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## Domestic Relations--Educational Degree Does Not Constitute Marital Property Subject to Division between Spouses upon Divorce

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## RECENT DEVELOPMENT

DOMESTIC RELATIONS—EDUCATIONAL DEGREE DOES NOT CONSTITUTE MARITAL PROPERTY SUBJECT TO DIVISION BETWEEN SPOUSES UPON DIVORCE. *Graham v. Graham*, 574 P.2d 75 (Colo. 1978).

*Graham v. Graham*<sup>1</sup> recently presented the Colorado Supreme Court with the compelling argument that an educational degree obtained during marriage should constitute marital property subject to division upon divorce. This argument was premised upon the wife's contribution to her husband's educational degree and his increased earning capacity.<sup>2</sup> The Colorado Supreme Court chose to approach this question within the narrow, definitional boundaries of "marital property," rather than to employ an equitable approach that recognized the practical consequences of excluding an educational degree from the category of marital property assets. As a result, the court foreclosed any relief when parties are situated as in the *Graham* context.

After six years of marriage, Anne and Dennis Graham jointly filed a petition to have their marriage dissolved. The wife had been employed as an airline stewardess throughout the marriage, while her husband worked part-time and attended school to earn a master's degree in business administration (M.B.A.). During this period the wife provided approximately seventy percent of their income. The parties had accumulated no marital property, and the wife sought no maintenance from her husband.<sup>3</sup>

The wife contended, however, that her husband's M.B.A. degree constituted marital property and, as such, was subject to division upon

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1. 574 P.2d 75 (Colo. 1978).

2. See notes 3-5 *infra* and accompanying text.

3. The husband's main pursuit during the marriage was his education. He acquired both a bachelor of science degree in engineering physics and a master's degree in business administration during the marriage. Upon graduation, he obtained employment with a large corporation at a starting salary of \$14,000 per year. 574 P.2d at 76.

dissolution of the marriage.<sup>4</sup> This contention was based on her economic support of the husband, which had enabled him to attain his degree and improve his potential earning capacity. Further, marital property subject to valuation and division must include the husband's degree if the wife was to be compensated for her "investment" in the future of their relationship.<sup>5</sup>

The wife's characterization of the M.B.A. degree as a property asset was prompted by the terms of Colorado's Uniform Dissolution of Marriage Act.<sup>6</sup> The Act removes fault considerations from the distribution of marital property<sup>7</sup> and attempts to avoid the problems associated with continuing support payments by encouraging property division as the means of satisfying support obligations. To achieve this aim, the statute denies the award of maintenance unless a spouse lacks sufficient property to provide for his needs *and* is unable to support himself through reasonable employment.<sup>8</sup>

In *Graham* the wife had supported the household during the marriage and was clearly capable of supporting herself upon divorce. Because of her inability to qualify for maintenance,<sup>9</sup> her only potential

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4. *Id.*

5. The "investment" nature of the wife's contribution to her husband's education was particularly emphasized by the dissent: "Her earnings not only provided her husband's support but also were "invested" in his education in the sense that she assumed the role of breadwinner so that he would have the time and funds necessary to obtain his education." 574 P.2d at 78 (Carrigan, J., dissenting).

6. COLO. REV. STAT. §§ 14-10-101 to 133 (1973).

7. The Colorado dissolution of marriage statutes are substantially adopted from parts III and IV of the Uniform Act, UNIFORM MARRIAGE AND DIVORCE ACT §§ 301-410. The Commissioners' prefatory note to the Uniform Act emphasized the intent of the National Conference of Commissioners on Uniform State Laws to totally eliminate the concept of marital fault in divorce proceedings. According to the Commissioners, the "Act's elimination of fault notions extends to its treatment of maintenance and property division." 9 U.L.A. 455, 457 (1973). See generally Newbern & Johnson, *The Uniform Marriage and Divorce Act: Analysis for Arkansas*, 28 ARK. L. REV. 175 (1974); O'Connell, *Marriage, Divorce, and the Uniform Marriage and Divorce Act*, 17 N.Y.L.F. 983 (1972); Comment, *The Uniform Marriage and Divorce Act*, 37 MONT. L. REV. 119 (1976); Note, *Property, Maintenance, and Child Support Decrees Under the Uniform Marriage and Divorce Act*, 18 S.D.L. REV. 558, 566 (1973).

