# The Problem of the Professional Spouse: Should an Educational Degree Earned During Marriage Constitute Property in Arizona?

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For better or for worse, divorce has attained a prominent position in the American way of life.[1] Secularization and rising expectations of marriage, coupled with liberalized laws and the decreased stigma of dissolution, have made divorce a more attractive and popular solution to marital discord.[2] In the words of one commentator, "[O]ur divorce laws have moved rapidly from no divorce at all, to divorce for serious faults hedged by defenses, past consensual divorce through collusive perjury, to effectively unilateral divorce—still with, but foreseeably to be without, continuing economic responsibilities."[3] Consonant with this theme has been the dramatic emancipation of women, both socially[4] and economically.[5] It is against this modern backdrop that the "problem of the professional spouse" has become prominent.

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1. Indeed, the statistics are unsettling. According to Bureau of the Census estimates, the rate of marriages per 1,000 population has remained relatively stable from 1950 (11.1) through 1979 (10.6). During the same period, the rate of divorces has more than doubled, from 2.6 per 1,000, to 5.4. *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1981 80 (102d ed. 1981) (hereinafter cited as STATISTICAL ABSTRACT). In Arizona, the rate of marital dissolutions has shown a similar escalation. *See id.* at 82. The increase in rate and numbers of divorces indicates the growing social and economic impact which divorce has on American family life. Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 U.C.L.A. L. REV. 1181, 1183 (1981).

The terms "divorce" and "marital dissolution" or "dissolution" are used interchangeably throughout this Note.

2. L. HALEM, DIVORCE REFORM 8 (1980). *See also* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, SERIES P-23, NO. 100, A STATISTICAL PORTRAIT OF WOMEN IN THE UNITED STATES: 1978 21 (1981).

3. H. KRAUSE, FAMILY LAW 804 (1976). Professor Krause perceives a significant shift in social values: "Lasting marriage no longer is a virtue *per se*, and divorce has become a socially accepted—in some circles a fashionable—event." H. KRAUSE, FAMILY LAW IN A NUTSHELL 271 (1977).

4. *Compare* W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, BOOK I, 442-45 (1765):

> By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband.
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> . . . .
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> But though our law in general considers man and wife as one person, yet there are some instances in which she is separately considered; as inferior to him, and acting by his

The "problem of the professional spouse" typically involves a young, impecunious couple.[6] One spouse (the wife)[7] works to support the economically struggling couple, thereby enabling the other spouse (the husband) to devote his time exclusively to academic pursuits, frequently in law or medicine.[8] Soon after the husband completes his studies, the marriage is terminated.[9] The wife, capable of self-support, is ineligible for an award of maintenance.[10] Further, since the young couple has accumulated few, if any tangible assets, there is little property to divide upon dissolution

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compulsion. And therefore all deeds executed, and acts done, by her, during her coverture, are void.

. . . .

[E]ven the disabilities which the wife lies under are for the most part intended for her protection and benefit: so great a favorite is the female sex of the laws of England.

*with* ARIZ. REV. STAT. ANN. § 25-214(B) (1976): "The spouses have equal management, control and disposition rights over their community property, and have equal power to bind the community."

5. *See* A. CHERLIN, SOCIAL AND ECONOMIC DETERMINANTS OF MARITAL SEPARATION 21-22 (1976) (report prepared for U.S. Department of Labor, Manpower Administration). In the past, women have had few economic opportunities. *Id.* With the winds of change, however, has come about a "dramatic increase in women's labor force participation." *Id.* at 22.

During the past 20 years, nearly 61% of overall civilian work force growth is attributable to female workers. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, SERIES P-20, NO. 363, POPULATION PROFILE OF THE UNITED STATES: 1980 29 (1981). The number of working women has increased by approximately 21 million since 1960, to a figure of 44.6 million in 1980. *Id.* Rates of female employment participation have also increased dramatically. *Id.* Among married women aged 16 to 44 years, with husbands present, those women without minor children (under 18 years old) had a work force participation rate of 79% in 1980; those with children aged 6 to 17 years only had a rate of 66% and those with children under 6 years old had a rate of 45%. *Id. See also* L. WEITZMAN, THE MARRIAGE CONTRACT 169-71 (1981).

6. *See In re* Marriage of Graham, 194 Colo. 429, 434, 574 P.2d 75, 78 (1978) (Carrigan, J., dissenting): "The case presents the not-unfamiliar pattern of the wife who, willing to sacrifice for a more secure family financial future, works to educate her husband, only to be awarded a divorce decree shortly after he is awarded his degree."

7. *See infra* note 194. *See also* Mahoney v. Mahoney, 182 N.J. Super. 598, 606 n.4, 442 A.2d 1062, 1067 n.4 (App. Div. 1982), 9 FAM. L. REP. (BNA) 2141 (N.J. Dec. 15, 1982): "[B]ecause that has been the actual situation in all reported cases, the contributing spouse is referred to as the wife."

8. *See, e.g.*, Pyeatte v. Pyeatte, — Ariz. —, — P.2d — (Ct. App. 1982) (law degree); Frausto v. Frausto, 611 S.W.2d 656 (Tex. Civ. App. 1980) (medical degree); *In re* Marriage of Lundberg, 107 Wis. 2d 1, 318 N.W.2d 918 (1982) (medical degree).

9. Characterizations of the problem of the professional spouse such as the one found in the *Graham* dissent, *supra* note 6, may be somewhat misleading because of two potential inferences. The first inference which may be drawn, and which may subliminally affect perception of the equities involved, is that the husband divorces the wife. Research, however, reveals that in a sizeable number of cases, the wife is the one who files the petition for divorce. *See, e.g., In re* Marriage of Horstmann, 263 N.W.2d 885 (Iowa 1978); Leveck v. Leveck, 614 S.W.2d 710 (Ky. App. 1981); Hubbard v. Hubbard, 603 P.2d 747 (Okla. 1979); *In re* Marriage of Lundberg, 107 Wis. 2d 1, 318 N.W.2d 918 (1982). The second potential inference is that somehow there is established a causal nexus between the husband's graduation and the marital dissolution. There seems to be no basis, however, other than perhaps an intuitive one, for asserting or implying such a nexus. Indeed, it would be surprising in view of the very high divorce rate in the population overall if divorces did not occur under such circumstances.

10. Generally, an award for maintenance or alimony is predicated upon the inability of a spouse to support himself or herself through appropriate employment. *See* ARIZ. REV. STAT. ANN. § 25-319 (1976). The terms "alimony" and "maintenance" are used synonymously in this Note.

According to the findings of at least one study, the public supports equal responsibilities for the sexes upon divorce. THE PUBLIC AGENDA FOUNDATION, TODAY'S AMERICAN WOMAN: HOW THE PUBLIC SEES HER 48 (Microfiche 1980). "The public also supports the mother or wife carrying more of the financial burden of the divorce. If a mother does or can earn a reasonable income,

of the marriage.[11]

The husband, after getting what amounts to a "free ride" through school, may look forward to fulfillment of his increased earning potential. The wife is left in the position of lamenting past sacrifices—sacrifices of her own career advancement through study, or of the more comfortable lifestyle during marriage which two wage-earners could have provided. Also, the wife's expectations of sharing in her husband's future wealth are dashed bitterly upon the rocks of divorce. Under such circumstances, the question seems inevitably to follow: "Has the wife sacrificed for naught?" Although relatively few courts have yet addressed the issue, there has been a surge of judicial response during the past few years.[12]

This Note commences with an overview of current doctrine pertinent to the problem of the professional spouse, then lays foundations for analysis of the problem in Arizona. Basic tenets of Arizona community property law are set forth, followed by a suggested rationale for treating an educational degree (conceptualized as part of human capital) as separate property, and a synopsis of the doctrine of reimbursement to the community for contributions to separate property. The Note proceeds from these foundations to formulate a conceptual framework for analysis of such cases in Arizona; this framework is then tested through application to a number of hypothetical situations. The Note will conclude with a thematic summary.

## OVERVIEW OF CURRENT DOCTRINE

Although relatively few states have addressed the problem of the professional spouse, there has been a significant increase in the number of pertinent cases since 1978.[13] Disparate judicial views have emerged;[14] however, the decisions may be categorized initially under two views. The weight of opinion would deny recovery to the working spouse, by hewing to the rationale that the educational degree[15] does not constitute property,

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they [the public] feel the father should only be required to pay part of the child support, and most feel she should not get alimony." *Id.*

11. As to the lack of tangible marital property at time of dissolution, *see Weitzman*, *supra* note 1, at 1188-96. "The first and perhaps most important fact that this research reveals about marital property is that many divorcing couples have little or no property to divide. The typical divorcing couple has relatively few community assets, and those assets are typically of a relatively low value." *Id.* at 1188.

It is clear that lack of community property at dissolution is a problem hardly unique to the context of the problem of the professional spouse.

12. *See, e.g.*, Pyeatte v. Pyeatte, — Ariz. —, — P.2d — (Ct. App. 1982); *In re* Marriage of Sullivan, 134 Cal. App. 3d 634, 184 Cal. Rptr. 796 (1982); Mahoney v. Mahoney, 182 N.J. Super. 598, 442 A.2d 1062 (App. Div. 1982), 9 FAM. L. REP. (BNA) 2141 (N.J. Dec. 15, 1982). *See also* Freed & Foster, *Family Law in the Fifty States: An Overview as of September 1982*, 8 FAM. L. REP. (BNA) 4065, 4069-74 (Sept. 28, 1982).

13. While there are a number of earlier cases pertinent to the problem of the professional spouse, *see, e.g.*, Stern v. Stern, 66 N.J. 340, 331 A.2d 257 (1975); Muckleroy v. Muckleroy, 84 N.M. 14, 498 P.2d 1357 (1972); Daniels v. Daniels, 20 Ohio App. 2d 458, 185 N.E.2d 773 (1961), significant concern in reported cases seems to have commenced around 1978.

14. *See* Freed & Foster, *supra* note 12, at 4070.

