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Divorce after Professional School: Education and Future Earning Capacity May Be Marital Property--In re Marriage of Horstmann

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an ADEA complainant a choice of forums, the *Holliday* court eliminates this problem and achieves judicial harmonization of state and federal age discrimination in employment laws.

Under the *Holliday* decision an older worker is now allowed to choose the quicker of the two available remedies and is not compelled to select the state remedy if that would unduly impede a prompt resolution of his grievance. This interpretation is consistent with the congressional purpose behind the ADEA and the remedial nature of the federal act.[65] Finally, allowing an aggrieved individual a choice of forums in which to bring his action may encourage all states, and especially states which are without age discrimination in employment laws, to enact age discrimination laws that are equal or superior to the federal law. The development of such laws would help facilitate efforts by the state agency charged with mediating age discrimination in employment disputes to resolve such complaints rapidly and at a minimum expense to the parties. These state laws would also provide an incentive for citizens to bring their complaints into state courts.[66] A judicial challenge to do so has now been clearly placed before the legislatures.

DANIEL ENGLE

DIVORCE AFTER PROFESSIONAL SCHOOL: EDUCATION AND FUTURE EARNING CAPACITY MAY BE MARITAL PROPERTY

In re Marriage of Horstmann[1]

Donna Horstmann worked at a bank while her husband, Randall, attended law school from 1973 to 1976. She contributed her pay to the family's living expenses. In 1976, Randall received his degree and was admitted to the bar. That same year Donna filed a petition for dissolution of their marriage, and the trial court dissolved the marriage. Noting the

65. *See* note 50 *supra*.

66. The legislative history of the ADEA supports this interpetation. *See* Vazquez v. Eastern Air Lines, Inc., 405 F. Supp. 1353, 1356 (D.P.R. 1975), *citing* HEARINGS BEFORE THE SUBCOMM. ON LABOR OF THE SENATE COMM. ON THE LABOR AND PUBLIC WELFARE ON S. 830, and S. 788, 90th Cong., 1st Sess. at 48 (1967) (testimony of Secretary Wirtz), *reprinted in* 113 CONG. REC. 31255 (1967).

1. 265 N.W.2d 885 (Iowa 1978).

dearth of other assests in the marriage, the court ordered Randall to pay $18,000, by future periodic payments, for the property division.[2] The Iowa Supreme Court, in affirming the decree,[3] became the first appellate court in the country to classify the increase in a spouse's potential earning capacity, made possible by the other spouse's efforts during marriage, as a marital asset subject to property distribution upon dissolution.[4]

Although the *Horstmann* holding would be equally applicable regardless of which spouse played the supporting role, more often than not it is the woman, through her financial support, who is brightening her husband's professional prospects by supporting him through professional school.[5] The *Horstmann* court's recognition of the wife's expectancies in the resulting increase in her husband's potential earning capacity, and of her entitlement to compensation for the loss of such expectancies upon dissolution, is indicative of the startling metamorphosis of the wife's role since common law. A marked evolution has removed the wife, in the eyes of the law, from a position of passive dependence upon her husband and his guardianship[6] to one resembling a partner of her husband.[7] The theory that marriage is a partnership, with both individuals working as partners for the betterment of the family unit, is a concept that an increasing

2. *Id.* at 888.

3. Reviews of decrees granting dissolution of marriage are de novo in Iowa. *In re* Marriage of Novak, 220 N.W.2d 592, 597 (Iowa 1974). MO. R. CIV. P. 73.01 also states that, in an appeal of a dissolution action, the appellate court should consider the evidence de novo. But decisions have emphasized giving due deference to the trial judge's findings and reversal is permitted only if the judgment of the trial court was clearly erroneous. Pope v. Pope, 520 S.W.2d 634 (Mo. App., D.K.C. 1975). *See* Krauskopf, *Marital Property at Marriage Dissolution,* 43 MO. L. REV. 157, 160 (1978).

