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Deborah Gronet

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DIVORCE—THE EFFECT OF A SPOUSE'S PROFESSIONAL DEGREE ON A
DIVISION OF MARITAL PROPERTY AND AWARD OF ALIMONY.
Hubbard v. Hubbard, 603 P.2d 747 (Okla. 1979).

I. INTRODUCTION

The case of *Hubbard v. Hubbard*¹ recently presented the Oklahoma Supreme Court with an interesting and difficult question concerning the award of alimony and the division of property in a divorce proceeding. At issue was the question of whether the husband's professional degree, obtained through the joint efforts of the couple, was property subject to distribution upon dissolution of the marriage.²

After twelve years of marriage, Delores Hubbard filed for a divorce from her husband, Doctor R. O. Hubbard. During the course of their marriage Ms. Hubbard had worked to support the couple while her husband attended college and medical school and participated in his internship and residency program. She had contributed the majority of the couple's support during this time.³ The divorce action was commenced subsequent to the husband's completion of his medical education and training.

Ms. Hubbard prevailed at trial. The trial judge, characterizing the husband's medical degree as a valuable property right, found that Ms. Hubbard had a vested interest in it and awarded her \$100,000 in lieu of division of that property.⁴ Doctor Hubbard appealed, contending that the trial court improperly considered his future earnings as jointly acquired property subject to division or alimony in lieu thereof.⁵

1. 603 P.2d 747 (Okla. 1979).

2. *Id.* at 749.

3. *Id.*

4. *Id.* at 750. In granting the award of alimony in lieu of property division, the trial court found "that the defendant is reasonably expected to earn \$500,000.00 over the first twelve years of his beginning practice of medicine, with a net income of not less than \$250,000.00." *Id.* The \$100,000 award represented 40% of the husband's future net income. In the case of *In re Marriage of Graham*, __ Colo. __, 574 P.2d 75 (1978), which involved the same issue as that present in *Hubbard*, the trial court made a property division award to the wife which also represented 40% of the husband's future earning capacity based on his masters degree in business administration. *Id.* at __, 574 P.2d at 76. See Note, *Graduate Degree Rejected As Marital Property Subject To Division Upon Divorce*: In Re Marriage of Graham, 11 CONN. L. REV. 62, 65 n.12 (1978).

5. 603 P.2d at 750.

On appeal, the Oklahoma Supreme Court found that "a professional degree or license is the intangible and indivisible 'property' of its holder and no other person has a vested interest therein."⁶ Nonetheless, the court affirmed "the trial court's determination that Ms. Hubbard [was] entitled to a cash award *in lieu of property division* but [remanded] for further consideration so that award [could] be calculated in accord with [its] opinion."⁷

Hubbard was not the first opportunity the Oklahoma Supreme Court had to examine the status of a professional degree in a divorce proceeding. This opinion, however, is important because of the court's treatment of the property issue, its application of the Oklahoma statutes governing the distribution of property upon divorce,⁸ and its approach in determining a cash award to be given to the contributing spouse⁹ when it is determined that a professional degree was obtained through a couple's joint effort. The court disposed of these issues in a confusing and inconsistent manner. This article will attempt to clarify the court's opinion and determine the status of the above issues after *Hubbard*. A brief look at two prior Oklahoma cases will aid in attempting to understand *Hubbard* and its effect on future decisions.

6. *Id.*

7. *Id.* at 752 (emphasis added).

8. The pertinent statutes are found in title 12, sections 1278 and 1289 of the Oklahoma Statutes. Section 1278 provides in part:

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, by a division of the property in kind, or by setting the same apart to one of the parties, and requiring the other thereof to pay such sum as may be just and proper to effect a fair and just division thereof.

OKLA. STAT. tit. 12, § 1278 (Supp. 1979). Section 1289 provides in part:

In any divorce decree which provides for periodic alimony payments, the court shall plainly state, at the time of entering the original decree, what dollar amount of all or a portion of each such payment is designated as support, and what dollar amount of all or a portion of such payment is a payment pertaining to a division of property, [sic] Upon the death of the recipient, the payments for support, if not already accrued, shall terminate, but the payments pertaining to a division of property shall continue until completed; and the decree shall so specify. The payments pertaining to a division of property shall be irrevocable.