15. There is some distinction in the cases as to precisely what it is that does not constitute property. Some courts speak in terms of the educational degree or professional license itself. *See In re* Marriage of Graham, 194 Colo. 429, 432, 574 P.2d 75, 77 (1978); Muckleroy v. Muckleroy,

and therefore is not an asset to which value may be ascribed in a divorce proceeding.[16] The contrary view, which has been espoused in a number of recent cases, would allow some type of recovery by the working spouse.[17] Two 1978 cases, *In re Marriage of Graham*,[18] and *In re Marriage of Horstmann*,[19] illustrate each of these views.

*In re Marriage of Graham*[20] is perhaps the leading modern case propounding the view which has proven to comprise the weight of authority, and certainly is one of the most frequently cited[21] cases dealing with the problem of the professional spouse. In *Graham*, the Colorado Supreme Court encountered the "not-unfamiliar pattern of the wife who, willing to sacrifice for a more secure family financial future, works to educate her husband, only to be awarded a divorce decree shortly after he is awarded his degree."[22]

The parties in this case, Anne and Dennis Graham, were married in 1968.[23] For approximately three and one-half years thereafter, Dennis attended school, acquiring both a bachelor's degree and an M.B.A.[24] During that period, and for the remainder of their six-year marriage, Anne worked full-time, contributing seventy percent of the couple's financial support.[25] At the time of divorce, there was no accumulation of tangible property,[26] but the present value of Dennis' future earnings from the M.B.A. was determined through expert testimony to be $82,836.[27]

The trial court determined that an education received by a spouse during marriage constitutes, as a matter of law, "jointly-owned property to which the other spouse has a property right,"[28] and awarded Anne $33,134

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84 N.M. 14, 15, 498 P.2d 1357, 1358 (1972); Frausto v. Frausto, 611 S.W.2d 656, 659 (Tex. Civ. App. 1980). Other courts pursue their analysis in terms of the increased earning potential of the individual who has earned the educational degree. *See, e.g., In re* Marriage of Goldstein, 97 Ill. App. 3d 1023, 1027, 423 N.E.2d 1201, 1204 (1981); Hubbard v. Hubbard, 603 P.2d 747, 752 (Okla. 1979). For purposes of this Note, no distinction is drawn between the degree or license, and the increased earning potential flowing therefrom.

16. The majority of jurisdictions considering the problem of the professional spouse have concluded that a degree does not constitute property subject to division upon marital dissolution. DeWitt v. DeWitt, 98 Wis. 2d 44, 53, 296 N.W.2d 761, 765 (Ct. App. 1980). *See* Mahoney v. Mahoney, 182 N.J. Super. 598, 605-06, 442 A.2d 1062, 1066-67 (App. Div. 1982), 9 FAM. L. REP. (BNA) (N.J. Dec. 15, 1982). *See also infra* note 75.

17. The "contrary" or "minority" view under this analysis is simply that which would allow some recovery by the working spouse. This is not to say that all courts which would allow recovery would do so by deeming the educational degree to constitute property. In fact, courts have employed divergent rationales, ranging from equitable distribution, "property" and quasi-contractual theories, *see* Freed & Foster, *supra* note 12, at 4070, through theories of "rehabilitative alimony," *see* Hill v. Hill, 182 N.J. Super. 616, 620-21, 442 A.2d 1072, 1074 (App. Div. 1982) ("rehabilitative alimony" concept recognized by New Jersey Supreme Court in *Hill* appeal, *see* 9 FAM. L. REP. (BNA) 2150 (N.J. Dec. 15, 1982)), and "compensatory" maintenance, *see In re* Marriage of Lundberg, 107 Wis. 2d 1, 12-14, 318 N.W.2d 918, 922-23 (1982).

18. 194 Colo. 429, 574 P.2d 75 (1978).

19. 263 N.W.2d 885 (Iowa 1978).

20. 194 Colo. 429, 574 P.2d 75 (1978).

21. *See infra* note 140 and accompanying text.

22. 194 Colo. at 434, 574 P.2d at 78 (Carrigan, J., dissenting).

23. *Id.* at 431, 574 P.2d at 76.

24. *Id.*

25. *Id.*

26. *Id.* at 431, 433, 574 P.2d at 76, 77.

27. *Id.* at 431, 574 P.2d at 76.

28. *Id.*

of the present value of the M.B.A.[29] On appeal, the trial court's decision was reversed. The Colorado Court of Appeals held that an education does not constitute property per se, although it is one factor to be considered in determining spousal maintenance or equitable property division.[30]

The Colorado Supreme Court, sitting *en banc*,[31] affirmed.[32] In a split decision,[33] the court reasoned that there are necessary limits upon what may be considered property, and that an educational degree, such as an M.B.A., is not encompassed by even the broadest definition of property.[34] Consequently, under the *Graham* rationale, the educational degree may not be valued or divided upon dissolution of the marriage.

Just two months later, in *In re Marriage of Horstmann*,[35] the Iowa Supreme Court propounded the contrary, less widely held view.[36] The Iowa court affirmed a lower court decree awarding the wife, Donna, a property distribution in the amount of $18,000 for financial contributions made while her husband, Randall, earned his law degree.[37]

Donna and Randall Horstmann were married in 1969, while both were in undergraduate school.[38] Donna subsequently dropped out of school and, between 1973 and 1975, worked in a bank, while Randall attended law school.[39] In 1976, when Randall received his law degree, Donna filed a petition for dissolution of the marriage.[40]

The Iowa Supreme Court recognized the *Graham* view that an educational degree has no "exchange value or any objective transferable value on an open market."[41] The Iowa court reasoned, however, that while the degree itself was not an asset, the husband's increased potential earning capacity did constitute an asset, susceptible of division upon marital dissolution.[42] "Division" in this case, however, was based upon essentially a restitutionary theory.[43] The broad language of the *Horstmann* court thus must be tempered somewhat by the fact that Donna Horstmann neither asked for nor received a property settlement based on the present value of

29. *Id.* This amount was payable in monthly installments of $100. *Id.*

30. *Id.* Needless to say, where there is no accumulation of marital property at time of dissolution, *a fortiori* there can be no "equitable property division."

31. *Id.* at 430, 574 P.2d at 75.

32. *Id.* at 433, 574 P.2d at 78.

33. Justice Carrigan, joined by Chief Justice Pringle and Justice Groves, vigorously dissented from the majority opinion. *Id.* The dissent noted that in such cases, "equity demands that courts seek extraordinary remedies to prevent extraordinary injustice." *Id.* at 434, 574 P.2d at 78.

34. *Id.* at 432, 574 P.2d at 76-77. The court utilized the definition of property found in BLACK'S LAW DICTIONARY 1382 (rev. 4th ed. 1968) as "everything that has an exchangeable value or which goes to make up wealth or estate." *Id.* at 432, 574 P.2d at 77. The majority noted that an advanced degree "does not have an exchange value or any objective transferable value on an open market. . . . It may not be acquired by the mere expenditure of money. It is simply an intellectual achievement that may potentially assist in the future acquisition of property." *Id.*

35. 263 N.W.2d 885 (Iowa 1978).

36. *See supra* note 17 and accompanying text.

37. 263 N.W.2d at 886, 892.

38. *Id.* at 886.

39. *Id.*

40. *Id.* The following year, Donna and Randall Horstmann were divorced. The couple had not accumulated any savings. *Id.* at 887.

41. *Id.* at 891.

42. *Id.* The court did not indicate, however, the reasoning used to arrive at this conclusion.

43. *See id.* at 887.

the potential increase in Randall's future earnings.[44]

*Graham* and *Horstmann* both involved the problem of the professional spouse. The factual situation in each case was similar—the spouses had accumulated little or no property prior to divorce, and the marriage was dissolved shortly after the student-husband received his professional degree. The judicial outcomes were, however, quite different. In *Graham*, the working wife was denied recovery.[45] In *Horstmann*, the working wife recovered $18,000 under a restitutionary theory.[46] These two cases thus representatively illustrate the two different paths which courts have taken when confronted with the problem of the professional spouse.

Since 1978, a veritable flurry of purportedly similar cases has been reported. At one end of the spectrum may be found a trilogy of recent trial court decisions: *Lynn v. Lynn*,[47] *Reen v. Reen*,[48] and *O'Brien v. O'Brien*.[49] These cases may be considered to follow the *Horstmann* rationale inasmuch as recovery is granted to the working wife. The three cases employ, however, a method of valuation based not upon restitution, but upon the present value of the student husband's increased earning potential.

In *Lynn v. Lynn*,[50] the wife forwent fulfillment of her stated desire to become a doctor, in order to support her husband through medical school.[51] One year after the husband graduated from medical school, the parties separated.[52] In 1979, they were divorced.[53] The trial court held that the medical school degree and license to practice medicine, acquired by the husband during marriage, constitute property and thus are to be included as assets subject to equitable distribution upon divorce.[54] Further, the court indicated that the valuation of such assets would be accomplished utilizing the discounted present value of the difference in earning capacities of a specialist in internal medicine and of a four-year college graduate.[55]

In *Reen v. Reen*,[56] the wife supported her husband for over nine years, while he acquired an undergraduate degree in liberal arts, a degree in dentistry, and an orthodontic degree.[57] The Massachusetts Probate and Fam-

44. *Id.*
45. *See supra* notes 31-34 and accompanying text.
46. *See supra* text accompanying notes 37, 43.
47. 7 FAM. L. REP. (BNA) 3001 (N.J. Super. Ct. Ch. Div. Dec. 5, 1980), *rev'd*, 9 FAM. L. REP. (BNA) 2151 (N.J. Dec. 15, 1982). Just prior to publication of this Note, the New Jersey Supreme court reversed the lower court opinion. *Id.*
48. 8 FAM. L. REP. (BNA) 2193 (Mass. P. & Fam. Ct. Dec. 23, 1981).
49. 114 Misc. 2d 233, 452 N.Y.S.2d 801 (Sup. Ct. 1982). *See also* Zahler v. Zahler, 8 FAM. L. REP. (BNA) 2694 (Conn. Super. Ct. Aug. 5, 1982); Kutanovski v. Kutanovski, 8 FAM. L. REP. (BNA) 2692 (N.Y. Sup. Ct. Aug. 25, 1982).
50. 7 FAM. L. REP. (BNA) 3001 (N.J. Super. Ct. Ch. Div. Dec. 5, 1980), *rev'd*, 9 FAM. L. REP. (BNA) 2151 (N.J. Dec. 15, 1982). *See supra* note 47.
51. 7 FAM. L. REP. (BNA) at 3001.
52. *Id.*
53. *Id.*
54. *Id.* at 3007.
55. *Id.* The dollar amount resulting from such valuation was not indicated.
56. 8 FAM. L. REP. (BNA) 2193 (Mass. P. & Fam. Ct. Dec. 23, 1981).
57. *Id.* at 2193. The wife saved from her earnings as much as possible to pay for her husband's tuition, and contributed a total of $120,215 in support over a period of approximately nine and three-quarter years. *Id.*

ily Court held the husband's license to practice orthodontia to constitute a marital asset and thus to be included as property for purposes of division at divorce.[58]