4. Diment v. Diment, 531 P.2d 1071 (Okla. 1974) was a precursor of *Horstmann.* In awarding "permanent alimony" the court was influenced by the wife's support of the husband from eleventh grade through medical school. The resulting increase in the husband's earning capacity was a factor in the large amount of permanent alimony granted. This amount would not terminate upon remarriage or death. As in *Horstmann,* the court was influenced by the lack of other marital property to divide.

5. In a 1972 survey of major schools women comprised 6% of the total enrollments in architecture, 12% in law, 13% in medicine, 5% in optometry, 14% in veterinary medicine. Parrish, *Women in Professional Training,* MONTHLY LABOR REV., May 1974, at 41. "The wife's involvement with her husband's career frequently begins before the career itself, during the stage when he is undergoing the advanced training so typical of these middle-class careers, while she is working in a temporary job to support them both, having abandoned or interrupted her own studies." Papanek, *Men, Women and Work: Reflections on the Two Person Career,* 78 AM. J. SOC. 852, 858 (1973).

6. *See* Comment, *Marital Property: A New Look at Old Inequities,* 39 ALB. L. REV. 52, 53 (1974).

7. The notion of marriage as a partnership was fostered originally in the community property states. Krauskopf, *Marital Property at Marriage Dissolution,* 43 Mo. L. Rev. 157, 158 (1978).

number of jurisdictions have come to accept.[8] The *Horstmann* decision further enhances this marital partnership notion by acknowledging that the potential for increase in the future earning capacity of one spouse acquired with the aid of the other during the marriage is a marital asset subject to division upon dissolution.[9]

Apart from *Horstmann,* all jurisdictions that have passed on the issue have consistently rejected attempts to characterize as a marital asset the future earning capacity, education, or professional degree of the husband.[10] There are several rationales that support the view taken by these jurisdictions. First, a professional degree lacks most of the attributes ordinarily associated with property. A degree has no standard barter or exchange value, it cannot be assigned or sold, and it is a manifestation of much more than tuition and lab fees.[11] It is personal in nature, the culmination of years of intensive labors by the student spouse. Since these same characteristics are attributes of potential earning capacity, potential earning capacity also lacks most of the attributes normally associated with property.[12]

In addition, the valuation of potential earning capacity for purposes of property division upon dissolution poses a complex problem. Like nonvested pension rights, an education[13] or a degree carries with it no

8. This notion is a relatively new theory in Missouri. *See* Forsythe v. Forsythe, 558 S.W.2d 675 (Mo. App., D.K.C. 1977); RSMo § 452.330 (Supp. 1975); Krauskopf, *Marital Property at Marriage Dissolution,* 43 MO. L. REV. 157, 158 (1978); Comment, *Tax Consequences of Interspousal Property Transfers Pursuant to a Missouri Dissolution,* 44 MO. L. REV. 92, 95 (1979) (deferred community property).

9. Missouri has not yet spoken to this issue directly. Missouri's property division statute, RSMo § 452.330 (Supp. 1975) and that of Colorado, COLO. REV. STAT. § 14-10-113 (1977), are virtually the same. Hence, *In re* Marriage of Graham, 574 P.2d 75 (Colo. 1978), or its strong dissenting opinion could influence Missouri courts. With *In re* Marriage of Vanet, 544 S.W.2d 236 (Mo. App., D.K.C. 1976), the husband's earning capacity was not an independent asset, but there was a 74%-26% split of property based largely on the wife's financial contribution to the husband's legal education. *See* Krauskopf, *Martial Property at Marriage Dissolution,* 43 MO. L. REV. 157, 166-68 (1978).

10. Todd v. Todd, 272 Cal. App. 2d 786, 78 Cal. Rptr. 131 (1969) (a law degree is, at best, an intangible property right which cannot have a monetary value placed upon it for division between spouses); *In re* Marriage of Graham, 574 P.2d 75 (Colo. 1978) (M.B.A. acquired by the husband during marriage is not a property asset to be divided upon dissolution); Stern v. Stern, 66 N.J. 340, 331 A.2d 257 (1975) (a person's earning capacity, even where its development has been aided and enhanced by the supporting spouse, should not be a separate marital asset to be included in the property division).

11. *In re* Marriage of Graham, 574 P.2d 75, 77 (Colo. 1978).

