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## *Horstmann v. Horstmann*: PRESENT RIGHT TO PRACTICE A PROFESSION AS MARITAL PROPERTY

The common law had its origins in a literal culture; the middle ages regarded the union of marriage as a fusion into a single legal entity, the husband. The Uniform Marriage and Divorce Act, adopted in various forms in most jurisdictions,<sup>1</sup> is one of the vanguards in the gradual transmogrification of the "union" into the "shared enterprise" or "implied partnership" concept of the marital relationship in common law jurisdictions.<sup>2</sup> Its outstanding feature is a characterization of dissolution as a "no fault" equitable process in which both parties receive a just share of that which was accumulated jointly during coverture.<sup>3</sup>

The Iowa court in *In re Marriage of Horstmann*<sup>4</sup> recently directed that equitable power to a traditionally inequitable phenomenon in the division of marital assets. This case presents the familiar pattern of a wife who, willing to sacrifice for a more secure financial future, works to send her husband through school, only to be awarded a divorce decree shortly after he is awarded his degree.<sup>5</sup> Normally the parties have not accumulated much in the way of marital assets because the return on the educational investment has not yet been realized, so the amount of divisible marital property is limited. Nor are the wife's expenditures refunded, because the monies are deemed to have been spent for "community purposes"<sup>6</sup> rather than on the enhancement of separate property,<sup>7</sup> although the education itself has

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<sup>1</sup> Including IOWA CODE ANN. § 598. See Foster, *Divorce Reform and the Uniform Act*, 7 FAM. L.Q. 179 (1973); Foster and Freed, *Economic Effects of Divorce*, 7 FAM. L.Q. 275 (1973); *State Divorce Laws*, FAM. L. REP. (BNA) 401:001 (1978).

<sup>2</sup> Krauskopf, *A Theory for "Just" Division of Marital Property in Missouri*, 41 MO. L. REV. 165 (1976); Murphy, *The Implied Partnership: Equitable Alternative to Contemporary Methods of Postmarital Property Distribution*, 26 U. FLA. L. REV. 221, 226 (1974).

<sup>3</sup> IOWA CODE ANN. §§ 598.3, .21.

<sup>4</sup> 263 N.W.2d 885 (Iowa 1978).

<sup>5</sup> *In re Marriage of Graham*, 574 P.2d 75, 78 (Colo. 1978) (Carrigan, J., dissenting). The positions occupied by husband and wife are obviously reversible, but because *Horstmann* follows the more typical role pattern of the wife as the supporting spouse the case is discussed in the context of this model.

<sup>6</sup> Cf. *Thompson v. Thompson*, 30 Colo. App. 57, 489 P.2d 1062 (1971) (husband's expenditures, which made it possible for wife to invest heavily in her separate property, should be considered a contribution to the increase of the parties' joint assets).

<sup>7</sup> Cf. *In re Abdale's Estate*, 28 Cal. 2d 587, 170 P.2d 918 (1946) (advancement of separate funds by wife to husband for investment in his separate property presumed a loan).

never been characterized as a marital asset.<sup>8</sup> Valuation of the parties' assets normally occurs at the time of the decree, therefore the husband leaves the marriage with a valuable asset in terms of increased earning capacity attributable to the present right to practice a profession,<sup>9</sup> while the wife is not even recompensed in the amount of her initial investment.

In response to unjust enrichment of the husband, literally at his former wife's expense, *Horstmann* seems to be the first case in which the wife is guaranteed a right to share in the fruits of the joint labor expended acquiring the education. The Iowa court termed that right an interest in the husband's potential for increase in future earning capacity, made possible by completion of law school and admission to the bar.<sup>10</sup> To the extent the Iowa court views the joint acquisition of a license to practice law in the nature of a franchise to be considered in a division of property, the author agrees it is within the equitable powers of the court to recognize that interest. However, the remedy fashioned by the court does not accord with its definition of the wife's interest and because the value of that interest is indeed speculative, subsequent decisions may well shape the nature of the interest to conform with the remedy.<sup>11</sup>

### I. FACTS

Donna and Randall Horstmann were married in 1969 while both were juniors in college. By 1976 Randall had completed a successful law school career as editor in chief of the law review. During law school his net income totalled about \$9,200. Donna never completed her college education. She worked as a bank teller during her husband's law school career, netting approximately \$15,800, which she contributed to the family's living expenses (including some of Randall's school costs). In addition to Donna's salary the couple received parental support. Randall's

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<sup>8</sup> *In re Marriage of Horstmann*, 263 N.W.2d 885, 891 (Iowa 1978).