Similarly, in *O'Brien v. O'Brien*,[59] the wife played a significant monetary role during the nine-year marriage in allowing the husband to complete pre-medical studies and medical school.[60] There was no appreciable accumulation of marital assets upon divorce.[61] The New York trial court held that under the "unique circumstances of this case,"[62] the medical school degree and license to practice medicine constituted marital property, to be divided equitably.[63] The court awarded the wife $188,000, representing forty percent of the present value of the husband's potential earnings increase flowing from the medical license.[64]

These trial court cases represent the far pole of the "minority" view, endeavoring to establish not only entitlement to recovery by the working wife, but also entitlement sweepingly based on a property interest in the student husband's potential increase in earnings. Appellate courts, however, have appeared to be more reluctant to accede to such a sweeping view. Indeed, the holdings in two recent appellate cases cast some doubt on two of the trial opinions just explicated.

The continued validity of the *O'Brien* holding may be questioned in light of an opinion issued one month later by the New York Supreme Court, Appellate Division. In *Lesman v. Lesman*,[65] the husband paid the full cost of medical school, some $25-30,000, from his savings and various personal loans.[66] The wife contributed no money to the cost of his medical education, although she did contribute subsequently to the couple's support for one and one-half years after the husband's graduation from medical school.[67] The *Lesman* court recited the *Graham* litany why an educational degree or professional license is not encompassed within "traditional concepts of property."[68] The *Lesman* court then invoked the talisman of the institutional nature of marriage, and noted that the disap-

58. *Id.* at 2194. The parties had other appreciable marital property, which was distributed by the court to the husband. *Id.*

59. 114 Misc. 2d 233, 452 N.Y.S.2d 801 (Sup. Ct. 1982).

60. *See id.* at —, 452 N.Y.S.2d at 801-02. The wife contributed approximately 76% of the couple's total income during the nine-year period. *Id.* at —, 452 N.Y.S.2d at 803.

61. *Id.* at —, 452 N.Y.S.2d at 802.

62. *Id.* at —, 452 N.Y.S.2d at 805.

63. *Id.*

64. *Id.* at —, 452 N.Y.S.2d at 806. The wife's expert attempted to distinguish the valuation of a medical education from that of a medical license. The former was computed as the present value of the wife's actual financial contributions; the latter, as the present value of the increase in the husband's expected earnings. *Id.* at —, 452 N.Y.S.2d at 805-06.

65. — Misc. 2d —, 452 N.Y.S.2d 935 (App. Div. 1982). *Lesman* did not, however, specifically overrule *O'Brien*. In Kutanovski v. Kutanovski, 8 FAM. L. REP. (BNA) 2692 (N.Y. Sup. Ct. Aug. 25, 1982), the trial court held that a wife who supported her husband while he studied for a medical examination is entitled upon divorce to ten percent of the value of his professional license for ten years. *Id.* at 2694. Although the *Kutanovski* opinion was issued post-*Lesman*, apparently the *Kutanovski* court did not yet have the benefit of the higher court's ruling.

66. *Id.* at —, 452 N.Y.S.2d at 936.

67. *Id.* at —, 452 N.Y.S.2d at 936, 939.

68. *Id.* at —, 452 N.Y.S.2d at 938. *See infra* notes 139-41 and accompanying text.

pointment of marital expectations is not to be compensated.[69]

Utilized as doctrinal underpinning in *Lesman*, and casting doubt on the continued validity of the *Lynn* holding, is the opinion of the New Jersey Superior Court, Appellate Division, in *Mahoney v. Mahoney*.[70] In *Mahoney*, although the wife made substantial monetary contributions to support the household while the husband studied for his M.B.A., his actual educational expenses were paid for entirely through veteran's administration benefits and an Air Force payment.[71] The marriage had not produced any substantial accumulation of assets.[72] Both spouses left the marriage with comparable earning capacities and educational achievements.[73] The trial court held that the husband's education and degree constituted a property right subject to equitable offset upon divorce.[74] The appellate court reversed, however, concluding that neither was the education a property right nor was the wife entitled to reimbursement for her contributions to her husband's support while he was earning the M.B.A. degree.[75]

The outcomes in each of these two appellate cases—*Lesman* and *Mahoney*—may be viewed as reflecting a balance of the equities within the context of the particular factual situation involved. In each case, although the wife made some contribution to the couple's support, she made none whatever to defray the husband's educational expenses. In one case—*Lesman*—the wife received "substantial alimony," thus obviating the need to

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69. *Id.* at —, 452 N.Y.S.2d at 939-40. The wife was, however, awarded "substantial maintenance," to be paid out of her husband's enhanced professional earnings. *Id.* at —, 452 N.Y.S.2d at 939.

70. 182 N.J. Super. 598, 442 A.2d 1062 (App. Div. 1982), 9 FAM. L. REP. (BNA) 2141 (N.J. Dec. 15, 1982). While the *Mahoney* opinion did not specifically overrule *Lynn*, it did express disagreement with the latter case. *Id.* at 604 n.3, 442 A.2d at 1065, n.3. *But see supra* note 47; *infra* note 75.

71. *Id.* at 601-02, 442 A.2d at 1064.

72. Mahoney v. Mahoney, 175 N.J. Super. 443, 445, 419 A.2d 1149, 1149 (Super. Ct. Ch. Div. 1980), *rev'd*, 182 N.J. Super. 598, 442 A.2d 1062 (App. Div. 1982), 9 FAM. L. REP. (BNA) 2141 (N.J. Dec. 15, 1982).

73. 182 N.J. Super. at 615, 442 A.2d at 1071.

74. 175 N.J. Super. at 443-44, 419 A.2d at 1150-51.

75. 182 N.J. Super. at 608, 614-15, 442 A.2d at 1069, 1071. The appellate court did not consider the working wife's loss of expectations resulting from termination of the marriage to be "any more compensable or demanding of solicitude than the loss of expectations of any other spouse who, in the hope and anticipation of the endurance of the relationship and its commitments, has invested a portion of his or her life, youth, energy and labor in a failed marriage." *Id.* at 614, 442 A.2d at 1071.

Just prior to publication of this Note, *Mahoney* was decided by the New Jersey Supreme Court. 9 FAM. L. REP. (BNA) 2141 (N.J. Dec. 15, 1983). The New Jersey Supreme Court indicated that a professional license or degree does not constitute property. *Id.* at 2141-43. To this extent, application and analysis in this Note of the intermediate court's *Mahoney* decision remain intact.

The high court did, however, introduce the concept of "reimbursement alimony." *Id.* at 2142. The court indicated that award of such reimbursement alimony is appropriate in cases where financial contributions by the working spouse were made "with the mutual and shared expectation that both parties to the marriage will derive increased income and material benefits . . . ." *Id.*

"Such reimbursement alimony should cover all financial contributions toward the former spouse's education, including household expenses, educational costs, school travel expenses and any other contributions used by the supported spouse in obtaining his or her degree or license." *Id.* Compare the New Jersey court's concept of "reimbursement alimony" with the Arizona community property doctrine of reimbursement of community contributions. *See infra* text accompanying notes 166-77. *See also infra* text accompanying note 196 (discussing valuation of the amount contributed).

consider property division. In the other case—*Mahoney*—the wife left the marriage with educational achievement and earning capacity comparable to those of her husband. In dicta, the *Mahoney* court indicated that where the spouses' earning capacities or educational achievements are not comparable at time of divorce, there may be equitable considerations prompting a remedy such as "rehabilitative alimony."[76]

Under another analysis, however, *Lesman* and *Mahoney* may be viewed as supporting the proposition that courts above the trial level are generally reluctant to adopt the theory that an educational degree constitutes property, or to approve any distribution based on such a theory. This proposition is buttressed by two recent Arizona and California appellate decisions.

In Arizona, the court of appeals encountered, in the 1981 case of *Wisner v. Wisner*,[77] the "novel argument"[78] that a medical license, board certificate, and value of post-graduate education received by a student husband during marriage[79] constitute property within the meaning of section 25-211 of the Arizona Revised Statutes.[80] The argument proceeded that since such property was acquired during marriage, it was community property, subject to equitable division between the spouses upon dissolution.[81]

When Harry and Mary Jane Wisner were married in Omaha, Nebraska in February 1962, Harry was completing his last year of medical school.[82] Mary Jane financed Harry's final semester at medical school and worked until the couple's first child was born several months later.[83] Thereafter, Harry supported the family while concurrently receiving further medical training; Mary Jane was not employed.[84] In 1970, the parties moved to Mesa, Arizona, where Harry set up a plastic surgery practice.[85] In 1976, Harry filed a petition for dissolution; in 1977, the marriage was formally dissolved.[86] The marriage had lasted fifteen years, and the community had acquired a considerable estate.[87]

The trial court awarded Mary Jane a division of community property in the amount of approximately $80,000.[88] The trial court did not include as community property the value of post-graduate education, *inter alia*,

76. 182 N.J. Super. at 615, 442 A.2d at 1071-72. Such an award of rehabilitative alimony would enable the wife to pursue her own educational objectives, thereby enhancing her own income capacity. *Id.* *See supra* note 75.

77. 129 Ariz. 333, 631 P.2d 115 (Ct. App. 1981).

78. *Id.* at 339, 631 P.2d at 121.

79. *Id.* at 335, 631 P.2d at 117.

