The Interest of the Community in a Professional Education

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THE INTEREST OF THE COMMUNITY IN A PROFESSIONAL EDUCATION

Increasing numbers of married individuals are financing their spouses’ professional school educations with community funds, an “investment” which they hope will secure a brighter family financial future. These community funds may also provide support for the student spouse who foregoes wages and is essentially a dependent while in school. If such marriages are terminated subsequent to the completion of the student spouse’s professional education, unfairness will result if that spouse is allowed to simply walk away from the marriage with the enhanced earning potential occasioned by the education without recognizing the community’s interests resulting therefrom. However, most courts in other states which have ruled upon claims by the supporting spouse to a proprietary interest in the student spouse’s professional education have refused to recognize the education as “property” which is subject to division upon dissolution of the marriage. This comment suggests that a professional education should be categorized as “property” which, if properly classified as community property

1. Of course, community funds and labor may also be expended in earning undergraduate or non-professional degrees. However, this comment assumes that a person with a college degree is at least “employable,” even in these days of high unemployment. In addition, professional educations are generally regarded as aids to the acquisition of higher-paying jobs. Thus, a couple “invests” in a professional education by foregoing the wages which the “employable” spouse could otherwise be earning, with an eye toward the enhanced earning potential which a professional education provides. Because of the “investment” nature of the quest for a professional education, it may be distinguished from undergraduate studies which many regard as a necessary prerequisite to initial “employability.”

2. See the discussion of these cases in text at notes 16-40, infra.

3. Though some of the courts have recognized a monetary interest in the education on the part of the supporting spouse, only Kentucky has recognized the education as “property” and most have expressly rejected this contention. See text at note 35, infra.

under the Louisiana Civil Code or the Revised Statutes, will allow a more just property settlement upon dissolution of the marriage.

The Division of Marital Property

Procedure for the division of marital property differs from state to state; therefore, different considerations are applicable to the issue of whether a professional education should be regarded as property according to which state is making the determination. The brief summary of such procedures which follows will demonstrate how Louisiana's unique procedures present a considerable theoretical roadblock to the recognition of the professional education as property.

In any state, community or non-community, the spouses are free to stipulate a property settlement. The spouses can simply stipulate the agreed upon settlement in court proceedings and the court will take no further action on the matter. However, the student spouse will be unlikely to stipulate that his spouse is entitled to any share in his education, since one's education is not the type of asset that a layman would instinctively recognize as "property" susceptible of "division."

Unfortunately, as at least one court has noted, the professional education and the concomitant increase in earning potential may be the only significant marital asset when the spouses part company shortly after the student spouse completes his education, at a time when the increased earning potential has not yet been realized in the accumulation of material wealth. Thus, the courts have seen and will continue to see disputes concerning the division of property when the sup-

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5. See note 4, supra. See also notes 77 and 80, infra, for texts of pertinent sections.
6. In any state, courts may not properly rule upon matters not before them. The spouses may stipulate a property settlement just as parties in any action may stipulate the facts in order to dispose of uncontested matters. Such uncontested matters are simply not presented to the courts for rulings.
7. Hereinafter, the husband will be regarded as the student spouse for consistency of pronoun usage. However, the principles expounded in this comment are also applicable to female student spouses.
porting spouse demands her rightful share of the professional education. When such disputes arise, and a court is called upon to order a division of marital property, the court may reach its decision by employing one of three basic methods, depending upon the state in which the court sits.

First, all of the non-community property states and five of the eight community property states have statutes requiring the trial judge to "equitably" divide the marital property of the spouses in the absence of a stipulated property agreement. These states will hereinafter be referred to as "Type I" states. In these states, a finding that the professional education is property is not absolutely necessary, since "equitable" property divisions are based upon the trial judge's consideration of "all the circumstances." Thus, the fact that one spouse has labored to help the other to attain an education which has increased his earning capacity may persuade the judge that the supporting spouse should get a larger share of the marital property for the division to be equitable. If the court were to find the education to be property, the value of that property, which the student spouse would be "taking with him," could be recognized by awarding more of the other property to the supporting spouse. In either case, whether the education is determined to be property or not, Louisiana cannot deal with the issue in this manner because of its own method of division of property as will be seen below.

A second basic method of judicial division of marital property prevails in the community property states of California and New Mexico, which will hereinafter be referred to as "Type II" states. In these states, community property is divided by the trial court under what has been termed the "aggregate

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Community property states: see, e.g., Idaho Code § 32-712 (1875), which allows the court to make a "just" assignment of property rights when a divorce decree is rendered on the ground of adultery or extreme cruelty.
11. See text at notes 93-94, infra, for a discussion of valuation of a professional education.
theory of community ownership.” Under this theory the judge in these states could award, for example, a community automobile to one spouse, the shares of community stock of equal value to the other spouse, and so on. Unlike “Type I” states, “Type II” states require a finding that the education is property, since “equitable” unequal divisions are not authorized. Nevertheless, once an education is classified as property and its value is determined, the judge would be empowered to “award” the professional education to the student spouse and community assets of equal value to the supporting spouse. Louisiana, however, does not employ this method of division.