OKLA. STAT. tit. 12, § 1289(B) (Supp. 1979).

9. A contributing spouse may be broadly defined as one who contributes materially to the other spouse's support and education. It would seem a spouse may also contribute in ways other than monetarily, namely to the other spouse's emotional and mental well-being. This may well be what the trial court in *Hubbard* meant when they referred to the contributing spouse as a "stabilizing force." 603 P.2d at 749.

II. OKLAHOMA LAW PRIOR TO HUBBARD

*Diment v. Diment*¹⁰ and *Colvert v. Colvert*,¹¹ cases that preceded *Hubbard*, presented facts similar to those in *Hubbard*. Both cases were concerned with the effect a professional degree had on a court's award of alimony and division of property.¹² In *Diment*, the trial court ordered the husband to pay \$39,600 in alimony. A year and a half after the divorce, the wife remarried. The husband then appealed, requesting a clarification of the purpose of the alimony award. He argued that the trial court's award was for the wife's support and therefore, under title 12, section 1289 of the Oklahoma Statutes, his obligation to support her had terminated.¹³ The court of appeals, rejecting this contention, found that the alimony award was "in substance a property award"¹⁴ made in consideration of the wife's contributions to her husband's increased earning capacity.¹⁵ The court of appeals noted that the award was made in lieu of a property division pursuant to section 1289,¹⁶ and was necessary in order to enable the court to reach an equi-

10. 531 P.2d 1071 (Okla. Ct. App. 1974). For a brief discussion of *Diment*, see Erickson, *Spousal Support Toward the Realization of Educational Goals: How the Law can Ensure Reciprocity*, 78 WIS. L. REV. 947, 964 (1978); 13 TULSA L.J. 646, 654 (1978).

11. 568 P.2d 623 (Okla. 1977). For a brief discussion of *Colvert* see 13 TULSA L.J. 646, 655-56 (1978).

12. 531 P.2d at 1073; 568 P.2d at 625. Title 12, section 1289 of the Oklahoma Statutes was recently amended. As amended it became effective October 1, 1979. Act of June 6, 1979, c. 278, 1979 Okla. Sess. Laws 793, § 1. Both *Diment* and *Colvert* were decided prior to this most recent amendment. While there was no substantive change made by the most recent amendment, that part of the statute dealing with alimony in lieu of property settlement was reworded. Prior to the 1979 amendment, section 1289 read as follows:

In any divorce decree entered after December 31, 1967, which provides for periodic alimony payments, the Court, at the time of entering the original decree, only, may designate all or a portion of each such payment as support, and all or a portion of such payment as a payment pertaining to a division of property.

OKLA. STAT. tit. 12, § 1289(b) (Supp. 1976). The 1979 amendment changed section 1289 to read as follows:

In any divorce decree which provides for periodic alimony payments, the court shall plainly state, at the time of entering the original decree, what dollar amount of all or a portion of each such payment is designated as support, and what dollar amount of all or a portion of such payment is a payment pertaining to a division of property.

OKLA. STAT. tit. 12, § 1289(B) (Supp. 1979). This attempted clarification may well have been in response to the confusion which resulted from *Diment* and *Colvert*.

13. 531 P.2d at 1072.

14. *Id.* at 1073.

15. *Id.*

16. OKLA. STAT. tit. 12, § 1289(B) (Supp. 1979). The court of appeals pointed out that under section 1289 designation of periodic alimony payments for purposes of either support or property division could only be made at the time of the entering of the original decree. Neither the trial court nor the court of appeals had the authority to change the decree. Because the trial court did not designate the periodic alimony payments as support alimony, the court of appeals held that such payments could continue in full, as alimony in lieu of property division, until the entire amount was awarded. 531 P.2d at 1074-75.

table result.