12. *Horstmann* is the first court to make a questionable distinction: the legal education in itself is not a marital asset, but the future earning capacity derived from it is. 263 N.W.2d at 889.

13. "If a spouse's education preparing him for the practice of the law can be said to be 'community property,' a proposition which is extremely doubtful even though the education is acquired with community moneys, it manifestly is of such

guarantee that it will in fact provide any future earnings.[14] At any time, the professional could change professions, become disabled, or die.[15] There is consequently a danger that the value of an individual's potential earning capacity may be ascertained only through speculation. Indeed, the primary reason for refusing to recognize potential earning capacity as a marital asset undoubtedly has been the fear that valuation of such an item would be too speculative or conjectural.[16]

Finally, classifying potential earning capacity as a marital asset may be an unnecessary complication. A wife's financial input to the education of her husband, the wife's enhancement of the husband's financial status or earning capacity, and the earning capacities of both husband and wife are factors that courts normally consider in the determination of the division of marital property[17] and the award of maintenance.[18] In most situations a

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a character that a monetary value for division with the other spouse cannot be placed upon it." Todd v. Todd, 272 Cal. App. 2d 786, 791, 78 Cal. Rptr. 131, 134 (1969). The court in *Todd* held that education was at best an intangible property right and likened its position to the right to practice a profession. In California the right to practice a profession is not community property. Franklin v. Franklin, 67 Cal. App. 2d 717, 725, 155 P.2d 637, 641 (1945).

14. Randall Horstmann used this argument before the trial court. 263 N.W.2d at 889. Non-vested pension rights are generally not considered marital property. *See* Krauskopf, *supra* note 3, at 172. An exception to this general rule is *In re* Marriage of Brown, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976), which held that pension rights, whether vested or not, represent marital property interests to the extent derived from employment during marriage.

15. The trial court in *Horstmann* noted, "naturally there is no guarantee that Respondent would have a good paying job during the time he was in law school or that his practice of law will be a financial success." 263 N.W.2d at 888.

16. *See, e.g.*, Stern v. Stern, 66 N.J. 340, 344-45, 331 A.2d 257, 260 (1975). The same has been held when an attempt was made to value a spouse's legal education. Todd v. Todd, 272 Cal. App. 2d 786, 791, 78 Cal. Rptr. 131, 134-35 (1969).

17. *See, e.g.*, Shapiro v. Shapiro, 115 Colo. 505, 507-08, 176 P.2d 363, 364 (1946) (wife during marriage, in addition to household duties, performed services which contributed to husband's business advantage and resulted in an increase in value of the property division accorded her); Greer v. Greer, 32 Colo. App. 196, 510 P.2d 905, 906-07 (1973) (that the wife taught school and paid for family expenses while her husband attended medical school was a consideration in the adjustment of property rights); *In re* Marriage of Cornell, 550 S.W.2d 823, 826 (Mo. App., D. Spr. 1977) (wife's contribution of working while her husband attended college and her work as a mother and a homemaker were considered as factors in determining the property division); Stern v. Stern, 66 N.J. 340, 345, 331 A.2d 257, 260 (1975) (the increase in potential earning capacity aided by the supporting spouse was a factor to consider in both the property distribution and alimony).

18. *See, e.g., In re* Marriage of Vanet, 544 S.W.2d 236, 242 (Mo. App., D.K.C. 1976) (husband's prior and anticipated earning capacity factors in determining amount of maintenance); Wheeler v. Wheeler, 193 Neb. 615, 615-17, 228 N.W.2d 594, 595-96 (1975) (wife's help in the prospering of her husband's career as a veterinarian and the husband's potential earning capacity were deem-

wife can be adequately compensated for her contribution to her husband's education and for her subsequent loss of expectations through maintenance awards and the division of traditional forms of marital assets without the need to characterize the husband's potential earning capacity, itself, as a marital asset.

The rationales against including earning capacity and education in divisible marital property are logical and have appeal. However, they are susceptible to critical analysis.