The Colorado statute's underlying purpose is to make "legal dissolution of marriage more effective for dealing with the realities of matrimonial experience by making an irretrievable breakdown of the marriage relationship the sole basis for its dissolution." COLO. REV. STAT. § 14-10-102(2)(c) (1973). The statute further provides that in a proceeding for disposition of the marital property, the division is to be made "without regard to marital misconduct." COLO. REV. STAT. § 14-10-113(1) (Supp. 1976).

8. UNIFORM MARRIAGE AND DIVORCE ACT § 308. The Commissioner's note following § 308 of the Uniform Marriage and Divorce Act specifies the intent to rely on property division rather than maintenance. Maintenance is only to be awarded if the property division is insufficient to satisfy a spouse's financial needs. *Id.* The Colorado statute also denies the award of maintenance unless a spouse lacks sufficient property to provide for his needs, and is unable to support himself through reasonable employment. COLO. REV. STAT. § 14-10-114(1)(a)-(b) (1973).

9. The Colorado Supreme Court repeatedly noted that the petitioner sought no maintenance

award from the court would come from the property division. Because there was no other marital property, she attempted to enlarge the classification of marital property to include her husband's degree.

Expert testimony established that the present value of the husband's M.B.A. degree was \$82,836.<sup>10</sup> The trial court classified this education as an independent asset of marital property and awarded the wife \$33,134.<sup>11</sup> This finding was based on the similar factual pattern and holding of *Greer v. Greer*.<sup>12</sup> The wife in *Greer* was awarded alimony in gross, and on appeal the former husband claimed that her remarriage had terminated his support obligation.<sup>13</sup> However, the Colorado Court of Appeals refused to allow termination of the husband's payment obligation. The court felt that the award "was not intended for the support of the wife. Rather it resulted from a consideration of the wife's contribution to the parties assets and constitutes an *adjustment of property rights*."<sup>14</sup>

### *The Graham Analysis*

The issue of whether an educational degree is an item of property was one of first impression for the Colorado Supreme Court.<sup>15</sup> The issue required the court to answer two questions regarding the role of an educational degree: first, whether such a degree should be considered an independent property asset and be divided between the parties, and second, whether it should be considered in determining each spouse's share of the marital property and the level of maintenance payments.<sup>16</sup>

The supreme court was unwilling to extend the "adjustment of property rights" argument to include a degree, noting that *Greer* had not determined that a medical education itself constituted marital prop-

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from her husband. Certainly the court recognized that she was unable to qualify within the statutory requirements. See note 8 *supra*.

10. 574 P.2d at 76. The expert testimony was based on the husband's increased capacity represented by the M.B.A. degree.

11. This amount was made payable in monthly installments of \$100. For discussion of the various forms of alimony, see H. CLARK, LAW OF DOMESTIC RELATIONS § 14.5 at 447 (3d ed. 1968) [hereinafter cited as CLARK].

12. 32 Colo. App. 196, 510 P.2d 905 (1973).

13. *Id.* at —, 510 P.2d at 907. See generally CLARK *supra* note 11 at § 14.9.

14. 32 Colo. App. at —, 510 P.2d at 907 (emphasis added).

15. 574 P.2d 75.

16. An affirmative answer to the first question would have upheld the ruling of the trial court. A degree would be accorded an independent value, included in the marital property assets and divided in the dissolution proceedings.

In the alternative, an affirmative answer to only the second question would produce a radically different result. Unless other marital property had been accumulated or maintenance was awardable, consideration of the degree as a factor in the division of property would be pointless.

erty.<sup>17</sup> Further, *Greer* was considered distinguishable since it involved a division of marital property and maintenance.<sup>18</sup>

Addressing the first question of whether a degree should be considered an independent property asset, the Colorado court divided. The majority chose to rely on the statutory definition of property<sup>19</sup> and prior case law.<sup>20</sup> The dissent recognized that the wife's contribution to her husband required a practical approach, one responsive to the need to provide her equitable compensation.<sup>21</sup> Despite the compelling arguments of the dissenting Justices, the majority's analysis centered on the limited definitional issue of whether an educational degree could be included within the traditional notions of "property."<sup>22</sup>

The majority held that an educational degree was not within the statutory definition of property, even though it was admitted that the legislature intended to create a "broadly inclusive" definition.<sup>23</sup> In arriving at this result, the critical factors identified were the absence of an exchange value for an educational degree, its personal relationship to the holder and the fact that such a degree is not inheritable.<sup>24</sup> Because an educational degree was not considered property and accorded an independent monetary value, it was not subject to division upon di-

17. 574 P.2d at 77.