Colvert v. Colvert was decided by the Oklahoma Supreme Court three years after *Diment*. In *Colvert*, the trial court awarded the wife \$35,000 as alimony in lieu of a property division.¹⁷ The court based the award on the husband's future earning capacity and his certificate to practice medicine. The husband appealed, contending that the trial court erred in giving his wife a property right in his certificate to practice medicine.¹⁸ The Oklahoma Supreme Court, although finding that the wife had no property right in her husband's certificate to practice, upheld the trial court's award, noting that the wife's contributions to her husband's education and support were an investment for which she should be compensated.¹⁹

The holdings of *Diment* and *Colvert* created a confusing construction of sections 1278 and 1279. Section 1278 provides for a division of jointly held property "as may appear just and reasonable."²⁰ The purpose of the property division is to give each party that portion of the property "justly and equitably due."²¹ Section 1278's mandate then, is to ensure that property is fairly distributed upon divorce. What that property was in *Diment* and *Colvert* is not clear.

Diment and *Colvert* presented the court of appeals and the supreme court with situations where equity could not be achieved through a traditional division of property. At the time of these divorces, neither couple owned sufficient tangible property to allow for a property division that would, in the courts' opinions, treat the wife fairly and be within the spirit of the law.²² Essentially all that was obtained during each marriage as a result of the couple's joint efforts was the husband's education. A traditional application of property distribution rules would mean that the wife would leave the marriage as she had entered. The husband, on the other hand, would walk away with his position and earning capacity substantially improved. Resolution of this dilemma resulted in the confusing construction of sections 1278 and 1279 and led the courts to a novel solution of the problem. The

17. 568 P.2d at 624.

18. The husband argued further that if there existed such a property right then he would claim a similar property right in his wife's certificate to practice pharmacy. *Id.* at 625.

19. *Id.* at 626.

20. OKLA. STAT. tit. 12, § 1278 (Supp. 1979).

21. *Davis v. Davis*, 61 Okla. 275, 278, 161 P. 190, 192 (1916) (quoting *Bowers v. Bowers*, 70 Kan. 164, ___, 78 P. 430, 431 (1904)). Section 1278 was derived from a similar Kansas statute. *Id.* at 278, 161 P. at 192.

22. 568 P.2d at 624; 531 P.2d at 1073.

courts believed that the wife should be compensated for her contributions to her husband's increased earning capacity.²³ In an attempt to reach this result, the courts compensated the wife for her efforts in the form of a cash alimony award made in lieu of a property division. Support alimony was not adequate in that it would force the wife to forego marriage if she were to continue to receive alimony payments.²⁴

While this approach superficially solved this dilemma, it ignored another equally important issue, the characterization of the husband's increased earning capacity.²⁵ In neither *Diment* nor *Colvert* did the court explicitly designate this increased earning capacity as property. There being an apparent absence of any property, the courts misapplied section 1278. The resulting anomaly is that an alimony award granted on nonproperty considerations was made in lieu of a division of property. The stage was set for *Hubbard*.

III. THE REASONING OF HUBBARD

A. *Resolution of the Property Issue*

In order to dispense with the primary issue presented in *Hubbard*, it was necessary to determine whether an individual's future earning capacity or educational degree may or may not be characterized as property.²⁶ On this point, the opinion is very confusing. The supreme

23. 568 P.2d at 625, 626-27; 531 P.2d at 1073.

24. If the wife were to remarry, her alimony support would terminate. OKLA. STAT. tit. 12, § 1289(B) (Supp. 1979). This was expressly recognized by the trial court in *Colvert*. 568 P.2d at 625 n.3. While this result may seem somewhat harsh, it is a rather liberal approach when compared with other jurisdictions. In two cases which found an educational degree and increased earning capacity not to be property subject to division in a divorce proceeding, the wife was statutorily precluded from receiving an award of support alimony or maintenance. *In re Marriage of Graham*, __ Colo. __, 574 P.2d 74, 78-79 (1978) (applying COLO. REV. STAT. 14-10-114 (1973)); *Wilcox v. Wilcox*, __ Ind. App. __, 365 N.E.2d 792, 795 (applying IND. CODE § 31-1-11.5-9(c) (Burns Supp. 1976)).