The third basic method of dividing marital property is unique to Louisiana. When the spouses cannot agree upon a property settlement and petition the court for a partition,13 the court is authorized only to partition community property equally in kind or by licitation.14 Partition in kind may only be ordered with regard to community property which is capable of such division, as where a parcel of land may be divided in half. Community property incapable of being divided equally is subject to partition by licitation. That is, the court orders a judicial sale of all such property and the spouses divide the proceeds equally.15 Louisiana, therefore, lacks the ability to employ the equitable distribution method used by “Type I” states or the aggregate theory used by “Type II” states since all community property is either physically divided equally or sold and the proceeds divided equally. This fact leads to the aforementioned legal roadblock to the classification of the professional education as community property in Louisiana: a professional education does not seem to be partitionable either in kind or by licitation. The supporting spouse cannot physically be given half of an education, nor can one’s education be sold. Thus, if a professional education is recognized as community property, what could the courts do with it?

12. W. REFFY & W. DE Funiak, supra note 9. All other states besides Louisiana subscribe to the “aggregate theory” as well, but are not limited to equal division of assets. See text at note 10, supra.
13. LA. CODE CIV. P. arts. 4601-08.
15. LA. CODE CIV. P. art. 4606.
This question need not be answered unless Louisiana courts are willing to recognize the education as property and assign it a value. Thus, the writer will return to this question after considering why the education should be property and how it should be valued. First, however, it may be helpful to consider the decisions of other states which have previously faced this issue.

Resolutions in Other Jurisdictions

At this time, only one state has specifically recognized the professional education of the student spouse as property subject to “division” upon dissolution of the marriage or community.\textsuperscript{16} However, most of the other states which have faced this issue have been able to use their particular methods of dividing marital property, as discussed in the preceding section, to protect the rights of the supporting spouse without the necessity of finding that the education is property. Thus, the following cases will be analyzed in light of the methods of division employed in the particular state where the decision was rendered.

California, a “Type II” state,\textsuperscript{17} is the only state which neither recognizes the education as property nor protects the supporting spouse’s interests by employing its divisional procedure, the “aggregate method.”\textsuperscript{18} In the first case squarely presenting the issue, \textit{Todd v. Todd},\textsuperscript{19} the supporting spouse claimed that her husband’s legal education, which had been partially funded by her community earnings, was a “community asset” to be taken into account in valuing the community estate.\textsuperscript{20} The court rejected this claim, stating that even if the education could be viewed as community property, a proposition which it termed “extremely doubtful,” it is “manifestly . . . of such a character that a monetary value for division cannot be placed upon it.”\textsuperscript{21} In so holding the court seemed to confuse the

\begin{itemize}
\item \textsuperscript{16} See Inman v. Inman, 47 U.S.L.W. 2582 (Ky. App. 1979).
\item \textsuperscript{17} See text at note 12, supra.
\item \textsuperscript{18} See text at note 12, supra.
\item \textsuperscript{19} 272 Cal. App. 2d 786, 78 Cal. Rptr. 131 (1969).
\item \textsuperscript{20} \textit{Id.} at 790, 78 Cal. Rptr. at 134.
\item \textsuperscript{21} \textit{Id.} at 791, 78 Cal. Rptr. at 134.
\end{itemize}
difficulty in valuing the education with the possibility of making such a valuation. Upon making an adequate valuation, the court could have employed the "aggregate theory" to award the education to the student spouse and assets of equal value to the supporting spouse. As it is, however, the effect of the above-cited language is that, even if the education is property, its zero value prevents the supporting spouse from being entitled to any offsetting assets upon dissolution. The court noted, in justification of its conclusion, that the spouses' community assets were the "results" of the legal education such that the supporting spouse "realized the value therefrom" in the award of property to her. This justification is inapposite in the situation in which spouses divorce shortly after the student spouse completes his education, before any significant assets have been accumulated which would allow the supporting spouse to "realize" the value of the education through a division of property. Nevertheless, the "aggregate theory" at least affords California a solution to the problem that is unavailable to Louisiana, despite the fact that the court in Todd failed to adopt such a solution.

Colorado, a "Type I" non-community property state, was the first state to recognize the rights of the supporting spouse in her husband's professional education in Greer v. Greer. However, the rationale behind the court's ruling in Greer is unclear. The case does not hold that the order to the husband
to make payments to his wife was in settlement of property rights, nor does it expressly state that the husband's medical education is property. The court did state that the husband's $150 per month payments "constitute an adjustment in property rights," which led a supporting spouse in the later case of *In re Marriage of Graham* to cite *Greer* as authority for the proposition that her husband's business degree, acquired during marriage, was property. In *Graham* the Colorado Supreme Court distinguished *Greer* and held that, although the education is not property subject to division, it may be a factor to consider in arriving at an equitable property distribution. Thus, under the *Graham* rationale, Colorado has employed its "Type I" method of equitably dividing marital property in order to protect the supporting spouse's rights, obviating the necessity of finding that the education is property. The other "Type I" non-community property states which have faced this issue have resolved it in the same manner as the Colorado court in *Graham*. Note again, however, that Louisiana does not terminate. Before the four-year period was up, the wife remarried, whereupon the husband brought suit to terminate the "alimony" payments. The court refused to terminate the payments since the payments were not alimony. Noting that the original order required payment not for "support," which in Colorado is the test for whether a payment is "alimony," but in view of the wife's funding of her husband's education, the court stated that the payments "[constituted] an adjustment of property...as a substitute for, or in lieu of, the wife's rights in the husband's property." 32 Colo. App. at 199, 510 P.2d at 907. However, the court later stated that if the award constituted "alimony in gross," i.e., "a fixed or determinable sum in connection with orders entered" pursuant to the statute, the result would not be different since neither an order to settle property rights nor an order for alimony in gross are terminated by the subsequent remarriage of the spouse.