Merely because courts normally take into consideration a wife's financial contribution to the increase in her husband's potential earning capacity as a factor in the determination of maintenance and property division does not guarantee the wife adequate compensation for her loss of expectancies upon dissolution. There are situations in which neither an award of maintenance nor a division of traditional forms of marital assets will sufficiently compensate the wife for such sacrifices. *Horstmann* is a pointed example of such a circumstance. A scarcity of other assests at the date of dissolution leaves the supporting spouse with little unless she is entitled to share in the acquired increase in potential earning capacity.

Likewise, if prospective earnings were only used as a relevant element in determining alimony or maintenance, the working wife in a situation such as *Horstmann* would be left with an extremely tenuous grasp upon what had been her reasonable expectations. Alimony and maintenance generally terminate with remarriage or death,[19] whereas property division payments in periodic form usually do not.[20] Moreover, under the statutes of some states, if the wife is self-supporting she is not entitled to maintenance.[21]

Lastly, although there is clearly a danger that valuing an individual's

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ed relevant in fixing alimony); Magruder v. Magruder, 190 Neb. 573, 575-77, 209 N.W.2d 585, 586-87 (1973) (wife's considerable contribution of working while her husband attended medical school weighed in alimony determination); Stern v. Stern, 66 N.J. 340, 345, 331 A.2d 257, 260 (1975) (the increase in potential earning capacity aided by the supporting spouse was a factor to consider in both the property division and alimony).

19. H. BASS & M. REIN, DIVORCE LAW—THE COMPLETE PRACTICAL GUIDE 125 (1976).

20. *See* Underwood v. Underwood, 64 So. 2d 281, 287 (Fla. 1953); Maybaum v. Maybaum, 349 Ill. App. 80, 82, 110 N.E.2d 78, 79 (1952); Knipfer v. Knipfer, 144 N.W.2d 140, 144 (Iowa 1966); Tracy v. Tracy, 205 S.W.2d 947, 948 (St. L. Mo. App. 1947); Stuart v. Stuart, 555 P.2d 611, 615 (Okla. 1976). *See also* Annot., 48 A.L.R.2d 270 (1956); Annot., 48 A.L.R.2d 318 (1956). Even if called alimony by the trial court, appellate courts have tended to look to the essence of a transaction to determine if it is a property settlement or decree. Underwood v. Underwood, 64 So. 2d 281, 288 (Fla. 1953); International Trust Co. v. Liebhardt, 111 Colo. 208, 218, 139 P.2d 264, 269 (1943).

21. COLO. REV. STAT. § 14-10-114 (1973); RSMo § 452.335 (Supp. 1975). There are also income tax considerations that may be important in this regard. *See generally* I.R.C. §§ 71, 215 (alimony and separate maintenance payments).

potential earning capacity would involve speculation, the presence of such a danger is not a valid reason for rejecting attempts to classify a potential for increase in future earning capacity as a marital asset. Valuing goodwill, an item that is nothing more than the expectation of future patronage, is certainly as amorphous an assessment as would be the valuing of potential earning capacity. Professional goodwill is "personal in nature and not a readily marketable commodity."[22] Nevertheless, courts frequently have placed a value on goodwill and have included it, as marital property, in the property division at dissolution.[23] In addition there are several available methods of valuing potential earning capacity in which the danger of speculation and conjecture is to some extent mitigated. For instance, in determining damages in tort actions for personal injury or wrongful death, inchoate skills and educations traditionally are taken into account in assessing the decrease in future earnings resulting from the tort.[24] Damages, in such cases, are viewed as the present value of the foregone income.[25] With the aid of expert testimony, ascertaining this amount "involves simultaneous analysis of inflation, economic growth, interest rates, taxes . . . , unemployment, personal consumption, value of home services and fringe benefits."[26] Expert analysis is also given to aid in the assessment of probable income increases, promotional possibilities, and actuarial tables.[27]

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22. Marriage of Lukens, 16 Wash. App. 481, 484, 558 P.2d 279, 281 (1976).