25. See notes 26-46 *infra* and accompanying text.

26. Courts are split on precisely what it is that constitutes the property asset subject to division. In *In re Marriage of Graham*, the dissent argued that the increase in the husband's earning power which resulted from a degree earned in part through the efforts of the wife was an asset subject to division. __ Colo. at __, 574 P.2d at 79. In *In re Marriage of Horstmann*, 263 N.W.2d 885 (Iowa 1979), the court held that the potential for increase in future earning capacity, made possible by the law degree acquired with the aid of his wife's efforts, constituted the asset subject to division. *Id.* at 891. In *Inman v. Inman*, 578 S.W.2d 266 (Ky. Ct. App. 1979), the court held that the wife had a property interest in her husband's professional degree measured by her monetary contribution to his earning capacity. *Id.* at 269. In *Moss v. Moss*, 80 Mich. App. 693, 264 N.W.2d 97 (1978), the court approved an award in lieu of a property division based on the husband's future earning capacity, finding that "[i]t was impossible to award the wife a portion of the husband's medical degree, the only substantial asset acquired during coverture." *Id.* at __, 264 N.W.2d at 98.

In *Daniels v. Daniels*, __ Ohio App. __, 185 N.E.2d 773 (1961), the court held that the hus-

court refused to accept the trial court's characterization of a professional degree or license to practice medicine as property. Rather, it followed a recent Colorado case, *In re Marriage of Graham*,²⁷ wherein the Colorado Supreme Court, addressing the identical issue, also refused to designate an educational degree as property.²⁸ Further evi-

band's medical degree was the principal asset of the marriage and affirmed an award of alimony based on the husband's right to practice medicine. *Id.* at __, 185 N.E.2d at 775. The distinction drawn by the courts between increased future earning capacity and an educational degree is unclear. Courts which have held that either an educational degree or increased earning capacity is property, have failed to explain why one may be considered property and the other may not. For purposes of this paper, an individual with an educational degree will be viewed as possessing an increased future earning capacity. The two will be treated as simply different labels for the same property concept. See Comment, *Professional Education as a Divisible Asset in Marriage Dissolution*, 64 IOWA L. REV. 705, 710 n.51 (1979).

27. __ Colo. __, 574 P.2d 75 (1978). *Graham* involved a couple who jointly filed for divorce after six years of marriage. During that time, the wife had worked as an airline stewardess and contributed 70% of the financial support which was used to pay for her husband's education and to support the couple. The husband worked part-time and attended school to earn both a bachelor of science degree in engineering physics and a masters degree in business administration. No marital assets were accumulated during the marriage. Expert testimony established that the future earnings value of the husband's advanced degree was \$82,836. The trial court awarded the wife \$33,134 as alimony in lieu of property division and held that an education obtained by one spouse during a marriage was jointly acquired property which was subject to division under the Colorado Uniform Dissolution of Marriage Act. COLO. REV. STAT. § 14-10-101 to 133 (1973 & Supp. 1978). The Colorado Court of Appeals reversed the trial court's decision, *In re Marriage of Graham*, 555 P.2d 527 (Colo. Ct. App. 1976), and the wife appealed to the Colorado Supreme Court.

28. __ Colo. at __, 574 P.2d at 77. In affirming the holding of the court of appeals, the Colorado Supreme Court defined an educational degree as merely "an intellectual achievement that may potentially assist in the future acquisition of property." *Id.* at __, 574 P.2d at 77. The supreme court pointed out that such a degree did not have an "exchange value or any objective transferable value on an open market as it could not be assigned, sold, transferred, conveyed, or pledged." *Id.* at __, 574 P.2d at 77.

In reaching this conclusion, the court relied on the cases of *Todd v. Todd*, 272 Cal. App. 2d 786, 78 Cal. Rptr. 131 (1969), and *Stern v. Stern*, 66 N.J. 340, 331 A.2d 257 (1975), to support its holding. __ Colo. at __, 574 P.2d at 77. In *Todd*, the wife's earnings were used as community income and to pay for the husband's college and law school education. The wife contended that her husband's education, which was paid for by community funds, was an independent community asset which should have been considered in evaluating the community estate for divorce purposes. The California Court of Appeals held that an education could not be considered an independent asset applicable to a division of community property in a divorce action because a monetary value could not be placed on it. 272 Cal. App. 2d at __, 78 Cal. Rptr. at 134-35. The wife, however, was awarded \$111,500.97 in other community property assets. The court noted that the acquisition of these assets was made possible by the husband's legal education and thus the wife realized the value of the husband's education through the award of those assets. *Id.* at __, 78 Cal. Rptr. at 135. Accord, *In re Marriage of Aufmuth*, 89 Cal. App. 3d 446, __, 152 Cal. Rptr. 668, 679 (1979) (lawyer's earning capacity and expectation of future professional income do not constitute professional goodwill subject to property division).