80. *Id.* at 339, 631 P.2d at 121. Under ARIZ. REV. STAT. ANN. § 25-211 (1976), "All property acquired by either husband or wife during the marriage, except that which is acquired by gift, devise or descent, is the community property of the husband and wife." The wife in *Wisner* also proceeded under an alternate theory of unjust enrichment. 129 Ariz. at 339, 631 P.2d at 121.

81. 129 Ariz. at 339, 631 P.2d at 121.

82. *Id.* at 334-35, 631 P.2d at 116-17.

83. Appellant's Opening Brief at 6.

84. *Id.*; Appellee's Answering Brief at 2.

85. 129 Ariz. at 335, 631 P.2d at 117 (Ct. App. 1981).

86. *Id.* at 335, 631 P.2d at 117.

87. *Id.* at 341, 631 P.2d at 123.

88. *Id.* at 335, 631 P.2d at 117.

received by the husband during the marriage.[89] On appeal, the Arizona Court of Appeals, faced with an issue of first impression,[90] affirmed this portion of the trial court's decision, adhering to the *Graham* view that education cannot properly be characterized as property, and thus cannot be subject upon dissolution to division between the spouses.[91]

Analytically, *Wisner* does not involve the typical problem of the professional spouse, and thus may be distinguished from the *Graham* and *Horstmann* line of cases. In each of the latter cases, the spouses had little opportunity to accumulate marital assets, since the divorce closely followed the husband's graduation.[92] Consequently, there were no significant tangible assets for purposes of property division. In *Wisner*, however, the marriage endured for many years after completion of the husband's medical training, with the result that the community had acquired a sizeable estate.[93] Courts have recognized that under such circumstances, different equitable considerations may apply.[94]

In another recent and much-publicized appellate decision in California, *In re Marriage of Sullivan*,[95] the court initially held that where there has been an increase during marriage in the value of an education, degree or license to practice, from which the community has not previously benefited, the community possesses a *pro tanto* interest in such increase.[96] In this case, Janet and Mark Sullivan were married in 1967,[97] while both were in college.[98] Janet contended that she then worked full time to support the community while Mark attended medical school.[99] In 1978, shortly before Mark established his practice in urology, Janet moved out—divorce followed.[100] At dissolution there was little community property.[101]

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89. *Id.*

90. *Id.* at 339, 631 P.2d at 121.

91. *Id.* at 340, 631 P.2d at 122. The court did recognize that although education itself is not divisible property, it is still one of the factors to be considered by the court in arriving at an equitable property division. *Id.*

92. *See supra* notes 23-26, 35-40 and accompanying text.

93. *See* 129 Ariz. at 334-35, 631 P.2d at 116-17. Indeed, at dissolution, Mary Jane was awarded a division of community property in an approximate amount of $80,000. *Id.* at 335, 631 P.2d at 117.

94. *See In re* Marriage of Graham, 194 Colo. 429, 434, 574 P.2d 75, 78 (1978): "If the parties had remained married long enough after the husband had completed his post-graduate education so that they could have accumulated substantial property, there would have been no problem." *See also infra* note 177 and accompanying text.

95. 8 FAM. L. REP. (BNA) 2165 (Calif. Ct. App. Jan. 8, 1982), *modified on reh'g*, 134 Cal. App. 3d 634, 184 Cal. Rptr. 796 (Ct. App. 1982). The *Sullivan* case has been accepted for review by the California Supreme Court.

96. *See id.* at —, —, 184 Cal. Rptr. at 797, 800; *see also* 8 FAM. L. REP. (BNA) at 2166.

97. 134 Cal. App. 3d at —, 184 Cal. Rptr. at 798.

98. 8 FAM. L. REP. (BNA) at 2165.

99. *Id. But see* the appellate court's position on rehearing that "there was not one shred of evidence before the trial court" to show that Janet had indeed "put hubbie through." 134 Cal. App. 3d at —, 184 Cal. Rptr. at 799-800. Justice McDaniel, writing for the court on the rehearing, noted that "*the factual basis on which the case was argued and on which our initial opinion proceeded was largely hypothesized.*" *Id.* at —, 184 Cal. Rptr. at 800 (emphasis in original). In any event, the parties apparently had stipulated that Mark's medical practice was separate property in which the community claimed no interest. *Id.* at —, 184 Cal. Rptr. at 798.

100. *Split Decisions, Divorce and Consequences*, TIME, Feb. 8, 1982, at 66.

101. 134 Cal. App. 3d at —, 184 Cal. Rptr. at 825 (Ziebarth, J., concurring in part, dissenting in part).

After the California Court of Appeals issued its initial opinion,[102] the court granted Mark's petition for rehearing.[103]

Upon rehearing, Justice McDaniel, in the majority opinion, asserted that the basic premise for the court's previous holding was erroneous.[104] The court then held that an education acquired during marriage does not constitute separate property, since the education possesses none of the "three attributes" of property.[105]

In a concurring opinion, Acting Presiding Justice Kaufman noted that under the Family Law Act, California courts may not "consider marital fault in dissolving a marriage or in dividing the marital property."[106] Since the court is prohibited from inquiring into the relative fault of the parties, he noted, *a fortiori* it is unable to determine whether there existed any injustice.[107]

In yet another opinion, concurring in part and dissenting in part, Justice Ziebarth (who authored the initial ruling) argued that an education, degree, or professional license, should be considered separate property.[108] Justice Ziebarth maintained that where the community has received no real economic benefit from the enhancement of the student spouse's earning capacity, the community should be reimbursed at least for the amount of any community funds expended to acquire the improvement.[109]

*Sullivan II*[110] appears to be essentially a revisitation of the *Graham* opinion, and hence is subject to the same criticism that it simply begs the question.[111] Starting with the conclusory premise that absent three "essential attributes" there is no property, the ruling appears not to address sufficiently the concept and underlying rationale of "property."[112]

At the conclusion of his lengthy dissent,[113] Justice Ziebarth noted that even were the educational degree not to constitute property, the working

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102. *See* 8 FAM. L. REP. (BNA) 2165 (Calif. Ct. App. Jan. 8, 1982), *modified on reh'g*, 134 Cal. App. 3d 634, 184 Cal. Rptr. 796 (1982).

103. 134 Cal. App. 3d at —, 184 Cal. Rptr. at 797. [hereinafter cited as *Sullivan II*.]

104. *Id.* at —, 184 Cal. Rptr. at 800.

105. *Id.* The court noted that property must have three attributes: it must be susceptible of ownership in common, of transfer and of survival. *Id.* The professional degree does not have any of these three attributes; therefore, under the *Sullivan II* rationale, it is not property. *Id.* Since the degree is not property, *a fortiori* it cannot be categorized as community or separate property. This is simply the *Graham* rationale, wearing a new hat. *See supra* note 34; *infra* notes 139-44 and accompanying text.

It is interesting to note that the body which the spouse brought to the marriage in *Jurek*, which is "certainly his separate property" in Arizona, *see infra* note 149 and accompanying text, also possesses none of these three *Sullivan II* attributes of property.

106. 134 Cal. App. 3d at —, 184 Cal. Rptr. at 802 (Kaufman, Acting P.J., concurring).

107. *Id.* at —, 184 Cal. Rptr. at 801.

108. *Id.* at —, 184 Cal. Rptr. at 803-04 (Ziebarth, J., concurring in part, dissenting in part).

109. *Id.* at —, 184 Cal. Rptr. at 813, 814 (Ziebarth, J., concurring in part, dissenting in part). Justice Ziebarth also noted that the working spouse has another potential remedy—that of an "independent action for equitable relief" on grounds of unjust enrichment or implied-in-law agreement. *Id.* at —, 184 Cal. Rptr. at 825 (Ziebarth, J., concurring in part, dissenting in part).

110. *See supra* note 103.

111. *See infra* note 142 and accompanying text.

112. *See infra* notes 143-44 and accompanying text.

113. Justice McDaniel's concise majority opinion is five pages long; Justice Ziebarth's voluminous opinion, concurring in part, dissenting in lengthier part, spans some twenty-three pages. *See* 134 Cal. App. 3d at —, 184 Cal. Rptr. at 802-25.

spouse still could maintain an independent action for equitable relief, based on a theory of agreement implied in law to prevent unjust enrichment by the student spouse.[114] This was the very rationale espoused soon thereafter by the Arizona Court of Appeals in *Pyeatte v. Pyeatte*.[115]

*Pyeatte* involved the typical problem of the professional spouse, with one twist: H. Charles and Margrethe Pyeatte had established during marriage an informal agreement concerning educational responsibilities.[116] The agreement was that Margrethe would support Charles through three years of law school, and that he would thereafter support her through attainment of her master's degree.[117]

While ostensibly affirming the *Wisner* rationale that an educational degree is not property,[118] the court held that in this case equitable relief, in the form of restitution, should be made available to Margrethe.[119] The valuation of the restitution was to be limited to Margrethe's financial contribution toward Charles' "living expenses and direct educational expenses."[120]

In *Pyeatte*, an Arizona court took the first tentative step away from the rigid *Wisner* rationale.[121] Nevertheless, the *Pyeatte* decision carefully limits its holding to the facts of the case. *Pyeatte* thus does not greatly facilitate elucidation of judicial precedent, or construction of a framework for analysis of similar cases in the future. Arizona trial courts will be compelled to determine, on an ad hoc basis, whether there exists unjust enrichment—that is, whether the working spouse reasonably could expect to be compensated, to what degree spousal support constitutes "benefit conferred" rather than "obligation fulfilled," and whether "justice requires a remedy."[122] Under the *Pyeatte* rationale, trial courts must engage in the delicate and uncertain balancing maneuvers mandated by considerations of such an equitable doctrine. In lieu of the *Pyeatte* approach, it is suggested in this Note that Arizona courts may take advantage, should they be

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114. *Id.* at —, 184 Cal. Rptr. at 825 (Ziebarth, J., concurring in part, dissenting in part).

115. — Ariz. —, — P.2d — (Ct. App. 1982).

116. *Id.* at —, — P.2d at —.

117. *Id.* Although the agreement was determined by the court to be unenforceable for want of certainty in its terms, *id.* at —, — P.2d at —, it was an important basis for resolution of the case. That is, the court determined that the agreement evidenced Margrethe's "expectation of compensation" and also the circumstances making unjust Charles' retention of "the benefits of her extraordinary efforts." *Id.* at —, — P.2d at —.