23. *See In re* Marriage of Foster, 42 Cal. App. 3d 577, 581-84, 117 Cal. Rptr. 49, 52-53 (1974); *In re* Marriage of Lopez, 38 Cal. App. 3d 93, 107-10, 113 Cal. Rptr. 58, 67-69 (1974); Todd v. Todd, 272 Cal. App. 2d 786, 792-94, 78 Cal. Rptr. 131, 135-36 (1969); Golden v. Golden, 270 Cal. App. 2d 401, 405, 75 Cal. Rptr. 735, 737-38 (1969); Mueller v. Mueller, 144 Cal. App. 2d 245, 248-52, 301 P.2d 90, 94-96 (1956); Stern v. Stern, 66 N.J. 340, 345-48, 331 A.2d 257, 260-61 (1975) (while rejecting the classification of potential earning capacity as a marital asset, held that professional goodwill was marital property; result might have been more akin to *Horstmann* had the husband just come out of law school and had there been a lack of traditional forms of property); Levene v. City of Salem, 191 Or. 182, 199-201, 229 P.2d 255, 263-64 (1951). *But see* Nail v. Nail, 486 S.W.2d 761, 761-64 (Tex. 1972).

Methods of valuing goodwill have varied; each case seems to have been determined upon its own circumstances. Factors such as length of time of professional practice, comparative success, age and health of the professional, past profits, and the condition of the physical assets of the practice have been considered. Marriage of Lukens, 16 Wash. App. 481, 484, 558 P2d. 279, 282 (1976).

24. *See* Scally v. W.T. Garratt & Co., 11 Cal. App. 138, 144, 104 P. 325, 328 (1909); De Haas v. Pennsylvania R.R., 261 Pa. 499, 503, 104 A. 733, 734 (1918); Wichita Valley Ry. v. Williams, 6 S.W.2d 439, 442 (Tex. Ct. App. 1928). *See also* Comment, *Personal Injury Damages in Colorado*, 35 COLO. L. REV. 332, 338 (1963).

25. Kirby, *Tort Actions and the Economic Expert*, 31 J. MO. BAR 25, 26 (1975).

26. *Id.* at 26.

27. Kirby, *Pecuniary Damage Determination*, 31 J. MO. BAR 117, 118 (1975).

Similar expert testimony could be employed in a divorce action like *Horstmann* to determine the difference in earning potentials between a spouse with a professional education and the same spouse without that education. Although such a valuation technique could involve a considerable degree of uncertainty, and has in fact been rejected by at least one court for that reason,[28] it would yield a valuation no more speculative than that which is well accepted in the area of tort law.

One remedy that would involve few dangers of speculation would be restitution to the working spouse of money earned by that spouse but used to pay for the other spouse's education. This would redistribute somewhat the benefit to the student who has received a professional education paid for by his spouse, and it would be relatively easy to value. In addition, it could provide the supporting spouse something for her efforts without treading upon what some courts consider hallowed ground—the personal nature of the student's degree. Unfortunately, for all its ease of implementation, restitution does not really measure potential earning capacity; the theory would fail to assign to the working spouse any portion of the education's potential economic value. Restitution would give back to the supporting spouse the financial input of the past but would provide her no realization of her expectation of economic benefit from the career for which the education laid the foundation.[29]

A slightly more sophisticated version of the restitution method is the "cost value" approach.[30] Under this method, the value of the total cost of the degree is restored to the supporting spouse to the extent attributable to her.[31] The total cost is determined by adding the direct purchase price of the education to the indirect cost, *i.e.*, the "cost opportunity" of the education. The cost opportunity is measured as the amount of potential earnings forgone during the period in which the student was engaged in his studies.[32] Because this approach takes into consideration cost opportunity, it would be more beneficial to the supporting spouse than straight restitution of education expenses. But like restitution, cost value is not a true measure of the worth of the final product of the degree. It does not measure earning potential but only income denied the family because of the education.

The valuation of the wife's marital interest should include a measure of future earning capacity and, to be totally equitable, it should also consider

28. *In re* Marriage of Graham, 574 P.2d 75, 76 (Colo. 1978) (such a comparison was made at trial level; reversed on appeal).

29. *See* Comment, *The Interest of the Community in a Professional Education*, 10 CAL. W.L. REV. 590, 592-97 (1974).