<sup>9</sup> For a discussion on the association between educational attainment and income see *Does Increased Education Produce Increased Income?*, N.E.A. RESEARCH BULL. 102 (Dec. 1968) (with tables) (concluding that percentage increases in income vary directly with educational attainment). See for details, BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, ANNUAL MEAN INCOME, LIFETIME INCOME, AND EDUCATIONAL ATTAINMENT OF MEN IN THE UNITED STATES FOR SELECTED YEARS, 1956 TO 1966 Series P-60, no. 56 (1968), cited in Schaefer, *The Interest of the Community in a Professional Education*, 10 CAL. WEST. L. REV. 590 (1974).

<sup>10</sup> 263 N.W.2d at 891.

<sup>11</sup> See text accompanying notes 70-72 *infra* for more detail.

parents permitted free use of a mobile home for four years and loaned their son \$5,700, which he used for school expenses. Donna's parents gave her gifts of money totalling \$10,500 which she contributed to family living expenses.

At the time of the divorce in 1976, the court assessed each party's present and prospective financial status. Randall had been admitted to the bar and was clerking for a federal district court judge at a salary of \$900 per month. He testified that by the following year he hoped to be employed at the U.S. Department of Justice, starting at \$12,000 a year, with expected increases up to \$26,000 at the rate of \$1,000 a year, not an unreasonable prediction given his outstanding school credentials. Randall estimated his monthly living expenses at \$524. Donna's take-home pay was \$405 per month and she testified that \$600 per month was the maximum wage she could receive in her present job. She estimated her monthly living expenses to be \$704 (including caring for the couple's only child).

## II. THE COURT'S EQUITABLE POWER IN THE DISSOLUTION PROCESS

As the facts indicate, the object of the Horstmans' joint efforts throughout the marriage was the attainment of the husband's law degree, pursued to the exclusion of other possible activities and investments. The husband's license to practice law represents the only substantial asset accumulated during the marriage, and by way of recognition of Donna's role as the supporting spouse, the court awarded her a cash sum of \$18,000.<sup>12</sup> A recognition of that interest is well within the court's equitable power in the matter of divorce<sup>13</sup> and the manner of its exercise in *Horstmann* has three particularly significant aspects.

One is that the Iowa appellate court has *de novo* review of all matters raised at the trial level.<sup>14</sup> The ability of the appellate court to emphasize the peculiarities of the individual case at bar is significant in its implication that each marital relationship is unique. Thus, the best assessment of the parties' circumstances

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<sup>12</sup> Although the court's calculations are sketchy, Donna's award seems to total her monetary contributions offset by Randall's earnings during his law school career: (\$15,800 + \$10,500) - \$9,200 = \$17,100. See text accompanying notes 66 and 70 *infra*.

<sup>13</sup> IOWA CODE ANN. § 598.3.

<sup>14</sup> *In re Marriage of Hitchcock*, 265 N.W.2d 599, 606 (Iowa 1978); *In re Marriage of Murray*, 213 N.W.2d 657, 659 (Iowa 1973). IOWA R. CIV. P. § 344(f)(7) (current version at IOWA R. APP. P. Rule 4).

becomes the vital consideration in fashioning a decree.<sup>15</sup> The facts of this case were clearly paramount in equitably assessing the parties' divisible assets.

Second, property is a protean concept, taking form by contextual definition.<sup>16</sup> In its broadest sense, property means "a thing owned" and is applicable to whatever is the subject of legal ownership. It includes things physical and intangible, entitlements and expectations.<sup>17</sup> "In short it embraces anything and everything which may belong to a man and in the ownership of which he has a right to be protected by law."<sup>18</sup> That the wife's interest in the instant fact pattern may be an intangible expectation during coverture does no violence to its conceptualization as property and should not foreclose its being deemed a guarantee in the nature of a property interest.<sup>19</sup>

Finally, one of the underlying fundamentals of the Uniform Marriage and Divorce Act is an attempt to provide for each party's financial needs by way of an equitable property settlement. Although maintenance is available as a supplement, the Act reflects the hope that the "more flexible property division powers of the court will end reliance on maintenance awards as the primary means of support."<sup>20</sup> Once the property is distributed, the court may determine whether either party's financial situation merits an alimony award.<sup>21</sup> The court in *Horstmann* framed its decree in accordance with these principles, and managed to settle the parties' financial affairs without resorting to alimony.<sup>22</sup>

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<sup>15</sup> *Bowman v. Bowman*, 146 N.W.2d 333, 334 (Iowa 1966) (citing *Arnold v. Arnold*, 257 Iowa 429, 133 N.W.2d 53, 60 (1965)).

<sup>16</sup> *Rogers v. Yellowstone Park Co.*, 97 Idaho 14, 539 P.2d 566 (1975).

<sup>17</sup> See, e.g., *In re Marriage of Powers*, 527 S.W.2d 949 (Mo. App. 1975) (husband's interest in profit-sharing plan included in parties' divisible assets); *In re Marriage of Brown*, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976) (pension rights considered community asset regardless of vesting to extent such rights derive from employment during marriage).