18. *Id.* The Supreme court's conclusion that *Greer* was distinguishable from *Graham* on the basis of the relief sought is questionable. Whether or not other marital property assets were involved or maintenance sought was immaterial to the definitional issue of property assets. The basis for the precedential value of *Greer* is its consideration of the wife's contribution to her husband's medical education as requiring a property rights analysis. 32 Colo. App. 196, 510 P.2d 905 (1973).

19. Section 14-10-113(2) of the Colorado statutes defines marital property:

For purposes of this article only, 'marital property' means all property acquired by either spouse subsequent to the marriage except:

- (a) Property acquired by gift, bequest, devise or descent;
- (b) Property acquired in exchange for property acquired prior to the marriage or in exchange for property acquired by gift, bequest, devise, or descent;
- (c) Property acquired by a spouse after a decree of legal separation; and
- (d) Property excluded by valid agreement of the parties.

COLO. REV. STAT. § 14-10-113(2) (1973).

20. The court recognized the broad discretionary powers of the trial court and absence of a strict formula for determining the division of marital property. *See Carlson v. Carlson*, 178 Colo. 283, 497 P.2d 1006 (1972). Further, the supreme court noted the following property definition: "In short it embraces anything and everything which may belong to a man in the ownership of which he has a right to be protected by law." 574 P.2d at 76 (quoting from *Las Animas County High School Dist. v. Raye*, 144 Colo. 367, 356 P.2d 237, 239 (1960)).

21. Justice Carrigan stated: "The issue here is whether traditional, narrow concepts of what constitutes 'property' render the courts impotent to provide a remedy for an *obvious injustice*." 574 P.2d at 78 (Carrigan, J., dissenting) (emphasis added).

22. *Id.* at 76.

23. The majority considered the legislature's use of the adjective "all" in COLO. REV. STAT. § 14-10-113(2) (1973), as evidence of a far reaching property definition. 574 P.2d at 76.

24. 574 P.2d at 77.

voce. In answer to the second question, the degree and the increased earning capacity which it represented were considered a *factor* in property division and award of maintenance.<sup>25</sup>

Precedent for this holding was found in decisions from California<sup>26</sup> and New Jersey.<sup>27</sup> These states have considered whether education or increased earning capacity, or both, could be considered as separate items of property. Both have held that neither has an independent value but merely constitute *factors* to be considered in the division of property and determination of alimony.<sup>28</sup>

The dissent rejected this authority and argued that the most valuable asset of the marriage was the husband's increased earning capacity.<sup>29</sup> Though unable to cite any decisions that have considered earning capacity as a separate property asset,<sup>30</sup> the dissent claimed that "[i]n cases such as this, equity demands that courts seek extraordinary remedies to prevent extraordinary injustice."<sup>31</sup> The dissent analogized the present case to decisions involving a spouse's contribution to the business advantage and good will of a professional practice.<sup>32</sup> Though considered intangible and difficult to evaluate, several jurisdictions have awarded the good will of a professional practice an independent value and made it subject to division as a marital property asset.<sup>33</sup>

25. *Id.* at —, 574 P.2d at 78. See notes 15, 16 *supra* and accompanying text.

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

27. *Stern v. Stern*, 66 N.J. 340, 331 A.2d 257 (1975).

28. The California Court of Appeals was faced with the issue of whether an educational degree obtained during the marriage constituted community property. Expert testimony was introduced to establish a property valuation of a law degree and the court rejected this evaluation. Education is considered an intangible property right and incapable of being assessed a monetary value. Therefore, no amount was to be considered for division between the parties. *Todd v. Todd*, 272 Cal. App. 2d 786, —, 78 Cal. Rptr. 131, 135 (1969).

In *Stern v. Stern*, 66 N.J. 340, 331 A.2d 257 (1975), the New Jersey Supreme Court held that regardless of whether earning capacity had been enhanced by the efforts of a spouse, it should only be considered in determining an equitable property distribution and on the issue of alimony. Future earning capacity was not deemed a separate item of property within the meaning of the statute. *Id.* at —, 331 A.2d at 260.

