deliberate attempts to avoid

---

215. The average salary for an attorney in San Francisco with three years experience is $39,500. Habeeb, *supra* note 213. If the student spouse started at a salary of $29,000, then separated from the supporting spouse, and at the time of trial three years later was earning $39,500, the income differential would still be $14,000, or the pre-separation starting salary of $29,000, less $15,000. The supporting spouse would again receive $21,000. *See supra* note 214.

216. The average salary for an attorney in San Francisco with four years experience is $42,000. Habeeb, *supra* note 213. If the student spouse had attained this salary, and the couple then separated, the income differential would be $27,000 ($42,000 - $15,000). The factor would still be three (3), equal to the number of years the supporting spouse supported the student spouse while in law school. The four years between the acquisition of the law degree and the separation are not added to the factor, because the community has not lost anything during that period; the student spouse's time and effort have been immediately returned to the community in the form of the student spouse's income.

Thus, the community would be reimbursed for $81,000: ($42,000 - $15,000) x 3 = $81,000. The supporting spouse has a one-half community interest in this amount, and would receive $40,500.

217. The Supreme Court of Wisconsin adopted this as one of several approaches in valuing the interest of the supporting spouse in a professional degree. *See supra* notes 52-59 and accompanying text.

218. If the professional spouse did not pursue his or her career immediately, but decided several years later to do so, the supporting spouse could not recover until that time.

this valuation and distribution.

Alternatively, if the professional decided not to start practicing, but elected to pursue a different career, there would be no benefit to be valued and the supporting spouse would recover from the reimbursement to the community for the cost of the education pursuant to California Civil Code section 4800.3.[219]

This solution has several advantages. It is simple and requires minimal speculation. It allows the professional the freedom to choose his or her occupation, yet guarantees the supporting spouse at least minimum reimbursement of cost in the event the professional chooses not to pursue his or her career. The differential allows the true and actual value of the degree to be calculated with minimum conflict with the community property principle that post-separation earnings are separate property. Finally, application of this proposal should produce consistent and predictable results useful to both courts and practitioners.

VI. CONCLUSION

Even if a degree is properly characterized as the separate property of its holder, the community should not be denied adequate relief for the contributions it has made in obtaining the degree. The legislature, in its attempt to rectify the gross inequity of allowing the student spouse to leave the marriage with such a "windfall" and requiring reimbursement for educational costs, has ignored the obvious contributions of the time and the effort to the degree by the student spouse.

The California Supreme Court recognized the inadequacy of the enacted statutes and, in *Sullivan*, attempted to bolster an otherwise ineffective amendment to the statutory guidelines for spousal support. Contrary to clearly expressed legislative intent, the court has created a modified rule of spousal support based on one spouse's "future ability to pay" for an award. In doing so, the court has not only disrupted the existing law of spousal sup-

219. The proposal can be incorporated as § 4800.3(b)(2) of the California Civil Code, with the present § 4800.3(b)(2) of the Civil Code redesignated as § 4800.3(b)(3). The balance of the provisions, § 4800.3(c)(1)-(3) of the Civil Code, are retained for this proposal. Also, § 4800.3(a) of the Civil Code would have to be modified to include within that subdivision's definition of "community contributions" the time and effort expended by the student spouse. *See supra* note 120 for the text of the current statutes.

port but may in effect, place a speculative value on the anticipated income of one spouse and award to the other spouse a portion of that anticipated income under the guise of spousal support.

The court's decision must be interpreted as a rejection of the solution offered by the legislature through AB 3000. The proposal described in this Comment, in combination with the reimbursement currently required,[220] would balance the equities between the spouses and prevent the demise of spousal support as we now know it.

*Bruce H. Rhodes**

220. CAL. CIV. CODE § 4800.3 (West Supp. 1985).

* Golden Gate University School of Law, Class of 1986.