<sup>18</sup> *Ludlow-Saylor v. Wollbrinck*, 275 Mo. 339, 342, 205 S.W. 196, 198 (1918), quoted in *Las Animas County High School Dist. v. Raye*, 144 Colo. 367, 371, 356 P.2d 237, 239 (1960).

<sup>19</sup> See text accompanying notes 63-65 *infra* for more detailed discussion.

<sup>20</sup> MODEL UNIFORM MARRIAGE AND DIVORCE ACT at 2 (1974) (comment, Editors of FAM. LAW REP.).

<sup>21</sup> *In re Marriage of Horstmann*, 263 N.W.2d 885, 892 (Iowa 1978); *In re Marriage of Zoellner*, 219 N.W.2d 517, 524 (Iowa 1974).

<sup>22</sup> One dollar per year alimony was awarded to preserve the issue for appeal as well as later modification should there be a sufficient change of circumstances. 263 N.W.2d at 888.

### III. ALIMONY: AN INADEQUATE ALTERNATIVE

Colorado and Michigan courts have dealt with the problem of the husband's unjust enrichment when the supporting spouse is denied a claim in the asset she helped create; unlike the Iowa court, both declined to raise that claim to the status of a property interest and instead provided a remedy in the form of alimony. Since the trial court in *In re Marriage of Graham*<sup>23</sup> had recognized an interest in the wife, the case was reversed and remanded with instructions that Ms. Graham's contributions were to be considered relevant in the award of maintenance. The Michigan court in *Moss v. Moss*<sup>24</sup> found it "impossible" to award the wife "a portion of the husband's medical degree" and affirmed an award of \$15,000 alimony "in lieu of a property settlement."<sup>25</sup>

Since the wives in *Horstmann* and *Moss* left their respective marriages in similar financial shape,<sup>26</sup> it would appear that maintenance is an adequate method of confronting the situation without the necessity of a redefinition of property interests. Alimony is an attractive idea, because as the husband's ability to pay increases the wife may seek to have the order modified (if she carries the burden of proving a sufficient change in circumstance).<sup>27</sup> Moreover, such an award does not disturb the pervasive

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<sup>23</sup> 574 P.2d 75 (Colo. 1978). Here the husband acquired his M.B.A. while his wife worked as a stewardess (providing approximately 70% of the total family income) and handled the majority of the couple's household and apartment managerial duties. At the time of the divorce the husband had been employed for eight months with Hamilton Management Corp. at \$14,000 per year. No marital assets were accumulated during coverture. The case seems to modify *Greer v. Greer*, 32 Colo. App. 196, 510 P.2d 905 (1973), in which the wife was awarded a \$7,200 lump sum payment in recognition of her contributions to the husband's medical education. See note 31 *infra*.

<sup>24</sup> 264 N.W.2d 97 (Mich. App. 1978). Ms. Moss worked as a guidance counselor while her husband attended medical school. At the time of the decree he was completing his residency, so her income still exceeded his. Ms. Moss claimed her contribution to her husband's medical degree totalled \$60,000. No marital assets were accumulated during coverture.

<sup>25</sup> *Id.* at 98.

<sup>26</sup> See text accompanying notes 12 and 25 *supra*.

<sup>27</sup> *Parmly v. Parmly*, 125 N.J. Eq. 545, 5 A.2d 789 (1939). That alimony is always modifiable is an oversimplification. Periodic alimony is generally modifiable while alimony in gross, characteristically a lump sum payment, is not. Moreover, IOWA CODE ANN. § 598.21, which permits modification when "expedient," has been interpreted as requiring a material (basically permanent) change in circumstances, *Holland v. Holland*, 149 N.W.2d 124 (Iowa 1967), not within the contemplation of the court at the time of the original decree, *Maikos v. Maikos*, 147 N.W.2d 879 (Iowa 1967), meaning the burden is on the applicant. IOWA R. CIV. P. § 344(f)(5), to show the change in circumstances renders the former decree unconscionable, *Pucci v. Pucci*, 143 N.W.2d 353 (Iowa 1966). See, e.g.,

rule that the court should not speculate as to a party's future earnings when adjusting finances upon dissolution.<sup>28</sup>

However, the conceptual differences between alimony and property division make the former the less satisfactory alternative: in the first instance because the wife's right to a property division is independent of her rights to alimony;<sup>29</sup> in the second because alimony itself is devoid of the qualities of a property right and never mandatory.<sup>30</sup> While the *amount* to which she is entitled may be disputed when the wife is said to have a right in the nature of a property interest, she is, nevertheless, specifically guaranteed some measure of return in recognition of the significance of her contributions to the acquisition of the parties' marital assets.<sup>31</sup> Though the court is not bound to a precise fifty-fifty split, an equitable division is based on the principle that each spouse is entitled to a just share of the property accumulated as a result of their joint efforts.<sup>32</sup>

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*In re Marriage of Haben*, 260 N.W.2d 401 (Iowa 1977). The expense, time, and uncertainty of litigation may also deter the wife from attempting to assert her interest by seeking modification. Finally, the wife confronts the fact that although an appellate court has *de novo* review of the facts of the case, there is a general reluctance to disturb a decree without a showing of an abuse of discretion. *Kjar v. Kjar*, 154 N.W.2d 123 (Iowa 1967).