30. *Id.* at 603.

31. Due to the restitutionary nature of this theory, family expense statutes, in those states that have such statutes, or the common law, may pose a barrier to an equitable allotment to the supporting spouse. *See* notes 40-44 and accompanying text *infra*.

32. Comment, *supra* note 29, at 603 n.75.

the independent effect that the husband's professional expertise will add to his future earning capacity beyond what the wife helped provide him during marriage. One commentator has proposed a method for valuing potential earning capacity in which both of these elements would, to a large extent, be present.[33] This formulation is premised upon the difference between potential earning capacity with and without the degree. It takes into account three basic considerations: (1) any projection of future income must include a projection of future tax liability; (2) earnings do not increase at a constant rate and there are certain peak earning periods; and (3) a determination must be made as to what portion of a spouse's future income will be attributable to the educational experience acquired during marriage.[34]

Under this proposed approach, these three basic factors are considered in making an initial determination, with the aid of expert testimony, of the difference between prospective income for each year of the expected working life of the spouse with a professional education, and what his prospective income would have been without that education. Using a somewhat complicated formula employing a "sliding fraction,"[35] the excess of the income expected as a professional over what would have been earned without the professional degree is then attributed for each year partly to the education and partly to acquired professional experience.[36] Each subsequent year a smaller part of the excess income is attributed to the professional degree and a larger part is deemed due to the professional's experience. The total of the amounts deemed each year to the professional degree will constitute the value of future earning capacity which becomes marital property.

The existence of valuation tools such as those discussed here demonstrates that future earning capacity may be characterized as marital property without unmanageable difficulty. The method used to value the future earning capacity must, however, not only be manageable but must also be consistent with the theory underlying recognition of that capacity as a marital asset. The *Horstmann* decision itself presents a paradox of theory and method. There the court spoke of potential earning capacity

33. *Id.* at 604-12.
34. *Id.* at 607-12.
35. *Id.* at 609.
36. The following formula should be employed for the projected income of each year in order to determine the amount of that income attributable to the professional education acquired during marriage:

$$\left[\begin{array}{c}\text{Income With}\\ \text{Professional}\\ \text{Education}\end{array}\right] \underset{\text{(minus)}}{-} \left[\begin{array}{c}\text{Income}\\ \text{Without}\\ \text{Professional}\\ \text{Education}\end{array}\right] \underset{\text{(times)}}{\times} \left[\frac{\begin{array}{c}\text{Number of Years of}\\ \text{Professional Education}\end{array}}{\begin{array}{c}\text{Number of Years Since}\\ \text{Professional Education}\\ \text{Commenced}\end{array}}\right]$$

Id. at 609-11.

and the need to provide the wife with some attainment for her loss of expectations, but then apparently proceeded to use restitution as the method of assessment. This method, as noted earlier, neither measures the actual worth of potential earning capacity nor provides the working spouse with any of the future benefits that she expected from her financial input to the other's education. The trial court seemed to base its total of $18,000 upon Donna Horstmann's computations which added her income over the three years of Randall's schooling to sums contributed by her parents for the family's support and deducted Randall's earnings over this period.[37] While the Iowa Supreme Court recognized that there were other methods of valuation, it concluded that there was nothing wrong with the one employed by the trial court.[38] Nowhere in *Horstmann* is there attempted a valuation of Randall's potential earning capacity; only a muddled analysis of family expenses and educational costs is presented.

This incongruity in the *Horstmann* decision is further compounded by the type of restitution apparently awarded. Donna Horstmann did not contribute to the cost of tuition, books, or fees. She supported the family while Randall attended law school. Randall's education was paid for by his loans, his employment, and a scholarship.[39] Consequently, it seems that Donna Horstmann was granted restitution not for money expended on education costs but rather for money spent on family expense. The Iowa court in *Horstmann* apparently did not consider Iowa's family expense statute, which states that the "reasonable and necessary expenses of the family . . . are chargeable upon the property of both husband and wife, or either of them, and in relation thereto they may be sued jointly or separately.[40] Similarly worded family expense statutes have been passed in several other jurisdictions.[41] Courts construing statutes such as this have generally held that where there is no specific agreement to the contrary,