Stern dealt with the issue of whether a husband's future earning capacity, enhanced through his marriage to a daughter of a man of high standing in his professional field, should be considered property subject to division in a divorce proceeding. The New Jersey Supreme Court held that "a person's earning capacity, even where its development has been aided and enhanced by the other spouse, should not be recognized as a property asset for purposes of equitable division of the marital assets upon divorce." 66 N.J. at __, 331 A.2d at 260 (applying N.J. STAT. ANN. § 2A:34-23

dence that the Oklahoma Supreme Court concluded that an educational degree could not be property can be found by examining the manner in which the award to Ms. Hubbard was to be computed,²⁹ and the court's overruling of *Colvert* insofar as it stood for the proposition that a court may consider the future earnings of a spouse in setting the amount of alimony under section 1278 and then designate such alimony payments based on future earning capacity as property division alimony under section 1289.³⁰

If this is indeed the position of the court, it is difficult to explain the result of the case. "[R]ecognizing that [Oklahoma would] be in the minority of jurisdictions affording relief by means of *property settlement*,"³¹ the court affirmed "the trial court's determination that Ms. Hubbard [was] entitled to a cash award *in lieu of property division*. . . ."³² If the professional degree is not property subject to division, then how may a cash award be given in lieu thereof? Resolution of this question will be delayed to examine the propriety of characterizing a professional degree as property for purposes of section 1278.

Several courts have advanced arguments against characterizing a professional degree or increased earning capacity as property. Various reasons have been given for this reluctance.³³ Foremost among them is the notion that a professional degree, being a tenuous property right, is difficult to value and would "create another field for battle in the al-

(West Supp. 1979)). The *Stern* court cited *Todd* as support for its conclusion. *Id.* at ___, 331 A.2d at 260 n.3.

See generally Erickson, *Spousal Support Toward the Realization of Educational Goals: How the Law Can Ensure Reciprocity*, 1978 WIS. L. REV. 947, 960-68; Comment, *The Interest of the Community in a Professional Education*, 10 CAL. W.L. REV. 590, 597-612 (1974); Note, *Graduate Degree Rejected as Marital Property Subject to Division Upon Divorce: In re Marriage of Graham*, 11 CONN. L. REV. 62 (1978); Comment, *Professional Education as a Divisible Asset in Marriage Dissolutions*, 64 IOWA L. REV. 705 (1979); Note, *In Re Marriage of Graham—Education Acquired During Marriage—For Richer Or Poorer?*, 12 J. MAR. J. PRAC. & PROCEDURE 709 (1979); Comment, *Divorce After Professional School: Education and Future Earning Capacity May be Marital Property*, 44 MO. L. REV. 329 (1979); 13 TULSA L.J. 646 (1978).

29. See notes 47-52 *infra* and accompanying text.

30. 603 P.2d at 752.

31. *Id.* at 751 (emphasis added).

32. *Id.* at 752 (emphasis added).

33. "[E]ducation is an intangible property right, the value of which, because of its character, cannot have a monetary value placed upon it for division between spouses." *Todd v. Todd*, 272 Cal. App.2d 786, ___, 78 Cal. Rptr. 131, 134 (1969). A vested present interest had to exist in order for something to come within the statutory definition of marital assets; a spouse does not have a vested present interest in his future earnings. *Wilcox v. Wilcox*, __ Ind. App. ___, 365 N.E.2d 792, 795 (1977). Earning capacity is not property because "it would be unjust to order the distribution of what is, at best, an expectancy, where that order would not be subject to modification should the expectancy fail to materialize." *Nastrom v. Nastrom*, 262 N.W.2d 487, 493 (N.D. 1978).