<sup>28</sup> See, e.g., *Donnelly v. Donnelly*, 167 Colo. 229, 449 P.2d 350 (1968); *Menor v. Menor*, 154 Colo. 475, 391 P.2d 473 (1964). Iowa has been somewhat more generous in allowing consideration of a party's future prospects in awarding alimony. See *Lehmkuhl v. Lehmkuhl*, 145 N.W.2d 456 (Iowa 1966).

<sup>29</sup> *Shapiro v. Shapiro*, 115 Colo. 505, 176 P.2d 363 (1946); *Knipfer v. Knipfer*, 259 Iowa 347, 144 N.W.2d 140 (1966).

<sup>30</sup> *Kjar v. Kjar*, 154 N.W.2d 123 (Iowa 1967); *Parmly v. Parmly*, 125 N.J. Eq. 545, 547, 5 A.2d 789, 791 (1939) (quoting *Sobel v. Sobel*, 99 N.J. Eq. 376, 132 A. 603 (1926)); *Lynde v. Lynde*, 64 N.J. Eq. 736, 52 A. 694 (1902).

<sup>31</sup> *Greer v. Greer*, 32 Colo. App. 196, 199, 510 P.2d 905, 907 (1973). Although *Greer* clearly remains authority for its practical differentiation between alimony and property division, *Graham* may have rendered its classification of the wife's share as a species of marital property valueless as precedent. See note 23 *supra*.

<sup>32</sup> *Knipfer v. Knipfer*, 259 Iowa 347, 352, 144 N.W.2d 140, 143 (1966). Colorado, a common law jurisdiction, defined the marital accumulations as community and characterized the wife's share as an interest similar in conception to community property, *i.e.* regarded as held by a species of common ownership. *Imel v. United States*, 375 F. Supp. 1102, 1110-11 (D. Colo. 1974). As a result, property division accompanying divorce is a non-taxable transfer. See Note, *Federal Taxation of Divorce Property Settlements and the Amiable Fictions of State Law*, 52 DEN. L.J. 799 (1975) for an excellent analysis of *Imel*. Oddly enough, the opposite conclusion was reached in *Wallace v. United States*, 439 F.2d 757 (8th Cir. 1971), *cert. denied*, 404 U.S. 831 (1971), at least insofar as it involved a transfer of stock, although the decision in *Horstmann* demonstrates that the time of vesting of the wife's interest is not controlling when the court orders an equitable division of property. See, e.g., *In re Marriage of Carruthers*, 577 P.2d 773 (Colo. App. 1977) (crops unsevered at the time of separation are included among the parties' divisible marital assets). See also text accompanying notes 55-59 *infra*.

On the other hand, the very essence of alimony is judicial discretion founded on the husband's duty at law to support his former wife, based on her need and his ability to pay,<sup>33</sup> and three significant factors will reduce the amount to which the court finds her entitled.<sup>34</sup> That she was the family's principal breadwinner during coverture will concurrently reduce her need and the husband's ability to pay, although as a result of his education, the husband's actual earnings will outstrip the wife's in the following years.<sup>35</sup> Further, duration of the marriage is of some consequence,<sup>36</sup> and a generous alimony award following a short-lived marriage is disfavored. Moreover, the import of the wife's commitment and its far-reaching impact on her spouse's earning power has very little to do with the brevity of the marital relationship, and to the extent the wife's contributions are counterbalanced by diminished obligations of the supported spouse, the husband is unjustly enriched. Finally, the husband is also obligated, to the greatest extent possible, to maintain his wife in the standard of living to which she was accustomed during coverture. Here the parties' marriage did not survive the preparation stage, though both anticipated a change in living standard to accompany the completion of the husband's education. In an unfortunate twist the wife's practice of deferred gratification renders her investment virtually worthless.

From the standpoint of a combined impact of these considerations on the award of alimony, the wife's chances of reimbursement are narrowed markedly. Even when her contributions are relevant in the determination of the maintenance award as in *Graham*, final realization by monetary compensation is purely discretionary, uncertain even in existence, and, more obviously, in amount. What distinguished *Graham* and *Moss* from

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<sup>33</sup> *Knipfer v. Knipfer*, 259 Iowa 347, 352, 144 N.W.2d 140, 143 (1966); *Schantz v. Schantz*, 163 N.W.2d 398, 405 (Iowa 1968); *Flanders v. Flanders*, 241 Iowa 159, 40 N.W.2d 468, 469 (1950) (quoting *Brannen v. Brannen*, 237 Iowa 188, 193, 21 N.W.2d 459, 466 (1946)).