118. The *Pyeatte* opinion may have narrowed somewhat the broad *Wisner* holding that an educational degree is "not property," 129 Ariz. 333, 341, 631 P.2d 115, 123 (Ct. App. 1981). The *Pyeatte* court noted more precisely that *Wisner* stands for the proposition that an educational degree does not constitute (community) property subject upon marital dissolution to valuation and division. — Ariz. at —, — P.2d at —.

119. — Ariz. at —, — P.2d at —.

120. *Id.* at —, — P.2d at —. If, however, the anticipated monetary benefit to Margrethe under the parties' informal agreement were to be in an amount less than that of Margrethe's financial contributions, then such lesser amount would constitute the award limit. *Id.*

121. The *Pyeatte* opinion does contain an erroneous assertion of fact. The court noted, "In *Wisner*, the wife had concededly not made any monetary contribution to her husband's medical education." *Id.* at —, — P.2d at —. In fact, Mary Jane Wisner financed the last semester of Harry's medical education. *See supra* note 83 and accompanying text.

122. *See generally* J. MURRAY, JR., MURRAY ON CONTRACTS 15-16 (1974).

so inclined, of a unique opportunity to establish a logical and consistent framework for analysis of the problem of the professional spouse.

## FOUNDATIONS FOR ANALYSIS OF FUTURE ARIZONA CASES

Certain foundations must be laid as a prerequisite to synthesis of a conceptual framework for analysis. These foundations consist essentially of exposition of basic tenets of Arizona community property law, the rationale advocating treatment of the educational degree as separate property, and the doctrine of reimbursement to the community of contributions to separate property. Each of these foundations will be set forth in some detail in the following sections.

### *Basic Tenets of Arizona Community Property Law*

Community property law in Arizona reflects the state's strong Spanish heritage,[123] and is based upon the concept of double ownership.[124] During the marriage, husband and wife are regarded as owning equal, undivided, one-half interests in the community property.[125]

The character of property, as either community or separate, is established when the property is acquired.[126] Community property in Arizona consists statutorily of "[a]ll property acquired by either husband or wife during the marriage, except that which is acquired by gift, devise or descent . . . ."[127] There is a strong "presumption that property acquired by either spouse during marriage is community property."[128] Once the character of property is established as community or separate, the property retains such character unless changed by spousal agreement or by operation of law.[129]

Predictably, either spouse's separate property includes property acquired before the marriage, or acquired during the marriage by gift, devise or descent.[130] Less obviously, however, certain other acquisitions during marriage have been held to constitute separate property. These include property acquired during marriage by one of the spouses using his or her

123. *See* C. SMITH, SUMMARY OF ARIZONA COMMUNITY PROPERTY LAW 3-5 (1981); W. DE-FUNIAK & M. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY 55-56, 82-83 (2d ed. 1971).

124. *See* Mortensen v. Knight, 81 Ariz. 325, 330-32, 305 P.2d 463, 466-68 (1956).

125. *See* 1 W. DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY 261-62 (1943), *quoted in* Hatch v. Hatch, 113 Ariz. 130, 131, 547 P.2d 1044, 1045 (1976): "The Spanish law of community very plainly provided that 'Everything the husband or wife may earn during union, let them both have it by halves.' " *See also Mortensen*, 81 Ariz. at 330 n.4, 305 P.2d at 466 n.4.

126. Pendleton v. Brown, 25 Ariz. 604, 609, 221 P. 213, 215 (1923); Bender v. Bender, 123 Ariz. 90, 92, 597 P.2d 993, 995 (Ct. App. 1979).

127. ARIZ. REV. STAT. ANN. § 25-211 (1976).

128. Sommerfield v. Sommerfield, 121 Ariz. 575, 577, 592 P.2d 771, 773 (1979). "Clear and convincing" evidence is required to rebut the presumption of community property. *Id.* The presumption applies regardless of which spouse holds legal title. Arizona Cent. Credit Union v. Holden, 6 Ariz. App. 310, 313, 432 P.2d 276, 279 (1967).

129. *Sommerfield*, 121 Ariz. at 578, 592 P.2d at 774; Porter v. Porter, 67 Ariz. 273, 281, 145 P.2d 132, 137 (1948).

130. ARIZ. REV. STAT. ANN. § 25-213 (1976) defines separate property as follows: "All property, real and personal, of each spouse, owned by such spouse before marriage, and that acquired afterward by gift, devise or descent, and also the increase, rents, issues and profits thereof, is the separate property of such spouse."

separate property,[131] certain damages for personal injuries,[132] and certain federal retirement benefits.[133]

The character of property is not altered by subsequent application of separate or community funds.[134] For example, where the separate property of one spouse is improved by the expenditure of community funds, the property still retains its separate character.[135] In such situations, however, the spouse whose estate has been benefited by the capital contribution becomes obligated to reimburse the community therefor.[136]

In a proceeding for dissolution of the marriage, the court assigns to each spouse his or her sole and separate property.[137] The court then divides "the community, joint tenancy and other property held in common equitably," although not necessarily equally, and "without regard to marital misconduct."[138]

### *Establishing the Educational Degree (Human Capital) As Separate Property in Arizona*

In *Graham*, the Colorado Supreme Court utilized a traditional *Black's Law Dictionary* definition in concluding that an educational degree simply does not constitute property.[139] In an oft-quoted[140] requiem, the court

131. W. VAN SLYCK, JR., DECENDENTS' ESTATES PROVISIONS OF THE 1974 ARIZONA PROBATE CODE 1-5 (2d ed. 1981).

132. *See* Jurek v. Jurek, 124 Ariz. 596, 598-99, 606 P.2d 812, 814-15 (1980) (ownership of a recovery for personal injury in a dissolution proceeding is dependent upon the nature of its component parts: compensation for damages incurred by the community for medical expenses and lost wages is community property; compensation for injuries to the "personal well-being" of the injured spouse is the separate property of that spouse); *In re* Marriage of Kosko, 125 Ariz. 517, 519, 611 P.2d 104, 106 (Ct. App. 1980) (benefits compensating a disability incurred during marriage are separate property following dissolution); Bugh v. Bugh, 125 Ariz. 190, 193, 608 P.2d 329, 332 (Ct. App. 1980) (workmen's compensation benefits paid after marital dissolution to an injured worker are the worker's separate property, even though the benefits may be for injuries received before dissolution). *See generally* Casenote, *Personal Injury Recoveries as Community Property*, 23 ARIZ. L. REV. 384 (1981).

133. Hisquierdo v. Hisquierdo, 439 U.S. 572, 590 (1979) (Railroad Retirement Act prohibits division of railroad retirement benefits under community property laws); Wisner v. Wisner, 129 Ariz. 333, 338-39, 631 P.2d 115, 120-21 (1981) (under Social Security Act, which provided at the time that non-contributing spouse's benefits did not vest until after 20 years of marriage, benefits were the sole and separate property of contributing spouse who had been married for less than 20 years at time of dissolution).

134. *See* Lawson v. Ridgeway, 72 Ariz. 253, 261, 233 P.2d 459, 464-65 (1951); Bourne v. Lord, 19 Ariz. App. 228, 231, 506 P.2d 268, 271 (1973).

135. Kingsbery v. Kingsbery, 93 Ariz. 217, 225, 379 P.2d 893, 898 (1963); Potthoff v. Potthoff, 128 Ariz. 557, 564, 627 P.2d 708, 715 (Ct. App. 1981).

136. Horton v. Horton, 35 Ariz. 378, 382, 278 P. 370, 371 (1929); Hanrahan v. Sims, 20 Ariz. App. 313, 317, 512 P.2d 617, 621 (1973). Recent cases have characterized the community contribution as a claim in the nature of an equitable lien. *See Potthoff*, 128 Ariz. at 562, 627 P.2d at 713; Tester v. Tester, 123 Ariz. 41, 43, 597 P.2d 194, 196 (Ct. App. 1979).

137. ARIZ. REV. STAT. ANN. § 25-318(A) (Supp. 1982-83).

138. *Id. See* Buttram v. Buttram, 122 Ariz. 581, 582, 596 P.2d 719, 720 (Ct. App. 1979).

139. 194 Colo. 429, 432, 574 P.2d 75, 77 (1978). The *Graham* court employed the definition, "everything that has an exchangeable value or which goes to make up wealth or estate." *Id.* It is interesting to note the criticism, however, that the *Graham* court selected from *Black's Law Dictionary* "terminology to suit its own views." Lynn v. Lynn, 7 FAM. L. REP. (BNA) 3001, 3006 (N.J. Super. Ct. Ch. Div. Dec. 5, 1980), *rev'd*, 9 FAM. L. REP. (BNA) 2151 (N.J. Dec. 15, 1982). The *Lynn* court undertook a more thorough scrutiny of *Black's Law Dictionary*, and came up with other definitions of "property" which are not so restrictive. *Id.*

140. *See, e.g.*, Wisner v. Wisner, 129 Ariz. 333, 339-40, 631 P.2d 115, 121-22 (Ct. App. 1981);

intoned:

> It [educational degree] does not have an exchange value or any objective transferable value on an open market. It is personal to the holder. It terminates on death of the holder and is not inheritable. It cannot be assigned, sold, transferred, conveyed, or pledged. . . . It may not be acquired by the mere expenditure of money. It is simply an intellectual achievement that may potentially assist in the future acquisition of property. In our view, it has none of the attributes of property in the usual sense of that term.[141]

Such an analysis, in the view of at least one noted legal commentator, simply begs the question.[142] Dean John Cribbet has observed that "property is not a mystical entity established by some fiat outside the framework of the law."[143] In Dean Cribbet's view, property consists simply "of the legal relations among people in regard to a thing."[144] Property interests have been found in such personal and nontransferable relations as tenured civil service employment[145] and government-furnished welfare benefits,[146] and in intangible assets such as professional goodwill.[147]

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*In re* Marriage of Horstmann, 263 N.W.2d 885, 891 (Iowa 1978); Hubbard v. Hubbard, 603 P.2d 747, 750 (Okla. 1979); *In re* Marriage of Lundberg, 107 Wis. 2d 1, 8, 318 N.W.2d 918, 921 (1982).