ready complex and delicate area of division of marital property."³⁴ The force of this argument is slight when one considers other principles, equally as intangible and tenuous as a professional degree, that have been recognized and valued as property. Professional goodwill,³⁵ a concept in many respects similar to increased earning capacity, has been characterized as "elusive, intangible [and] difficult to evaluate. . . ."³⁶ The courts, however, have not found this to be a reason for excluding it from an evaluation of a professional business for purposes of property division upon divorce.³⁷ Also, as pointed out by the dissent in *Graham*, the fear of being unable to value a spouse's increased earning capacity is unfounded.³⁸ In other areas of the law, for example wrongful death actions, a spouse's future earning capacity is valued.³⁹ Such is the case in Oklahoma.⁴⁰ A few courts, after considering a number of factors that clothe something with a property label, found that increased earning capacity or an educational degree could be characterized as property.⁴¹

The Oklahoma Supreme Court has stated that private property "necessarily includes everything that can be held or owned by private persons, and it is not limited to a tangible subject matter or corpus, but includes the right of user and enjoyment thereof."⁴² A spouse's future earning capacity, as represented by a professional degree, would seem to be encompassed by this definition of property and it should be treated accordingly. This is especially true for the limited purpose of

34. *Inman v. Inman*, 578 S.W.2d 266, 268 (Ky. Ct. App. 1979).

35. "The 'goodwill' value of any business is the value that results from the probability that old customers will continue to trade with an established concern." *Freeling v. Wood*, 361 P.2d 1061, 1063 (Okla. 1961). Goodwill has been commonly defined as an intangible asset which is "an element responsible for the profits in a business." *Jacob v. Miner*, 67 Ariz. 109, ___, 191 P.2d 734, 741 (1948).

36. *In re Marriage of Lopez*, 38 Cal. App. 3d 93, 108, 113 Cal. Rptr. 58, 67 (1974).

37. *Id.*

38. 574 P.2d at 78-79.

39. *Id.* at 79.

Thus one who tortiously destroys or impairs another's future earning capacity must pay as damages the amount the injured party has lost in anticipated future earnings

Where a husband is killed, his widow is entitled to recover for loss of his future support damages based in part on the present value of his anticipated future earnings, which may be computed by taking into account probable future increases in his earning capacity.

Id. (Carrigan, J., dissenting).

40. See OKLA. STAT. tit. 12, § 1053 (1971).

41. See note 26 *supra*.

42. *British-Am. Oil Producing Co. v. McClain*, 191 Okla. 40, 43, 126 P.2d 530, 533 (1942) (quoting from 50 C.J. *Property* § 2 (1930)).

equitable treatment of the parties upon a divorce.⁴³ This concept was accepted by a strong dissent in *Hubbard*. Chief Justice Lavender writing for the dissent found: "[T]he potential for an increase in the husband's future earning capacity to the extent it was made possible by the wife's efforts does constitute an asset (of the husband) out of which an award of alimony in lieu of a division of property can be made."⁴⁴

The Oklahoma Supreme Court's apparent characterization of a spouse's increased earning capacity by reason of a professional degree obtained through joint efforts of the couple as nonproperty indicates that the court's use of sections 1278 and 1279 was incorrect. How is it possible to award alimony in lieu of a property division when the court has found that there is no property? Perhaps the court's application of these sections was merely out of habit, a result of its traditional application in divorce proceedings. In reality the court has masked a novel application of another doctrine under the guise of sections 1278 and 1279.

B. *The Hubbard Court's Award*

The court stated that "[to] avoid unnecessary confusion and speculation, we stress that we have done nothing in this action but allow Ms.

43. In Oklahoma an action for divorce, alimony, and division of jointly acquired property is one of equitable cognizance. *Peters v. Peters*, 539 P.2d 26, 27 (Okla. 1975).