37. 263 N.W.2d at 887.
38. *Id.* at 891.
39. *Id.* at 886.
40. IOWA CODE § 597.14 (1971).
41. *See* COLO. REV. STAT. § 14-6-110 (1973); ILL. REV. STAT. ch. 68, § 15 (1975); MONT. REV. CODES ANN. § 36-109 (1961); OR. REV. STAT. § 108.40 (1977); UTAH CODE ANN. § 30-2-9 (1969); WASH. REV. CODE ANN. § 26.16.205 (Supp. 1977). *See also* the last sentence of WYO. STAT. ANN. § 20-1-201 (1977). Other states have statutes which hold the wife or her property responsible for the necessaries furnished to the family. *See* 41 AM. JUR. 2d *Husband and Wife* § 371 (1968); 41 C.J.S. *Husband and Wife* § 64 (1944); 3 C. VERNIER, AMERICAN FAMILY LAWS § 160 (1935).

The initial purpose for enacting family expense statutes may have been to protect third party creditors. Family expense statutes were passed in many states at the time of the Married Women's Property Acts. Because the husband no longer controlled the wife's property, creditors had feared that the wife's separate property would not be subject to payment of family debts. Family expense statutes enabled creditors to hold the wife's property answerable for any family support obligations. Krauskopf & Thomas, *Partnership Marriage: The Solution to an Ineffective and Inequitable Law of Support*, 85 CHI.-KENT L. REV. 558, 571 (1974).

and the wife has voluntarily paid the family expenses, she has no claim against the husband for reimbursement of those costs.[42] At the time *Horstmann* was decided, Iowa precedent clearly indicated that there should be no recovery by the wife for costs of keeping the family which she paid during the marriage.[43] Since then, however, the Iowa Supreme Court has overruled those cases and held that "nothing in the mutuality of the statutory obligation forecloses a right of contribution between the parents when one has performed a duty the other should in justice and equity have helped with."[44] In jurisdictions where the issue is undecided, or decided as previous Iowa law that there was no right to contribution, a strong argument can be made for a similar reversal.

Although the *Horstmann* court can be lauded for its tacit, perhaps even unconscious, foreshadowing of the reinterpretation of the state family expense statute, the remedy it granted was inconsistent with the theory which the court espoused for granting it. The award of future value of the professional training or earning capacity is solely forward looking; the amount of the award was based on the contribution of the wife to expenses over the term of the marriage, a completely backward looking consideration. The *Horstmann* court could have been much more consistent had it used the sliding fraction approach or a similar method of valuation. Unlike restitution or cost value, the sliding fraction method will provide an

42. This has been the majority holding under the common law in jurisdictions with or without family expense statutes. *E.g.,* See v. See, 64 Cal. 2d 778, 785, 415 P.2d 776, 781, 51 Cal. Rptr. 888 (1966); *In re* Marriage of Cosgrove, 27 Cal. App. 3d 424, 431, 103 Cal. Rptr. 733, 737 (1972); Agnew v. Agnew, 67 Colo. 81, 83, 185 P. 259, 259 (1919); Hausser v. Ebinger, 161 Ohio St. 192, 196, 118 N.E.2d 522, 524 (1954). *See also* Annot., 101 A.L.R. 442 (1936). The Illinois statute was patterned after the Iowa statute, and although the statute is not mentioned in the decisions, it is likely one ground for Illinois' consistent holdings that reimbursement for family expenses incurred during the term of the marriage is not available upon divorce. Spalding v. Spalding, 361 Ill. 387, 393-95, 198 N.E. 136, 139 (1935); Crenshaw v. Crenshaw, 45 Ill. App. 3d 880, 883, 360 N.E.2d 576, 579 (1977); Norris v. Norris, 16 Ill. App. 3d 879, 880-81, 307 N.E.2d 181, 182 (1974); Harnois v. Harnois, 10 Ill. App. 3d 1062, 1067, 295 N.E.2d 511, 514-15 (1973). Analogous holdings denying reimbursement to the wife have been the majority rule where the husband has used property from the wife's separate estate with her knowledge and consent to pay for family expenses. *See* Colburn v. Colburn, 262 Md. 333, 338, 278 A.2d 1, 4 (1971); Murray v. Murray, 293 S.W.2d 436, 443 (Mo. 1956); T.G.W. Realties v. Long Island Bird Store, 151 Misc. 918, 922, 272 N.Y.S. 602, 606 (1934). *But cf. In re* Estate of Trierweiler, 5 Wash. App. 17, 23, 486 P.2d 314, 318 (1971) (Washington family expense statute, wife entitled to be reimbursed from her deceased husband's estate).