The first District Court of Appeals of Indiana has held that "there is nothing in the statute which lends itself to the interpretation that future income is 'property' and therefore divisible." *Wilcox v. Wilcox*, 365 N.E. 2d 792, 795 (Ct. App. Ind. 1977). See also *Daniels v. Daniels*, 20 Ohio Op. 2d 450, 185 N.E.2d 773 (Ct. App. 1961); *Vanet v. Vanet*, 544 S.W.2d 236 (Mo. App. 1976), where future earning capacity has been considered a factor in the award of alimony.

29. 574 P.2d at 78 (Carrigan, J., dissenting).

30. Several decisions are cited by the dissent which have held earning capacity to be a factor in the award of alimony and division of property. See *Kraus v. Kraus*, 159 Colo. 331, 441 P.2d 240 (1966); *Shapiro v. Shapiro*, 115 Colo. 505, 176 P.2d 363 (1946). Cf. *Spears v. Spears*, 148 So. 2d 564 (Fla. Dist. Ct. App. 1963); *Hegge v. Hegge*, 236 N.W.2d 910, 919 (N.D. 1975) (Vogel, J., dissenting) (where the dissent considers an educational degree as a property asset.)

31. 574 P.2d at 78 (Carrigan, J., dissenting).

32. *Id.*

33. *Mueller v. Mueller*, 144 Cal. App. 2d 245, 301 P.2d 90 (1956); *In re Marriage of Goger*, 27

For this analogy to be valid, good will and an educational degree must share similar characteristics.<sup>34</sup> The dissent's good will analogy meets nearly all the majority's objections in their analysis of an educational degree as property.<sup>35</sup> An educational degree is neither alienable nor inheritable, and it is personal to the holder. Likewise, good will of a professional practice is personal and non-inheritable. Good will possesses a present exchange value, and an educational degree, particularly a professional degree, *can be* assessed a present exchange value<sup>36</sup> in terms of earning potential.<sup>37</sup> The critical break down in the good will analogy is the inability to transfer an educational degree.

Though the analogy is not complete, the dissent could have argued that the absence of alienability is not sufficient to justify the inequitable result in *Graham*. Had the parties remained married for a period after the husband's graduation, substantial marital property would have been accumulated. Initiation of divorce proceedings after the accumulation of marital property would have enabled the wife's contribution to receive consideration in the property division.<sup>38</sup> The classic situation in *Graham*, where no marital property has been accumulated and maintenance is not available, rewards the husband who petitions for divorce immediately after graduation.

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Or. App. 729, 557 P.2d 46 (1976); *In re Marriage of Lukens*, 16 Wash. App. 481, 558 P.2d 279 (1976). *But see* *Nail v. Nail*, 486 S.W.2d 761 (Tex. 1972).

34. "Goodwill" was defined by Justice Story to be:

[T]he advantage or benefit which is acquired by an establishment beyond the mere value of the capital, stock, funds or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers, on account of its local position, or common celebrity, or reputation for skill or affluence, or punctuality, or from other accidental circumstances, or necessities, or even from ancient partialities or prejudices.

J. STORY, *STORY ON PARTNERSHIPS* § 99 at 170 (1868). *See In re Marriage of Foster*, 42 Cal. App. 3d 577, 581-82, 117 Cal. Rptr. 49, 52 (1974); Lurvey, *Professional Goodwill on Marital Dissolution: Is It Property or Another Name for Alimony?*, 52 CAL. S.B.J. 27 (1977).

35. The majority analysis focused on the factors of: (1) alienability, (2) the personal nature of the item to the holder, and (3) inheritability. 574 P.2d at 77.

36. *See Mueller v. Mueller*, 144 Cal. App. 2d 245, 301 P.2d 90 (1956); *In re Marriage of Goger*, 27 Or. App. 729, 557 P.2d 46 (1976); *In re Marriage of Lukens*, 16 Wash. App. 481, 558 P.2d 279 (1976). *But see Nail v. Nail*, 486 S.W.2d 761 (Tex. 1972).

37. "[F]ederal and state records, surveys and statistics dealing with incomes and earnings of people with various educational backgrounds and of various occupations and professions," were not allowed into evidence in *Todd v. Todd*, 272 Cal. App. 2d 786, —, 78 Cal. Rptr. 131, 134 (1969). However such data was utilized by the trial court in *Graham* to establish the present value of the husband's increased earning capacity. *See* note 10 *supra*.

38. The dissent explained that in a divorce with the accumulation of marital property, "abundant precedent authorized the trial court, in determining how much of the marital property to allocate to the wife, to take into account her husband's earning capacity." 574 P.2d at 78 (Carri-gan, J., dissenting).