44. 603 P.2d at 75. While recognizing this as an asset, the dissent expressly rejects technical rules of property as the guidepost to its decision. *Id.* The dissent cited *In re Marriage of Horstmann*, 263 N.W.2d 885 (Iowa 1978), in support of this argument. In *Horstmann*, the wife sacrificed her education in order to have a child and to support the family while her husband attended law school. The couple had accumulated very little in the way of marital assets. During the marriage, the couple received financial assistance from their parents. The trial court viewed the attainment of the husband's education through the efforts of both parties as "similar to the building of a business through the joint efforts of both parties that has good potential for the future." *Id.* at 887. The trial court held that the husband's education was an asset of the marriage subject to property division and awarded the wife an \$18,000 property distribution. The husband appealed, contending that a law school education and admittance to the bar did not constitute an asset of the marriage subject to division. The Iowa Supreme Court affirmed the award holding that the husband's "potential for increase in earning capacity made possible by a law degree and certificate of admission conferred upon the husband with the aid of his wife's efforts . . . constitute the asset for a distribution by the court." *Id.* at 891. For a case rejecting the *Horstmann* decision, see *In re Marriage of Aufmuth*, 89 Cal. App. 3d 446, ___, 152 Cal. Rptr. 668, 678 n.5 (1979). For a detailed discussion of *Horstmann* and the methods that could be used to value a degree or increased future earning capacity and the problems surrounding their use, see Comment, *Professional Education as a Divisible Asset in Marriage Dissolutions*, 64 IOWA L. REV. 705 (1979); Comment, *Divorce After Professional School: Education and Future Earning Capacity May Be Marital Property*, 44 MO. L. REV. 329 (1979). For a brief discussion of *Horstmann* and the various remedies used by the states to solve the problem presented in *Hubbard* as well as a proposal for a new cause of action for reimbursement of educational expenses, see Erickson, *Spousal Support Toward the Realization of Educational Goals: How the Law Can Ensure Reciprocity*, 1978 WIS. L. REV. 947.

Hubbard a return on her investment to prevent Dr. Hubbard's unjust enrichment."⁴⁵ A substantial portion of the court's opinion concerned the investment which Ms. Hubbard had made in her husband's education and the inequitable result which would follow if he were allowed to retain this unjust enrichment. From the language of the opinion, it is apparent that the court is applying the doctrine of quasi-contract. The court said, "We are persuaded by the suggestion in the forceful dissenting opinion in *Graham* that the doctrine of quasi contract offers a remedy for a spouse in these circumstances."⁴⁶ This approach is consistent with the court's treatment of the property issue. That the court is basing Ms. Hubbard's award on quasi-contract and not a property division is apparent when they say that "we limit the factors determining [the] award to fair compensation for her past investment, rather than a 'vested interest' in his future earnings."⁴⁷

45. 603 P.2d at 752. The court attempted to limit its holding to the facts that were before it. It stated, "We view this recovery as limited by the facts of the case before us." *Id.* However, the fact that increased earning capacity is not treated as property by the court, coupled with the court's use of quasi-contract as a remedy for a spouse in Ms. Hubbard's situation, logically gives rise to the possibility of the creation of a new independent cause of action in which a spouse could bring an action *ex contractu* to recover the initial investment which he or she may have made in the other spouse's education or abilities. This new cause of action would not be contingent upon whether there are jointly acquired marital assets to divide between the couple upon divorce.

46. 603 P.2d at 751. The *Graham* dissent argued that equity required the court in such a situation to "seek extraordinary remedies to prevent extraordinary injustice" to a spouse in this situation. 574 P.2d at 78 (Carrigan, J., dissenting). The dissent suggested that "the wife might have a remedy in a separate action based on implied debt, quasi-contract, unjust enrichment, or some similar theory." *Id.* at 79. The dissent pointed out that had the parties remained married long enough after the husband had completed his postgraduate education, so that they could have accumulated substantial property assets, this situation would not have presented a problem. For "the trial court, in determining how much of the marital property to allocate to the wife, [could] take into account her contributions to her husband's earning capacity." *Id.* at 78.