43. Johnson v. Barnes, 69 Iowa 641, 644, 29 N.W. 759, 760 (1886); Courtright v. Courtright, 53 Iowa 57, 59-60, 4 N.W. 824, 826 (1880). *Cf.* Freet v. Holdorf, 205 Iowa 1081, 1084, 216 N.W. 619, 620 (1927) (divorced wife could not recover from her husband money expended by her to support herself and their child, decision not based on statute).

44. Brown v. Brown, 269 N.W.2d 819 (Iowa 1978) (involving child support after divorce; broad language of decision would cover *Horstmann* and similar cases).

actual measure of an individual's potential earning capacity and will thereby allot to the working spouse her share of future benefits that she anticipated would flow because of the other spouse's professional education.[45] Perhaps the court in *Horstmann* did not utilize such a valuation approach because of the difficulty in application that would be involved. Concededly, that type of approach is complex. However, the possibility that the sliding fraction method of valuation may cause a court some difficulty to apply it must be weighed against the equitable demands for its implementation.

Many courts have wrestled with the equitable problem arising where a wife has provided support for a student spouse, only to be denied the anticipated benefits of her husband's degree because of a divorce.[46] A seemingly sound investment of the wife has netted her no return. "In short, the student spouse will walk away with a degree and the supporting spouse will depart with little more than the knowledge that he or she has substantially contributed toward the attainment of that degree."[47]

The efforts of both parties in a marriage where one partner is supporting the other through professional school are analogous to the building of a business with good potential for the future of both individuals.[48] The supporting spouse has given up vital years of her life in which she could have pursued further education or in some manner honed her own marketable skills. The supporting spouse may even suffer a direct lessening of earning potential where she has given up one career for inferior employment so that the student spouse might pursue a professional education.[49]

Horstmann could strongly influence other jurisdictions troubled by this syndrome of abrupt marital dissolution upon one partner's completion of a professional education. There is a need to go beyond the constraints of the traditional, narrow concepts of property so that courts will not remain impotent in the midst of this social dilemma and can rectify present ine-

45. Comment, *supra* note 29, at 604-12.

46. *E.g.*, Greer v. Greer, 32 Colo. App. 196, 510 P.2d 905 (1973); *In re* Marriage of Vanet, 544 S.W.2d 236 (Mo. App., D.K.C. 1976); Wheeler v. Wheeler, 193 Neb. 615, 228 N.W.2d 594 (1975); Magruder v. Magruder, 190 Neb. 573, 209 N.W.2d 585 (1973).

47. Comment, *supra* note 29, at 590.

48. The trial court in *Horstmann* asserted this. 263 N.W.2d at 887.

49. *Cf. In re* Marriage of Beeh, 214 N.W.2d 170, 174 (Iowa 1974) (the interruption of an interesting and rewarding career of teaching nursing by sixteen and one-half years of working as a homemaker and a mother make her employment opportunities at forty much less than they were at twenty-four); Brueggemann v. Brueggemann, 551 S.W.2d 853, 857 (Mo. App., D. St. L. 1977) (that wife remains at home and cares for children and forgoes her opportunity to develop a career or acquire job experience makes a determination of the wife's earning capacity difficult or impossible); Conrad v. Conrad, 471 P.2d 892, 893 (Okla. 1969) (the earning capacity of the defendant was virtually destroyed by the marriage, as she quit a promising position, tended the children, and briefly worked in her husband's office to help make his osteopathic practice successful).