<sup>34</sup> Cf. *Stuckey v. Stuckey*, 231 Cal. App. 2d 382, 41 Cal. Rptr. 792 (1964) (wife's salary as teacher vital in determining whether court abused discretion by awarding too much alimony).

<sup>35</sup> Donna never completed college after she married. Ironically, by foregoing her own educational opportunities to invest in her husband's, she reduced her own potential earning power. *Remmers v. Remmers*, 264 N.W.2d 857 (Neb. 1978), takes into account the interruption of personal careers or educational opportunities when making a property division.

<sup>36</sup> *Schantz v. Schantz*, 163 N.W.2d 398, 405 (Iowa 1968).



*Horstmann* is that in Iowa *some* remuneration is obligatory, while in Colorado and Michigan it is discretionary. "Alimony . . . lies within the discretion of the trial court; the spouse should not be dependent on the discretion of the court . . . to provide her with the equivalent of what should be hers as a matter of absolute right."<sup>37</sup> The nature of the wife's sacrifice merits the kind of guarantee that seems to exist in Iowa since *Horstmann* was decided.

#### IV. JUSTIFICATION OF HORSTMANN'S CLASSIFICATION OF THE PRESENT RIGHT TO PRACTICE A PROFESSION AS MARITAL PROPERTY

Identified as a property interest in the context of the marital community, education (more specifically, the present right to practice a profession) suffers no crisis of credibility,<sup>38</sup> for property is essentially "nothing but an expectation; the expectation of deriving certain advantages from a thing we are said to possess, in consequence of the relation in which we stand towards it."<sup>39</sup> In *Horstmann*, the parties made the support arrangement with the *expectation* of jointly reaping the harvest of their collective effort. The completion of a professional education represents the first step in that process, and the resulting potential for an increase in earning power is the only real asset acquired during coverture. That "a lawyer's professional education and the right to practice law are in the nature of a 'financial resource' "<sup>40</sup> gives substance to both parties' expectations, and is attributable to the interaction between the concept of acquisition and the partnership theory of the marital relationship.

It is the method of acquisition that determines what becomes a marital asset subject to equitable division. Marital property is that which is acquired by onerous title through the labor of both spouses (or as a gift to the community), while property which has its basis in pure donation is said to be acquired by lucrative title

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<sup>37</sup> *In re Marriage of Brown*, 15 Cal. 3d 838, 849, 544 P.2d 561, 567, 126 Cal. Rptr. 633, 639 (1976) (quoting *In re Marriage of Peterson*, 41 Cal. App. 3d 642, 651, 115 Cal. Rptr. 184, 191 (1974)).

<sup>38</sup> Schaefer, *The Interest of the Community in a Professional Education*, 10 CAL. WEST. L. REV. 590, 591 (1974).

<sup>39</sup> Bentham, *Theory of Legislation, Principles of the Civil Code, Part I*, 111-13, Dumont Edition, Hildreth translation (1864), quoted in Brief and Petition for Writ of Cert., petitioner-appellant at 6, *In re Marriage of Graham*, No. C-1054, appealing from decision in 555 P.2d 527 (Colo. App. 1976).

<sup>40</sup> *In re Marriage of Vanet*, 544 S.W.2d 236, 242 (Mo. 1976).

and remains the separate property of the owner.<sup>41</sup> Acquisition by onerous title focuses on the joint and several expenditures and efforts of the marital partners<sup>42</sup> and should encompass all assets of every nature possessed by the parties.<sup>43</sup> The key word is *acquired*, since the Uniform Marriage Act allows for the equitable distribution of property legally and *beneficially* acquired during marriage.<sup>44</sup> Accepting that Donna's contributions played a significant part in the acquisition of her husband's law degree<sup>45</sup> and that the degree increases the likelihood of future financial success, the manner in which it was obtained seems to call for its inclusion in the parties' marital assets.

As joint and beneficial acquisition define the contents of the marital community, the marital relationship is analogous to a partnership or shared enterprise. In determining the value of a license to practice a profession, consideration must be given the fact that upon dissolution that practice goes automatically to the licensed spouse. He is not selling out or liquidating, but continuing in business. In effect, it is the case of a silent partner withdrawing from the business. If such partner is to receive fair compensation for her enforced retirement, the value of that license to the community must be determined.<sup>46</sup> Upon divorce the wife's "partnership interest" is not based solely on the money she invests, but rather on the totality of her contribution to the accomplishment of the goals of the partnership.<sup>47</sup> In *Horstmann Donna*

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<sup>41</sup> *Painter v. Painter*, 65 N.J. 196, 320 A.2d 484 (1974); *Graham v. Franco*, 488 S.W.2d 390 (Tex. 1972).