The *Hubbard* court relied on the case of *Inman v. Inman*, 578 S.W.2d 266 (Ky. Ct. App. 1979), as authority for the application of the *Graham* dissent's view. 603 P.2d at 751. In *Inman*, the husband, a dentist, and the wife, a teacher, were divorced after seventeen years of marriage and three children. Both spouses contributed financially to the husband's education and support. While married, the Inmans were able to acquire an expensive home. It was, however, later foreclosed. The trial court found that Dr. Inman's license to practice dentistry was marital property. It did not, however, place a dollar value on it. Viewing Dr. Inman's future earning capacity as marital property, the trial court allocated most of the valuable marital assets to the wife. The issue on appeal was whether the trial court acted improperly in allocating most of the marital assets to the wife under the theory that the husband's license to practice dentistry constituted a marital asset. The Kentucky Court of Appeals held that the wife had a property interest in her husband's license to practice dentistry. 578 S.W.2d at 270. The court stated,

Thus the amount spent for direct support and school expenses during the period of education, plus reasonable interest and adjustments for inflation, should be apportioned to the spouse who provided support when, as in the case of the Inmans', there is little or no marital property acquired through the increased earning capacity provided by the supported spouse's degree or training. *Id.* at 269-70.

47. 603 P.2d at 752. In Oklahoma it has been held that " 'contracts implied by law . . . are a class of obligations which are imposed or created by law without regard to the assent of the party

Accordingly, the supreme court remanded the case for the limited purpose of calculating the award. In accordance with the opinion, this calculation will have to be based on a theory of quasi-contract. The factors to consider in setting this award are the spouses' "contributions to . . . direct support and school and professional training expenses, plus reasonable interest and adjustments for inflation as and for property division alimony"⁴⁸

While the court seems compelled by the equities of the situation to provide the contributing spouse with some type of award, it did not go far enough. Allowing an award for a return of an investment based on quasi-contract is not attuned to the realities of the situation. The contributing spouse is not receiving that which he or she is due. The following example may clarify this point. Suppose spouse A and spouse B both contribute five dollars towards the acquisition of a piece of property. Further suppose that after holding the property for a period of time its value appreciates to one hundred dollars. The two parties then decide to divest themselves of the property and do so for one hundred dollars. Would it be equitable to give only five dollars to spouse A as a return of his or her investment when the property is worth more?

This is the precise result of *Hubbard*. By limiting Ms. Hubbard's award in the manner in which they did, the court did not reflect her real interest in Dr. Hubbard's professional degree. The degree was worth substantially more than her investment yet the trial court will be limited in its determination of the amount to be awarded Ms. Hubbard to a mere return of that investment. More appropriate would have been to value the degree, perhaps measured by the earning capacity of the husband, and allow her an award based on her proportionate investment. This is the result reached by the trial court⁴⁹ and adopted by the dissent in *Hubbard*.⁵⁰

bound, on the ground that they are dictated by reason and justice.' " *Frost v. Ponca City*, 541 P.2d 1321, 1325 (Okla. 1975) (quoting *Anderson v. Copeland*, 378 P.2d 1006, 1007 (Okla. 1963)). In *McBride v. Bridges*, 202 Okla. 508, 215 P.2d 830 (1950), the Oklahoma Supreme Court stated:

"Unjust enrichment arises not only where an expenditure by one person adds to the property of another, but also where the expenditure saves the other from expense or loss. One is not unjustly enriched, however, by retaining benefits involuntarily acquired which law and equity give him absolutely without any obligation on his part to make restitution."

Id. at 510, 215 P.2d at 832 (quoting 46 AM. JUR. *Restitution and Unjust Enrichment*, at 99-100 (1943)).

48. 603 P.2d at 752.

49. See note 45 *supra* and accompanying text.

50. 603 P.2d at 753.

IV. CONCLUSION

Two principles appear clear from the *Hubbard* decision. First, a spouse in the position of Ms. Hubbard will be able to obtain an award based on quasi-contract for a return on her investment made during the marriage. This award may well be characterized as alimony in lieu of property division. Second, increased earning capacity is not a property asset under sections 1278 and 1289.

While this situation is preferable to leaving the contributing spouse with nothing, the Oklahoma Supreme Court did not go as far as they could or should have. Their refusal to characterize a spouse's increased earning capacity as property is unfounded. Increased earning capacity, like many other things in the law, may be difficult to value, but this difficulty should not act as an obstacle to reaching an equitable result. Only by treating the increased earning capacity as property, valuing it accordingly, and dividing it according to the spouses investment, will a person in Ms. Hubbard's situation be given the award they deserve.

Deborah Gronet