Furthermore, cases involving a spouse's contribution to education and future earning capacity will typically involve young couples without substantial assets or accumulated marital property.<sup>39</sup> Such couples have concentrated their resources on the attainment of the degree which the Colorado Supreme Court has determined does not have an independent value.<sup>40</sup> A rule of law rewarding divorce immediately upon graduation may have been created unthinkingly by the court.

*The Availability of Alternative Relief?*

The Court maintained that a spouse who contributes to the higher education and increased earning capacity of her husband is not without a remedy.<sup>41</sup> It is true that where marital property *has been* accumulated, the contribution to the education of the spouse may be taken into consideration in the property division. Each spouse's contribution to marital property has traditionally been a factor in property division.<sup>42</sup> On the other hand, where no marital property has been acquired,<sup>43</sup> as in *Graham*, no basis exists upon which to adjust the equities of the wife's contribution to her husband's degree.

The court further explained that the determination of maintenance payments was to be based on all relevant factors, and the educational support provided in *Graham* was clearly such a relevant factor.<sup>44</sup> This basis for consideration of a spouse's contribution is even more illusory than in the property division context. The policy of the Uniform Act is to achieve financial independence through property division, and qualification for maintenance is extremely difficult.<sup>45</sup> Although the Colorado Supreme Court considered a legal remedy available, the petitioning wife in *Graham* was caught in a perfect "catch-22." She invested her present earnings in the attainment of the husband's advanced educational degree which improved *his* future earning capacity, and by proving her ability to provide for the couple's needs, she has

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39. Justice Carrigan considered *Graham* as representative of the "not un-familiar 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." *Id.*

40. See notes 17-25 *supra* and accompanying text.

41. 574 P.2d at 78.

42. See *Greer v. Greer*, 32 Colo. App. 196, 510 P.2d 905 (1973); *Mallett v. Mallett*, 540 P.2d 1109 (Colo. App. 1975); *Rieger v. Christensen*, 529 P.2d 1362 (Colo. Ct. App. 1974); *Carlson v. Carlson*, 178 Colo. 283, 497 P.2d 1006 (1972); *Thompson v. Thompson*, 489 P.2d 1062 (Colo. Ct. App. 1971).

43. In the case where little marital property has been accumulated, even a total distribution to the contributing spouse may be insufficient compensation.

44. 574 P.2d at 78. See also *Kraus v. Kraus*, 159 Colo. 331, 411 P.2d 240 (1966); *Shapiro v. Shapiro*, 115 Colo. 505, 176 P.2d 363 (1946); *In re Marriage of Ellis*, 538 P.2d 1347 (Colo. Ct. App. 1975).

45. See notes 7, 8 *supra* and accompanying text.



negated the possibility that she might be repaid for her efforts. Without accumulated marital property, her support during the marriage is without a basis for consideration and her contribution is an uncompensated loss.

### *The Oklahoma Alternative*

In contrast to the Colorado Supreme Court's definitional approach to the issue of whether an educational degree constitutes marital property,<sup>46</sup> the Oklahoma courts have devised an equitable remedy for the situation presented in *Graham*. Oklahoma statutes<sup>47</sup> concerning the disposition of property and award of alimony upon divorce allow the courts considerable discretion in achieving a just and reasonable settlement.<sup>48</sup> In contrast, the Colorado statute is more explicit in defining what factors should be considered in property distribution.<sup>49</sup> Regardless of these statutory differences, the practical result of *property* division in both jurisdictions is generally the same. Trial courts are given broad discretion in determining property divisions, and the Oklahoma Courts generally apply the same factors set fourth in the Colorado statute.<sup>50</sup> The statutes and resulting impact are radically different in their requirements for *alimony* payments. The Oklahoma divorce and alimony law does not require the wife to qualify within the restrictive Colorado guidelines for maintenance.<sup>51</sup> The Oklahoma courts are sim-

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46. See notes 19-24 *supra* and accompanying text.

47. OKLA. STAT. tit. 12, §§ 1278, 1289 (Supp. 1977).

48. Section 1278 provides in part:

Alimony may be allowed from real or personal property, or both, or in the form of money judgment, payable either in gross or in installments, as the court may deem just and equitable. As to such property, whether real or personal, which has been acquired by the parties jointly during their marriage, whether the title thereto be in either or both of said parties, the court shall make such division between the parties as may appear just and reasonable . . . ."