<sup>42</sup> *Painter v. Painter*, 65 N.J. 196, 214, 320 A.2d 484, 493 (1974). Here the court enlarged the ambit of beneficial acquisition by the marital partners to include property acquired by gift or inheritance, although such property has been traditionally excepted from the division in community property states. The court noted common law principles rather than community property principles controlled, and cited the mandate for equitable distribution to justify its decision.

<sup>43</sup> *Englert v. Englert*, 576 P.2d 1274, 1276 (Utah 1978).

<sup>44</sup> *Schantz v. Schantz*, 163 N.W.2d 398, 405 (Iowa 1968); *Painter v. Painter*, 65 N.J. 196, 215, 320 A.2d 484, 495 (1974).

<sup>45</sup> *In re Marriage of Vanet*, 544 S.W.2d 236, 241 (Mo. 1976). The wife was the principal breadwinner while her husband attended law school. Because her contributions were of "inestimable value" in increasing his earning capacity, the court based the alimony award on his earning capacity rather than actual present income which was low because he had left an established law firm to go into solo practice.

<sup>46</sup> *Brawmen v. Brawmen*, 199 Cal. App. 2d 876, 19 Cal. Rptr. 106, 109-10 (1962). By way of recognition of the partnership, *Vai v. Bank of America*, 56 Cal. 2d 329, 364 P.2d 247, 15 Cal. Rptr. 71 (1961) declared the existence of a fiduciary relationship, distinguished from the traditional confidential relationship existing between spouses.

<sup>47</sup> *Hogan v. Hogan*, 234 Ark. 333, 352 S.W.2d 184 (1962).

functioned for a time as the supporting spouse so that Randall could complete law school, and determinative of her right to share in her husband's asset under the implied partnership theory is the nature and quantum of their commercial interrelationship and expectations. Had the Horstmanns' marriage survived, Donna would have shared in Randall's earnings. Had he deliberately attempted to defeat his marital obligation of support by refusing to work to his capabilities the court could have framed the decree in reference to his earning capacity rather than his actual earnings.<sup>48</sup> Had Donna advanced the fund specifically for investment in Randall's separate property the money could have been presumed a loan rather than a gift.<sup>49</sup> Denial of a guaranteed interest in the product of joint labor in *Graham* and *Moss* because the divorce antedates the monetary rewards for those efforts is to sacrifice an equitable property division on the altar of impermissible speculation.<sup>50</sup>

Placing a value on an individual's earning potential admittedly engages the court in speculation. The crux of the problem is that the husband will never have a vested right to any particular level of income, but only a potential for increased earnings made possible by his education. In essence *Graham* and *Moss* refuse to vest in the wife that which cannot vest as a right in the husband.<sup>51</sup>

What is crucial however, is not what the husband will earn, but rather, the effect of the present right to practice a profession on his earning *capacity*.<sup>52</sup> The Iowa court has recognized that an education can increase earning potential, basing an alimony award on the husband's projected earnings,<sup>53</sup> and a California

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<sup>48</sup> *Hess v. Hess*, 134 N.J. Eq. 360, 35 A.2d 677 (1944) (citing *Robins v. Robins*, 106 N.J. Eq. 198, 150 A. 340, 341 (1930)).

<sup>49</sup> See note 7 *supra*.

<sup>50</sup> The court in *Graham* refers to the husband's education as simply an intellectual achievement that may assist in the acquisition of property, without having any of the attributes of property itself. 574 P.2d 75, 77 (Colo. 1978).

<sup>51</sup> As to whether the wife's share of the marital assets is an inchoate right during coverture, see note 32 *supra*.

<sup>52</sup> *Accord*, *In re Marriage of Vanet*, 544 S.W.2d 236, 242 (Mo. 1976); *Stern v. Stern*, 66 N.J. 340, 331 A.2d 257 (1975); *Daniels v. Daniels*, 20 Ohio Op. 2d 458, 185 N.E.2d 773 (1961) (court finds present right to practice medicine to be in the nature of a franchise constituting property, and admits evidence concerning potential earning power for the purpose of awarding alimony since Dr. Daniel's salary as a resident was not fairly indicative of earning capacity).