141. *Graham*, 194 Colo. at 432, 574 P.2d at 77. While this view has often been repeated, it has by no means been universally accepted. For example, compare Effland, *Arizona Community Property Law: Time for Review and Revision*, 1982 ARIZ. ST. L.J. 1, 7 ("The conceptual difficulty with classification is that a college degree and a license to practice a profession are not 'property' in the usual sense of the term.") with W. REPPY, JR. & C. SAMUEL, COMMUNITY PROPERTY IN THE UNITED STATES 201 (2d ed. 1982) ("Surely *Frausto* is wrong in holding that the college degree is not property at all; it must be *H's* separate property.").

142. J. CRIBBET, PRINCIPLES OF THE LAW OF PROPERTY 5 (2d ed. 1975):

> Occasionally . . . you will find a court saying, "We cannot grant the relief requested by the plaintiff because no property interest is involved and in this class of cases the court acts only to protect property rights." Is not this reasoning in reverse? If the court grants the protection, it has created a species of property . . . . If it refuses the remedy then no property can be said to exist because "take away laws and property ceases."

143. *Id. See also* J. BENTHAM, THEORY OF LEGISLATION 111, 113 (E. Dumont ed., R. Hildreth trans. 1882): "[P]roperty . . . is entirely the work of law. . . . Property and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases."

144. J. CRIBBET, *supra* note 142, at 2: "[Y]ou must come to realize that property is a concept, separate and apart from the thing [res]." *Id. See* Justice Stewart's famous reproach concerning the "false" dichotomy between property rights and personal liberties: "Property does not have rights. People have rights. . . . In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized." Lynch v. Household Finance Corp., 405 U.S. 538, 552 (1972) (citations omitted).

145. *See* Arnett v. Kennedy, 416 U.S. 134, 166 (1974). "The decisions of this Court have given constitutional recognition to the fact that in our complex modern society, wealth and property take many forms. We have said that property interests requiring constitutional protection 'extend well beyond actual ownership of real estate, chattels, or money.' " *Id.* at 207-08 (Marshall, J., dissenting). *But see* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 538-39 (1978) (criticism of the "new property").

146. Goldberg v. Kelly, 397 U.S. 254, 262 (1970) (state could not terminate public assistance payments to a particular recipient without affording him the opportunity for an evidentiary hearing prior to termination). "Much of the existing wealth in the country takes the form of rights that do not fall within traditional common-law concepts of property." *Id.* at 262 n.8. *See id.* at 275 (Black, J., dissenting); *Arnett*, 416 U.S. at 208 (Marshall, J., dissenting).

147. *See* Wisner v. Wisner, 129 Ariz. 333, 335, 337-38, 631 P.2d 115, 117, 119-20 (Ct. App. 1981). The *Wisner* court noted that in Arizona, "[G]oodwill has been defined as 'that asset, intangible in form, which is an element responsible for profits in a business,' " and remanded to the

Recently, in *Jurek v. Jurek*,[148] the Arizona Supreme Court noted, in connection with a recovery for personal injury, that "the body which [the husband] brought to the marriage is certainly his separate property."[149] The *Jurek* rationale was subsequently espoused by the Arizona Court of Appeals in *In re Marriage of Kosko*.[150] The appellate court held that civil service disability benefits represent a substitute for lost earning ability and thus should be treated after dissolution as the separate property of the recipient spouse.[151] A similar analysis was employed in *Bugh v. Bugh*,[152] wherein the court held that workmen's compensation benefits for injuries incurred during marriage are the worker's separate property when paid after marital dissolution.[153] Judge O'Connor, writing for the court, observed that "a 'right to personal security' is owned by an individual . . ., thus it is his separate property."[154]

If the body which a spouse brings to the marriage is "certainly his separate property,"[155] then why not his mind?[156] Enhancement of an individual's education, or attainment of an educational degree, may be conceptualized simply as an investment in human capital.[157] "Human capital" has been defined as the sum total of "an individual's productive skills, talents and knowledge,"[158] and thus subsumes an individual's body

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trial court for a determination of the value of the goodwill at issue in the case. *Id.* at 337, 631 P.2d at 119.

148. 124 Ariz. 596, 606 P.2d 812 (1980). Husband received a personal injury two days after he filed for marital dissolution. *Id.* The issue was whether the wife should receive one-half of any recovery. *Id.*

149. *Id.* at 598, 606 P.2d at 814. The court added that "[t]he compensation for injuries to [the husband's] personal well-being should belong to him as his separate property." *Id.* The *Jurek* court thus followed the reasoning expounded in Soto v. Vandeventer, 56 N.M. 483, 245 P.2d 826 (1952), that "the wife brought her body to the marriage and on its dissolution is entitled to take it away, so she should be similarly entitled to compensation from one who has wrongfully violated her right to personal security." 124 Ariz. at 598, 606 P.2d at 814. On the other hand, compensation for damages incurred by the community for medical expenses and lost wages is community property. *Id.*

150. 125 Ariz. 517, 611 P.2d 104 (Ct. App. 1980). The court interpreted *Jurek* as requiring that, "for an accident occurring during marriage, any portion of a recovery which represents compensation for post-dissolution earnings of the injured spouse is the separate property of that spouse." *Id.* at 518, 611 P.2d at 105.

151. *Id.* at 517, 611 P.2d at 104.

152. 125 Ariz. 190, 608 P.2d 329 (Ct. App. 1980).

153. *Id.* at 192, 608 P.2d at 331.

154. *Id.* Judge O'Connor noted that the *Jurek* court did not "discuss the nature of future loss of earnings recovered after the dissolution." *Id.*

155. *See supra* notes 148-49 and accompanying text.

156. To analogize to *Soto* and *Jurek*, *see supra* note 149, the spouse brings his mind to the marriage and on its dissolution is entitled to take it away.

157. *See* W. MCMAHON, INVESTMENT IN HIGHER EDUCATION xi (1974). Formal education is one of the most important human capital investments which an individual can make. W. NICHOLSON, INTERMEDIATE MICROECONOMICS AND ITS APPLICATION 443 (2d ed. 1979). Costs of such investment may be divided into two types: explicit historical costs such as tuition, fees, transportation, incidentals; and implicit opportunity costs of earnings foregone. *Id.*

158. L. THUROW, INVESTMENT IN HUMAN CAPITAL 1 (1970). The value of human capital is usually measured by capitalization of the flow of expected future monetary earnings. *Id.* at 134. *See generally* Krauskopf, *Recompense for Financing Spouse's Education: Legal Protection for the Marital Investor in Human Capital*, 28 KAN. L. REV. 379 (1980).

Two Nobel laureates in economics, Paul Samuelson and Theodore W. Schultz, have advocated human capital theory. *See* P. SAMUELSON, ECONOMICS 751-52 (11th ed. 1980); *see generally* T. SCHULTZ, INVESTING IN PEOPLE (1981). Human capital theory positing a direct causal nexus

and mind. It is a simple economic concept that an individual's human capital, by virtue of its effect on productivity and future earnings, constitutes a form of wealth;[159] or, alternately put, of property.[160]

Conceptualization of the educational degree itself as property is misleading;[161] such a degree is not severable, nor may it be acquired absent an accumulation of many years of prior education and learning. The property interest found in human capital[162] lies in the sum total of the knowledge and skills of the individual, which foster enhanced productivity and earning power.[163] A degree evinces successful completion of a level of study which adds to the knowledge and skills of the individual. Viewed in this light, the degree is simply a testimonial of improvement on the asset of human capital.[164]

The *sine qua non* of such conceptualization is that the property interest in an individual's human capital exists long before marriage. In Arizona, all property acquired prior to marriage is by statute defined as "separate property."[165] Thus, the property interest in an individual's human capital must, in Arizona, be separate property.

### *The Doctrine of Reimbursement to the Community of Contributions to Separate Property*

In Arizona, property takes its nature as separate or community at the time of its acquisition.[166] All property acquired prior to marriage is separate property,[167] and subsequent application of community funds does not alter its nature.[168] "When community funds are used to improve the separate property of a spouse, [however,] the community has a claim for reimbursement."[169]

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between investment (expenditures on education) and higher wage rates (earnings) has come under some recent criticism, though. *See* C. MCCONNELL, ECONOMICS 622-23 (8th ed. 1981).

159. P. HEYNE, THE ECONOMIC WAY OF THINKING 239 (3d ed. 1980). "The most readily portable form of wealth is human capital, which may explain why prospering ethnic minorities have so often obtained unusually high levels of education." *Id.* at 242.

160. Recall the traditional *Black's Law Dictionary* definition utilized by the *Graham* court: "everything . . . which goes to make up wealth or estate." 194 Colo. 429, 432, 574 P.2d 75, 77 (1978). *See supra* note 139 and accompanying text. Indeed, the analyses in *Kosko* and *Bugh*, *see supra* notes 150-54 and accompanying text, may be phrased alternately in terms of "human capital." Thus, disability benefits are a substitute for lost earning ability, or alternately phrased, for injury to an individual's human capital.

161. *See Graham*, 194 Colo. 429, 435, 574 P.2d 75, 79 (1978) (Carrigan, J., dissenting).

162. Admittedly, human capital has a number of unique characteristics. *See* L. THUROW, *supra* note 158, at 121; W. NICHOLSON, *supra* note 157, at 444-45.

163. In the views of a number of scholars, however, higher incomes earned by college graduates probably are not the result of higher levels of education alone. *See* L. ATKINSON, ECONOMICS 585 (1982); C. MCCONNELL, *supra* note 158.

164. The degree "gives the . . . graduate 'credentials,' the worth of which is reflected in higher wages." L. ATKINSON, *supra* note 163.

165. ARIZ. REV. STAT. ANN. § 25-213 (1976). Short of transmutation by agreement, gift or commingling, such property retains its separate character even after marriage. *See* C. SMITH, *supra* note 123, at 22-23; *see also* cases cited *supra* note 129.

166. Bender v. Bender, 123 Ariz. 90, 92, 597 P.2d 993, 995 (1979).

167. ARIZ. REV. STAT. ANN. § 25-213 (1976). *See generally* I. CANTOR & C. SMITH, ARIZONA MARRIAGE DISSOLUTION MANUAL 28-29 (1980).