OKLA. STAT. tit. 12, § 1278 (Supp. 1977).

49. The statute provides that property shall be divided without regard to marital misconduct, and in such proportions as the court deems fair after considering all relevant factors including:

(a) The contribution of each spouse to the acquisition of the marital property, including the contribution of a spouse as homemaker;

(b) The value of the property set apart to each spouse;

(c) The economic circumstances of each spouse at the time the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to the spouse having custody of any children; and

(d) Any increase or decreases in the value of the separate property of the spouse during the marriage or the depletion of the separate property for marital purposes.

COLO. REV. STAT. § 14-10-113(1) (1973).

50. Compare *Harrod v. Harrod*, 34 Colo. App. 172, 526 P.2d 666 (1974) with *Peters v. Peters*, 539 P.2d 26 (Okla. 1975).

51. Compare COLO. REV. STAT. § 14-10-114 (1973) with OKLA. STAT. tit. 12, §§ 1278, 1289 (Supp. 1977).

ply directed to award alimony "payable either in gross or in installments, as the court may deem just and equitable,"<sup>52</sup> without the stringent need and unemployability requirements. As a result of this broad standard, Oklahoma decisions have frequently obscured the distinction between alimony and property division.<sup>53</sup>

Section 1289(b) of the Oklahoma statute calls for the courts to distinguish between alimony and property division. The subsection provides that the court must designate each portion of any periodic payments as either payments for support or as a division of property.<sup>54</sup> This distinction permits property division payments to continue beyond the death or remarriage of the recipient.<sup>55</sup>

The statutory distinctions between payments for support and payments effecting a property division are critically relevant in the context of *Graham*. On several occasions the Oklahoma courts have faced a fact situation to *Graham*.<sup>56</sup> For example, in *Diment v. Diment*<sup>57</sup> a wife had supported her husband through undergraduate college and medical school. The couple had accumulated no marital property, and the wife was clearly capable of supporting herself. In consideration of the wife's contribution to her husband's support and education, the trial court ordered the husband to pay \$39,600 as "permanent alimony."<sup>58</sup> On appeal the husband argued that, since the award was not designated as a property division or alimony for support, it should be considered a support obligation and be terminated due to the wife's remarriage.<sup>59</sup>

The court of appeals ruled that "although the award [was] termed

52. OKLA. STAT. tit. 12, § 1278 (Supp. 1977). See note 48 *supra* for the relevant text of the statute.

53. See, e.g., *Bowring v. Bowring*, 196 Okla. 520, 166 P.2d 415 (1946). See generally Comment, *Domestic Relations: Relevant Factors in the Division of Jointly Acquired Property*, 23 OKLA. L. REV. 288 (1970); Comment, *Alimony and the Division of Jointly Acquired Property*, 14 OKLA. L. REV. 422 (1961). For discussion of the traditional distinctions between alimony and property settlements, see CLARK *supra* note 11, at § 14.8.

54. See OKLA. STAT. tit. 12, § 1289(b) (Supp. 1977).

55. Section 1289(b) provides that payments made in division of property are nonterminable. Payments for support shall continue until completed as per the decree or terminate upon death of the recipient. The court is also directed to terminate the support payments upon remarriage of the recipient unless a proper showing is made that the support is still necessary. OKLA. STAT. tit. 12, § 1289(b) (Supp. 1977).

56. See *Colvert v. Colvert*, 568 P.2d 623 (Okla. 1977); *Diment v. Diment*, 531 P.2d 1071 (Okla. Ct. App. 1974); *Conrad v. Conrad*, 471 P.2d 892 (Okla. 1969); *Henley v. Henley*, 428 P.2d 258 (Okla. 1967).

57. 531 P.2d 1071 (Okla. Ct. App. 1974).

58. *Id.* at 1072.

59. *Id.* Since *Diment*, the Oklahoma Supreme Court has ruled that "under § 1289(b) periodic alimony payments will not terminate upon remarriage of the recipient unless the original decree designates such payments as being for support, or expressly provides such payments are to terminate upon remarriage of the recipient." *Shea v. Shea*, 537 P.2d 417, 419 (Okla. 1975).