<sup>53</sup> *In re Marriage of Dally*, 222 N.W.2d 478, 482 (Iowa 1974).

court has indicated that expectation of future professional income can be a community asset.<sup>54</sup> Moreover, the notion that vesting of a party's property is a prerequisite to its inclusion among the divisible assets of the marriage has been considered unnecessary with respect to retirement benefits,<sup>55</sup> pensions,<sup>56</sup> and profit-sharing plans<sup>57</sup> without doing any violence to the concept of property, generally because courts have viewed the dependence on a contingency to be something greater than a "mere expectancy."<sup>58</sup> Thus, a New Jersey court determined the husband's accounts receivable to be a marital asset, noting the irrelevancy of the customary usages of the concept of vesting to the question of establishing an equitable property division. The statute was interpreted as focusing on *acquisition*, without reference to vesting.<sup>59</sup>

Speculation is, in fact, a slippery term: What is permissible may ultimately rest on what is most expedient or necessary. A California court valued the good will of the husband's business at \$25,000 for the purpose of a property division, reasoning that when a person acquires a reputation for learning in a particular field, he creates a valuable, though intangible, property by winning the confidence of patrons.<sup>60</sup> A Wyoming court valued a parcel of real estate according to its potential mining value to assure each party a fair share of the fruits of their joint efforts during marriage.<sup>61</sup> It seems that when the conventional indicia of earning capacity do not fairly describe the assets a party possesses, a

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<sup>54</sup> See *Fritschi v. Teed*, 213 Cal. App. 2d 718, 29 Cal. Rptr. 114, 119 (1963) (dictum).

<sup>55</sup> *In re Marriage of Roesch*, 81 Cal. App. 3d 137, 146 Cal. Rptr. 255, 261-62 (1978); *contra*, *Ellis v. Ellis*, 552 P.2d 506 (Colo. 1976).

<sup>56</sup> *In re Marriage of Brown*, 15 Cal. 3d 838, 544 P.2d 561, 562, 126 Cal. Rptr. 633, 634-35 (1976); *contra*, *Robbins v. Robbins*, 463 S.W.2d 876, 879 (Mo. 1971).

<sup>57</sup> *In re Marriage of Powers*, 527 S.W.2d 949, 957 (Mo. App. 1975).

<sup>58</sup> *In re Marriage of Brown*, 15 Cal. 3d 838, 847, 544 P.2d 561, 565, 126 Cal. Rptr. 633, 637.

<sup>59</sup> *Stern v. Stern*, 66 N.J. 340, 331 A.2d 257, 262; *cf. In re Marriage of Carruthers*, 577 P.2d 773 (Colo. App. 1977) (unsevered crops harvested by husband alone considered marital property). See text accompanying note 32 *supra*. This is logically consistent with the fact that it is the totality of the wife's contributions to the objects of the marital relationship that is determinative of her right to an equitable share of the assets accumulated during coverture. See text accompanying note 47 *supra*.

<sup>60</sup> *Mueller v. Mueller*, 144 Cal. App. 2d 245, 301 P.2d 90, 95 (1956); *contra*, *Nail v. Nail*, 486 S.W.2d 761, 763 (Tex. 1972).

<sup>61</sup> *Kane v. Kane*, 577 P.2d 172, 175 (Wyo. 1978).

court may speculate to arrive at a more accurate measure of those assets.<sup>62</sup>

An example of the interrelationship of the dynamic concept of property and the primarily equitable nature of property division is California's characterization of either spouse's cause of action for personal injury as community property,<sup>63</sup> despite the fact that such cause of action is intangible, and has been held to be non-survivable<sup>64</sup> and non-transferable.<sup>65</sup> Nevertheless, a claim for personal injury is community property because the courts characterize the damage as an injury to the community. In the same sense a professional education may be considered a *benefit* to the partnership, and therefore a necessary inclusion in the parties' marital assets.

#### V. REMEDIES AND CONCLUSORY REMARKS

Despite its recognition of a guarantee in the nature of a property interest, *Horstmann* fails to provide a remedy of equal scope. Without some modification, its purported redefinition of equitable property division is eclipsed by a remedy of no greater practical impact than that of *Graham* or *Moss*. Premised on the assumption that a professional education is solely a monetary purchase, the court measured Donna's recovery in the amount her financial contributions exceeded Randall's during his law school career: an implied loan, repaid without interest.<sup>66</sup> Conceptually a loan requires a return on one's investment in the form of interest; its omission in *Horstmann* makes the remedy inadequate, because the wife derives absolutely no monetary benefit from the association while the husband leaves the marriage with a valuable asset.

However, an implied loan remedy that includes interest is not without advantages. The amount due the wife can be easily calculated, without the need for speculation concerning earning capacity.<sup>67</sup> Further, such a remedy is consistent with the general

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<sup>62</sup> *Daniels v. Daniels*, 20 Ohio Op. 2d 458, 185 N.E.2d 773, 776 (1961).

<sup>63</sup> *Flores v. Brown*, 39 Cal. 2d 662, 248 P.2d 992 (1952).

<sup>64</sup> *De la Torre v. Johnson*, 200 Cal. 754, 254 P. 1105 (1927). Today a cause of action for personal injury is considered survivable. CAL. PROB. CODE § 573 (West Supp. 1974).

<sup>65</sup> *Wikstrom v. Yolo Fliers Club*, 206 Cal. 461, 274 P. 959 (1929).