168. Bourne v. Lord, 19 Ariz. App. 228, 231, 506 P.2d 268, 271 (Ct. App. 1973).

169. Tester v. Tester, 123 Ariz. 41, 43, 597 P.2d 194, 196 (Ct. App. 1979). *See* Lawson v. Ridgeway, 72 Ariz. 253, 261, 233 P.2d 459, 464-65 (1951).

The measure of reimbursement has been fixed alternately by the Arizona decisions as the amount contributed by the community,[170] or as the increase in the value of the property.[171] In *Honnas v. Honnas*,[172] the Arizona Supreme Court recently recognized the confusion regarding the proper formula to be utilized to reimburse the community.[173] The court dispelled confusion within narrow limits by affirming the value-at-dissolution formula for real property cases, but left much of the confusion intact by implying that the amount-spent formula might be viable in other types of cases.[174]

When community funds are used to improve one spouse's separate property, the community's claim for reimbursement is in the nature of an equitable lien on the property.[175] Since this right to reimbursement is purely equitable, equity dictates that benefits already received by the community be taken into consideration when determining the amount of reimbursement.[176] Thus, where the community has already benefited by the spouse's separate property, such benefit would reduce the amount to be reimbursed to the community.[177]

This explication of the doctrine of reimbursement completes the foun-

170. Kingsbery v. Kingsbery, 93 Ariz. 217, 225, 379 P.2d 893, 898 (1963). Under Spanish law, it would appear that the measure of reimbursement was the amount contributed. "This doctrine of the improvements, in the opinion of Febrero, is understood only as regards what is spent in making them, and not as regards the greater value of the land." Novisimo Sala Mexicano, Sec. 2a, Title IV, No. 4, *quoted in* W. DE FUNIAK & M. VAUGHN, *supra* note 123, at 169 n.39.

171. Lawson v. Ridgeway, 72 Ariz. 253, 262, 233 P.2d 459, 465 (1951).

172. 133 Ariz. 39, 648 P.2d 1045 (1982).

173. *Id.* at 40-41, 648 P.2d at 1046-47. *See also* W. REPPY, JR. & W. DE FUNIAK, COMMUNITY PROPERTY IN THE UNITED STATES 244-45 (1975): "Arizona cases can be found for almost every possible position, with irreconcilable holdings as to whether amount-spent or enhanced-value-at-dissolution is the proper formula." Confusion regarding this issue seems not to have been monopolized by the Arizona cases. Compare the amount-expended formula explicated in W. DE FUNIAK, *supra* note 125, at 190:

> Similarly, the principle of the Spanish law of community in respect to improvements during the marriage to the separate property of one spouse at the expense of the community has, in effect, been fairly closely followed in this country. . . . [T]he value of such improvements is shared in the sense that the other spouse . . . is entitled to reimbursement *to the extent of half the value of the community funds or of the labor so expended.*

(emphasis added), with the enhanced-value formula set forth in W. DE FUNIAK & M. VAUGHN, *supra* note 123, at 171:

> The principle of the Spanish law of community in respect to improvements . . . has, in effect, been fairly closely followed in this country. . . . [T]he value of such improvements is shared in the sense that the other spouse . . . is entitled to reimbursement *to the extent of half the enhanced value of the property.*

(emphasis added). The theme of the earlier text, containing the amount-expended formula appears to accord more harmoniously with the tenor of the quoted opinion of Febrero. *See supra* note 170.

174. 133 Ariz. at 41, 648 P.2d at 1047. "We do not decide which formula, amount-spent or value-at-dissolution, is the more desirable in cases involving insurance." *Id. See also* Tester v. Tester, 123 Ariz. 41, 43, 597 P.2d 194, 196 (Ct. App. 1979): "Whether the measure of reimbursement is the amount of community funds expended or the amount by which the value of the separate property has been enhanced need not be answered here."

175. Lawson v. Ridgeway, 72 Ariz. 253, 262, 233 P.2d 459, 465 (1951); Tester v. Tester, 123 Ariz. 41, 43, 597 P.2d 194, 196 (Ct. App. 1979).

176. *Tester*, 123 Ariz. at 43, 597 P.2d at 196, quoting Hanrahan v. Sims, 20 Ariz. App. 313, 318, 512 P.2d 617, 622 (1973).

177. *See Tester*, 123 Ariz. at 43-44, 597 P.2d at 196-97.

dations upon which will be synthesized, in the following section, a framework for analysis of the problem of the professional spouse in Arizona.

## FRAMEWORK FOR ANALYSIS

### *Construction of the Framework*

Arizona community property law provides a unique foundation upon which may be constructed a consistent method for analysis of the problem of the professional spouse. The framework for analysis is predicated upon conceptualization of human capital as separate property.[178] That element of human capital consisting of an individual's body already has been deemed to be separate property by the Arizona Supreme Court;[179] surely, the element consisting of an individual's mind should not be treated otherwise. An educational degree or professional license simply evinces a certain level of development of this human capital.

When community funds are expended to improve the separate property of one spouse, the community is entitled to reimbursement.[180] Under this doctrine, when community funds earned by the working spouse are used to improve the separate human capital of the student spouse, the community should have a claim for reimbursement. Within different contexts, the measure of such reimbursement has been fixed by Arizona decisions as the amount contributed by the community, or as the increase in value of the separate property.[181]

Although the value-at-dissolution measure may appear to be more equitable from one theoretical point of view,[182] other contervailing factors must be taken into consideration. When applied as the present value of an individual's increased earning potential, such a measure would seem to be speculative and distorting,[183] and may even lead to contravention of social policy.[184]

According to principles of general community property law, the earning of each (former) spouse after marital dissolution are the separate prop-

178. *See supra* notes 148-65 and accompanying text.

179. Jurek v. Jurek, 124 Ariz. 596, 598, 606 P.2d 812, 814 (1980).

180. Tester v. Tester, 123 Ariz. 41, 43, 597 P.2d 194, 196 (Ct. App. 1979). In some community property jurisdictions, it is possible to infer that a gift was intended. *See In re* Marriage of Warren, 28 Cal. App. 3d 777, 781, 104 Cal. Rptr. 860, 862 (1972) (in California, there is a presumption of a gift, and hence no entitlement to reimbursement, when a husband uses community funds to improve the wife's separate property). *See also* W. REPPY, JR. & C. SAMUEL, *supra* note 141, at 105-06.

181. *See* W. REPPY, JR. & C. SAMUEL, *supra* note 141, at 108. *See also* Honnas v. Honnas, 133 Ariz. 39, 41, 648 P.2d 1045, 1047 (1982) (reaffirming the *Lawson v. Ridgeway* value-at-dissolution formula for real property, although not necessarily for insurance, cases).

182. The value-at-dissolution measure may appear to be more equitable under the theory set forth in Cockrill v. Cockrill, 124 Ariz. 50, 601 P.2d 1334 (1979), that "profits [or increases in value], which result from a combination of separate property and community labor, must be apportioned accordingly." *Id.* at 54, 601 P.2d at 1338. *See also* Honnas v. Honnas, 133 Ariz. 39, 41, 648 P.2d 1045, 1047 (1982). It might appear at first blush that increases in human capital, within the context of the problem of the professional spouse, are essentially attributable to the labor of the student spouse (community labor), and accordingly, should be apportioned primarily to the community.

183. *See infra* notes 189-90 and accompanying text.

184. *See infra* notes 190-93 and accompanying text.

erty of that individual.[185] There is an exception to this general rule. When earnings to be received after dissolution represent deferred compensation (such as a pension, retirement benefits, or profit-sharing plan) for work performed during marriage, then there is a community interest at dissolution in such anticipated earnings.[186] The increased post-dissolution earning potential of the professional spouse (the graduated student spouse) does not, however, fall within the ambit of this exception. There does not appear to be any element of deferred compensation for that spouse's educational efforts or labor.[187]

Treatment of post-dissolution earnings of each spouse as separate property would appear to be analogous economically to the treatment accorded to each spouse's separate "right to personal security" (right to freedom from personal injury or pain and suffering), compensation for violation of which is separate property.[188] The enhanced value-at-dissolution theory not only would infringe upon this "right to economic security" which each spouse brings into the marriage as separate property, but also would run counter to the trend toward divorce without unduly burdensome economic responsibilities.[189]

Use of the value-at dissolution measure within the context of the problem of the professional spouse would be potentially distorting and inequitable from the "reverse" point of view also, springing from the potential magnitude of such measure, which greatly exceeds the generally modest measure of actual investment. The working spouse actually may be motivated to divorce the recently graduated student spouse, if by so doing, the former may expect to secure a lifetime of comparative economic ease resulting from application of the enhanced valuation method.[190]

Furthermore, burdensome property division based on the value-at-dissolution measure may encourage the recently graduated student spouse (with little tangible property) to avoid division requirements by filing a petition for discharge in bankruptcy.[191] Availability and use of such a tac-

185. Bugh v. Bugh, 125 Ariz. 190, 193, 608 P.2d 329, 332 (Ct. App. 1980).

186. Van Loan v. Van Loan, 116 Ariz. 272, 274, 569 P.2d 214, 216 (1977); *Bugh*, 125 Ariz. at 193, 608 P.2d at 332.

187. While the increased earning potential may result in large part *from* the student spouse's educational labor, such potential cannot fairly be said to represent deferred compensation *for* such labor.

188. *See* Jurek v. Jurek, 124 Ariz. 596, 598, 606 P.2d 812, 814 (1980); Bugh v. Bugh, 125 Ariz. 190, 192, 608 P.2d 329, 331 (Ct. App. 1980).

189. *See supra* notes 1-5 and accompanying text.

190. Carrying this line of reasoning one step further, it is not difficult to imagine the "reverse problem of the professional spouse"—the unscrupulous working spouse who enters into marriage with a student spouse, in contemplation of filing for marital dissolution shortly after the latter's graduation. Under the enhanced value-at-dissolution measure, the working spouse's recovery could far exceed any reasonable relationship to that spouse's actual contribution!