'permanent alimony' it [was] in substance a property award"<sup>60</sup> for the contribution the wife had made to her husband's increased earning capacity. Although not directly confronted with the issue of whether an educational degree is a marital asset, the *Diment* opinion did consider the value of increased earning capacity as an independent asset for property division. This result is apparently opposite to the *Graham* court's conclusion that an educational degree could not constitute an independent property asset.<sup>61</sup>

The logical extension of the *Diment* opinion was later restricted by the Oklahoma Supreme Court in *Colvert v. Colvert*.<sup>62</sup> On the basis of facts nearly identical to *Diment*, the trial court had awarded the wife \$35,000 in "alimony as a property division."<sup>63</sup> On appeal, the husband who had received his medical degree six months after petitioning for divorce, contended that the trial court decree had given the wife a property right in his license to practice medicine. If such a property right existed, the husband claimed a similar right in her license to practice pharmacy.<sup>64</sup> Without substantial clarification, the Oklahoma Supreme Court rejected the property rights argument and simply stated that the decree of the trial court "gave no property rights in the yet to be received certificate to practice medicine."<sup>65</sup>

In upholding the decree, the supreme court did not consider the dual analysis of whether earning capacity or an educational degree should be considered an independent asset subject to property division, or a factor in the determination of alimony.<sup>66</sup> Property rights were not involved and yet the \$35,000 award constituted a non-terminable *property division*.<sup>67</sup>

The equitable considerations voiced in the opinion of the court provide some clarification for its holding. The Justices paid particular attention to the husband's increased earning capacity which had been

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60. 531 P.2d at 1073.

61. See notes 16-19 *supra* and accompanying text.

62. 568 P.2d 623 (Okla. 1977).

63. In *Colvert*, the wife provided support for the family while her husband attended medical school. The husband's father had paid for most of the medical school tuition and other educational expenses. *Id.* at 624.

64. *Id.* at 625.

65. *Id.*

66. See note 16 *supra* and accompanying text.

67. The Oklahoma Supreme Court held: "The decree gave the wife alimony designated as property settlement, rather than support, as allowed by 12 O.S. 1971 §§ 1278 and 1289." 568 P.2d at 625.

acquired through the efforts of his wife.<sup>68</sup> The family was considered as having made an "investment, not in real or personal property, but in [the] husband's professional education as a doctor."<sup>69</sup> The court was simply unwilling to deny the wife compensation for her contributions to the family.

In refusing to classify this award as a "property right" in the medical degree, the court would have seemingly agreed with the majority in *Graham*. Nevertheless, *Colvert* must have granted the degree some independent value since the small amount of other marital property subject to division was exceeded in value by the wife's award in the divorce decree. The Oklahoma courts have ruled, through *Colvert* and *Diment*, not only that increased earning capacity or an educational degree is to be considered in determining each spouse's share of the marital property, but that they may be considered to increase the basis for that share.

Thus the Oklahoma Supreme Court has utilized the flexibility in the Oklahoma statutes to fashion an equitable remedy. However, the cost of this position is a further blurring of the traditional lines between alimony for support and payments to effect a property settlement.<sup>70</sup>

### Conclusion

The Uniform Marriage and Divorce Act has provided concise guidelines for determining property division and maintenance in dissolution proceedings.<sup>71</sup> The application of the Colorado version of the Act under the circumstances in *Graham* illustrates the potential for unjust results when the statute is strictly applied. Classifying a spouse's contribution to the educational status of her partner as a factor in determining the financial settlement is in accordance with other jurisdictions,<sup>72</sup> but the Colorado emphasis on property division and restrictive qualifications for maintenance results in inequity. In the absence of accumulated marital property, a spouse's contribution is without a basis for consideration and merely an illusory factor.

While not adhering to the traditional concepts and purposes of alimony and property division, the Oklahoma Supreme Court has fashioned an equitable remedy for the injustice presented in *Graham*. This

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68. *Id.* at 626. The equitable arguments of the *Graham* dissent are reflected in the reasoning of the Oklahoma Justices.

69. *Id.*

70. See note 53 *supra*.

71. UNIFORM MARRIAGE AND DIVORCE ACT §§ 301-410. See note 7 *supra* and accompanying text.

72. See notes 28-30 *supra* and accompanying text.

approach, while obscuring the conceptual framework of property division and support alimony, coincides with the perceptions of the dissenting justices in *Graham*.

The Colorado statute is a successful attempt to define the financial considerations in marriage dissolution, but diverse situations require responsive judicial treatment and equitable solutions. Consistent failure to recognize such equitable demands may render the inflexibility of the statute intolerable.

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