<sup>66</sup> See text accompanying note 12 *supra*.

<sup>67</sup> At a return rate of 6% Donna would receive approximately \$19,100; at 6½% about \$19,200.

practice of courts to equate the commitment of the parties to a marriage with its duration and frame the decree accordingly.<sup>68</sup>

The acquisition of an education represents more than a mere monetary purchase. Both partners also expend considerable time and effort in its acquisition, and the wife's right to share in the rewards should be based on her total contribution to the marital partnership.<sup>69</sup> Realistically, the monetary cost of a professional education has only the loosest sort of relationship to the value of that education as a means to the end of practicing a profession, and to the extent its value to the husband exceeds its cost, the implied loan theory permits the husband to be unjustly enriched.

One commentator<sup>70</sup> has proposed a formula that seems a more accurate assessment of the value of the present right to practice a profession for the purpose of a property division. He advocates the wife be reimbursed for approximately one-half the opportunity cost of the education. Opportunity cost is the sum of the direct cost<sup>71</sup> plus the indirect cost (basically what the husband's total earnings would have been if he had worked during coverture rather than going to school).<sup>72</sup> Because such a formula confines income speculation to a relatively short period and, moreover, does not allow the court to speculate beyond the duration of the parties' marriage, it allows monetary recognition of the significance of the wife's contributions without eschewing criteria

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<sup>68</sup> *Schantz v. Schantz*, 163 N.W.2d 398, 405 (Iowa 1968) (duration of the marriage is considered a post-marital criterion in the equitable determination of the parties' respective property rights).

<sup>69</sup> *Shapiro v. Shapiro*, 115 Colo. 505, 507-08, 176 P.2d 363, 364 (1946) (Where wife has contributed either funds or services enabling husband to increase or preserve his property holdings, she is entitled to equitable division of that property, dependent on extent of her contribution). See also text accompanying note 47 *supra*.

<sup>70</sup> Schaefer, *The Interest of the Community in a Professional Education*, 10 CAL. WEST. L. REV. 590 (1974).

<sup>71</sup> Direct cost is here defined as the extent of the wife's monetary contributions to the family during the period her husband attends professional school. Schaefer actually defines direct cost as the price of the education itself (*i.e.* tuition, etc.) but the Iowa court calculated cost in the amount Donna's contributions exceeded her husband's. See note 12 *supra*. Because such contributions alleviated Randall of his support obligations and freed his separate funds for tuition purposes, the *Horstmann* offset formula for computing direct cost is perfectly adequate.

<sup>72</sup> Assuming Randall could have earned \$12,000 per year instead of going to law school (certainly possible since he had received a masters degree in 1973), Donna's share would be approximately  $(\$18,000 + \$36,000) \div 2$  or \$27,000. Moreover, the court would not be bound to a strict fifty-fifty split and could adjust the moieties according to the parties' circumstances. See note 32 *supra*.

for considering duration of a marriage in property division.<sup>73</sup>

Read literally, *Horstmann's* recognition of a guarantee in the nature of a property right is a bold attempt to cure a traditional inequity. The appropriate remedy, however, calls for a certain amount of speculation, and the willingness (or lack thereof) of subsequent decisions to grapple with this exigency may well prevent the wife's full realization of her interest.

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<sup>73</sup> Schaefer suggests the following formula to determine the amount of the wife's interest, premised on the fact that the value of experience and skill increases, while that of education diminishes, in subsequent years of practice. The calculations are made for each year of the husband's remaining work life and should reflect the fact that earnings tend to decline just before retirement.

$$\left( \begin{array}{l} \text{Income with} \\ \text{Professional} \\ \text{Education} \end{array} - \begin{array}{l} \text{Income without} \\ \text{Professional} \\ \text{Education} \end{array} \right) \times \frac{\begin{array}{l} \text{Number of Years} \\ \text{of Professional Ed.} \\ \text{Number of Years} \\ \text{Since Professional Ed.} \\ \text{Commenced} \end{array}}$$

Although such a calculation in theory reflects the most accurate assessment of the extent of the wife's interest, it is almost indefensibly speculative in practice, and moreover, calculates over too great a time span to accord with the *Schantz* requirement that duration of the marriage have some relevance in the division of property. See note 68 *supra*. Moreover, in this case, cost opportunity and future earning formulas yield a similar figure. Assuming Randall's salary would increase at \$1,000 per year as he testified, 263 N.W.2d at 887, and that without a professional education his earning would be \$12,000 per year (see note 71 *supra*), Donna would receive about \$25,000 as her share of his earnings over the next thirteen years. As the facts did not include Randall's age, it is difficult to compute his remaining useful worklife; thus this calculation extends only over the period mentioned in the testimony, although the award could increase another \$2,000 to \$3,000 were the calculations extended another five or six years.