191. Under the Bankruptcy Code, 11 U.S.C. § 523(a)(5) (West Supp. 1982), an individual debtor is not discharged from any debt owed "to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support . . . in connection with a separation agreement, divorce decree, or property settlement agreement." There is a "fine distinction[, however,] between nondischargeable alimony obligations and dischargeable property settlement obligations." B. WEINTRAUB & A. RESNICK, BANKRUPTCY LAW MANUAL ¶ 3.09[5], at 3-36 (1980). *See generally* Rude, *Bankruptcy: Support and Maintenance in Competition with Property Settlements*, 56 FLA. B.J. 78 (1982).

tic would evade the equitable purpose of reimbursement.

It has been stated that the right to reimbursement is purely equitable;[192] surely, the measure of reimbursement should not be otherwise.[193] Consideration of equities, however, should not be confused with deference to a lingering dominion of paternalism in a social order where equality between the sexes has become an increasingly significant way of life.[194] Within the context of the problem of the professional spouse, the amount actually contributed by the community would appear to be the more equitable measure of reimbursement.

In Arizona, equitable principles also dictate that benefits already received by the community be considered in determining the amount of reimbursement.[195] In certain cases, the marriage may have endured for a lengthy period of time, with enjoyment by the community of bountiful fruits derived from substantial earnings by the professional spouse. In such cases, the court may, in its discretion, determine the reduced measure of reimbursement which, under the circumstances of each case, would be equitable.

While the amount contributed appears to be the appropriate measure of reimbursement in professional spouse cases, there are a number of different ways in which to measure this amount. For example, the amount contributed may comprise the value of community contributions to general support, or more narrowly, of community contributions to defray the student spouse's academic expenses (such as tuition, textbooks, transportation and supplies). The reasonable value of the student spouse's educational efforts (i.e., value of the time spent in studying) might also be a factor, as well as adjustment for interest or inflation.

Selection of the proper valuation of the amount contributed should be a matter properly left to the discretion of the court. It is suggested, however, that the most conservative valuation, and thus the one open to least

192. Tester v. Tester, 123 Ariz. 41, 43, 597 P.2d 194, 196 (Ct. App. 1979) (quoting Hanrahan v. Sims, 20 Ariz. App. 313, 318, 512 P.2d 617, 622 (1973)).

193. In his concurrence in *Sullivan II*, Acting Presiding Justice Kaufman indicated the limitations of California law within which the *Sullivan II* court was constrained. 134 Cal. App. 3d 634, —, 184 Cal. Rptr. 796, 801-02 (1982). For example, in California, "the expenditure of community funds by mutual consent of the parties during marriage is presumably made with a donative intent." *Id.* at —, 184 Cal. Rptr. at 801. *See supra* note 180. More importantly, perhaps, by statute community property must be divided equally by California courts, which do not exercise general equity powers in marital dissolution proceedings. *Id.* at —, 184 Cal. Rptr. at 802. *Compare* CALIF. CIV. CODE § 4800 (West Supp. 1982) (requiring equal distribution) *with* ARIZ. REV. STAT. ANN. § 25-318(A) (Supp. 1982-83) (providing for equitable distribution).

194. In today's society, there are large numbers of female professional students. *See* STATISTICAL ABSTRACT, *supra* note 1, at 167 (Table No. 285). In Arizona, results of an informal survey of admissions offices at the University of Arizona Colleges of Law and Medicine, and at the Arizona State University College of Law, indicate that on September 30, 1982, approximately 40% (357/871) of law students and 35% (125/356) of medical students were female.

In view of such large proportions of female professional students (presumably some of whom must be married), it is somewhat surprising that all of the reported cases concerning the problem of the professional spouse have involved a working wife and a student husband. Research through time of preparation of this Note reveals not a single case wherein a working husband has requested compensation for supporting a student wife (with the possible exception of Sudholt v. Sudholt, 389 So.2d 301 (Fla. Dist. Ct. App. 1980)—a case which is not precisely on point).

195. *See supra* note 176.

question or criticism, is the one based upon reimbursement to the community of funds actually used to defray the student spouse's direct academic expenses.[196] Once the amount of reimbursement to the community has been determined, it is left to the discretion of the court to divide all community property in an equitable manner between the spouses.[197]

*Application of the Framework*

Having synthesized a framework for analysis, it remains to be seen how this framework fares in practical use. Accordingly, the theory will be applied to a number of hypothetical situations. In all cases, the amount-contributed measure, measured by actual contributions to defray the student spouse's direct academic expenses, will be used.

*Hypothetical 1*: Working spouse ("WS") supports student spouse ("SS") through professional school; marriage terminates soon after SS graduates or attains educational degree; community has few tangible assets.[198] (Typical problem of the professional spouse).

*Application*: Community contributions (derived from earnings of WS) used to defray SS's educational expenses are to be reimbursed to the community.

*Hypothetical 2*: Same factual situation as in 1 above, except that the marriage terminates *before* graduation of SS.[199]

*Application*: Same as in 1 above. The fact that the marriage has been dissolved prior to attainment of the educational degree, while possibly of significance under an enhanced value-at-dissolution theory of measurement, is irrelevant under the actual amount-contributed measure employed here.

*Hypothetical 3*: Same factual situation as in 1 above, except that WS does not work and contributes neither to support the community nor to defray SS's academic expenses; SS works full time to support the community, and also attends school.[200]

*Application*: Community contributions (derived from earnings of SS) used to defray SS's educational expenses are to be reimbursed to the community. Under community property doctrine, the earnings (acquisition through onerous title) of either spouse during coverture belong to the community.[201] Therefore, under community property precepts, it is irrelevant

196. This position finds support in the view of at least one economic scholar: "[W]e do not [compute] food and lodging as a cost of going to college because this cost would be incurred anyway and therefore does not constitute a cost by our definition." R. MILLER, INTERMEDIATE MICROECONOMICS 394 (2d. ed. 1982).

197. ARIZ. REV. STAT. ANN. § 25-318(A) (Supp. 1982-83).

198. *See Sullivan II*, 134 Cal. App. 3d 634, 184 Cal. Rptr. 796 (1982); *In re* Marriage of Graham, 194 Colo. 429, 574 P.2d 75 (1978); *In re* Marriage of Horstmann, 263 N.W.2d 885 (Iowa 1978); Reen v. Reen, 8 FAM. L. REP. (BNA) 2193 (Mass. P. & Fam. Ct. Dec. 23, 1981); O'Brien v. O'Brien, 114 Misc. 2d 233, 452 N.Y.S.2d 801 (Sup. Ct. 1982).

199. *See* DeLa Rosa v. DeLa Rosa, 309 N.W.2d 755 (Minn. 1981).

200. *See generally* Lesman v. Lesman, — Misc. 2d —, 452 N.Y.S.2d 935 (App. Div. 1982). Note that if SS utilizes exclusively SS's own separate property to defray academic expenses, the community has no claim to reimbursement.

201. ARIZ. REV. STAT. ANN. § 25-211 (1976) provides that all property acquired by either spouse during marriage, except that acquired by lucrative title, is community property.

whether the earnings are those of WS or SS.

*Hypothetical 4*: WS supports SS through professional school; the marriage endures for some time after SS graduates; the community enjoys benefits in the form of a sustained higher standard of living; however, at dissolution, the community has few tangible assets.

*Application*: The court may, in its discretion, consider the benefits already received by the community in determining the amount of reimbursement which would be equitable. The maximum reimbursement would be the amount actually contributed by the community to defray the educational expenses of SS.

*Hypothetical 5*: Same factual situation as in 4 above, except that there is an extensive accumulation of community property.[202]

*Application*: The court may, in its discretion, consider the benefits already received by the community in determining the amount of reimbursement which would be equitable. As a practical matter, in view of the relative insignificance of amounts contributed compared to the magnitude of accumulated community property, reimbursement, if any, should be minimal.

It is submitted that the theory set forth herein—the framework for analysis—translates into a predictable, logically consistent result, as evidenced by the foregoing hypothetical applications. The reader is invited to judge for himself whether or not such is actually the case.

## CONCLUSION

The problem of the professional spouse has become increasingly more visible during the past several years. The typical problem involves a working spouse who supports the other spouse's academic endeavors, often in law or medicine, with marital dissolution (characterized by the absence of significant accumulated assets) following close on the heels of the student spouse's graduation. In such situations, the working spouse may attempt to assert that the student spouse's educational degree, or potential for increased earnings, is an asset, the value of which should be divided at dissolution of the marriage.

When confronted with this problem, courts have trod different paths. The weight of authority would deny recovery to the working spouse, under the rationale that the educational degree does not constitute property and thus may not be divided. A number of courts, however, have awarded recovery to the working spouse under a variety of theories, including restitution, quasi-contract, equitable distribution, reimbursement alimony, rehabilitative alimony, compensatory maintenance, and property division. A few trial courts have awarded recovery based on the discounted present value of the student spouse's potential earnings increase flowing from the educational degree attained.

Analysis of current Arizona decisions—*Wisner* and *Pyeatte*—does not yield a consistent basis for decisionmaking by the parties, practitioners, or

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

the courts. Analysis of the human capital concept coupled with community property law, however, reveals a potential schema for principled resolution of the problem in Arizona. This Note attempts to formulate such a conceptual framework for analysis.

Human capital, consisting of the total of an individual's knowledge and skills, is the basis for productivity and earnings, and should be deemed an asset or property interest. In Arizona, a spouse's body constitutes separate property. Human capital, which subsumes an individual's body and mind, meets even the traditional definitions of property; by its very nature, human capital, acquired long before marriage, should be considered the separate property of a spouse.

Support of the student spouse by the working spouse constitutes expenditure of community funds to improve separate property, and forms the basis of entitlement to reimbursement of the community. The measure of such reimbursement should be the amount actually contributed by the community to pay expenses directly related to the student spouse's education. It is then left to the discretion of the court to divide the community property in an equitable manner between the spouses.

Admittedly, application of this suggested schema generally will not result in a large monetary recovery on the part of the working spouse. By definition, however, the working spouse is capable of self-support. Under such circumstances, perception of the public policy against unusually burdensome marital dissolution requirements should preclude award of disproportionately large recoveries. The fact that the working spouse may be a woman should make no difference in resolution of the problem, for traditional conceptions of the man as the breadwinner of the family are being superseded by the many and varied roles which spouses assume in marriages today.