28. See note 27, supra.
29. 32 Colo. App. at 199, 510 P.2d at 907.
30. 574 P.2d 75 (Colo. 1978).
31. Id. at 77.
32. "Where there is marital property to be divided, such contribution to the education of the other spouse may be taken into consideration by the court." Id. at 78 (emphasis added). Note that the language is discretionary in nature, allowing the court to consider the contribution of the supporting spouse, but not requiring such a consideration.
33. Id.
34. Kentucky is the only exception. See text at notes 35-39, infra.

The Iowa Supreme Court, in *In re Marriage of Horstmann*, 263 N.W.2d 885 (Iowa 1978), cited *Graham* in ruling that the trial judge should consider a professional educa-
have the ability to “equitably” divide marital property.

Kentucky is the only state at this time which has expressly recognized a proprietary interest of the supporting spouse in a professional education. In Inman v. Inman the court placed a husband’s license to practice dentistry into the category of marital property in recognition of the wife’s financing of his dental school education. Referring to the situation of divorce following shortly after the completion of the education and thus at a time when the spouses have accumulated little property, the court expressed concern that, under “traditional” views of what constitutes property, “the spouse who has devoted much of the product of several years of labor to an ‘investment’ in future family prosperity is barred from any return on his or her investment.” The court felt that its holding was necessary to avoid allowing the student spouse to receive “a windfall of contribution to his or her increased earning capacity.” However, the court indicated that a finding that an education is property may not be necessary or even desirable when the spouses have accumulated sufficient marital property so that an equitable division thereof could do justice between the spouses.

One may summarize the rulings of the courts in other states which have treated this issue as follows: the “Type I”
states, except Kentucky, protect the supporting spouse adequately only where sufficient marital assets exist for an equitable division; Kentucky, through the ruling in Inman, has the flexibility to protect the supporting spouse regardless of the spouses' property accumulation; finally, California does not recognize or protect the supporting spouse's interests at all, though it considers the supporting spouse adequately protected without such a remedy when sufficient property has been accumulated.

In any case, Louisiana cannot avail itself of the division of property methods which, as in Colorado, allow some protection for the supporting spouse without the necessity of a finding that the education is property. However, despite the problems inherent in classifying an education as property, Louisiana, like Kentucky, can find that an education is property for the reasons to be discussed in the following section.

The Professional Education as Property

By and large, the courts in other states have declined to accord "property" status to a professional education due to "traditional, narrow concepts of what constitutes 'property.'"

40. It is arguable that Iowa has reached a similar result in In re Marriage of Horstmann, 263 N.W.2d 885 (Iowa 1978). See note 34, supra. Though the court in Horstmann apparently rejected the claim that the husband's law degree was property, the degree was later referred to as an "asset" of the marriage. In addition, the spouses had very little marital property, but the wife was awarded $18,000 because of the husband's increased earning potential resulting from his legal education. Thus, the court apparently protected this supporting spouse in the absence of an accumulation of marital property for division, a solution which the other "Type I" states except Kentucky may not be able to reach.


The Colorado Supreme Court in Graham summarized some of these traditional aspects in holding that a professional degree is not property. Id. at 77. First, the court pointed out that the degree "does not have an exchange value or any objective transferable value on an open market." Id. This statement is undoubtedly true, but does it prevent the education (through its degree manifestation) from being classified as property? It is submitted that it does not, since the term "value" is a relative term which does not necessarily draw its significance only from the marketplace. For example, an old automobile may have depreciated to the point that its "blue book" value is zero. Because of age and potential mechanical failures, such an automobile may actually have a market value of zero as well, since no willing buyer could be found. Is
Admittedly, a professional education is not the sort of thing that a layman would instinctively recognize as property.

However, Louisiana courts are not bound by "traditional" common law concepts of property. There is ample civil law authority for the proposition that one's education, as manifested in its concomitant increase in earning capacity, is a part of one's patrimony; as a patrimonial asset, it is property which must be considered in a judicial partition of community prop-

such an automobile incapable of classification as property? Certainly not. One may argue, however, that this example may be distinguishable in that a car is inherently capable of being sold, while one cannot sell an education because of its nature. However, this argument does not address the statement made by the court in *Graham*, since the statement merely points out that the degree has no "exchange value" on an "open market," which undoubtedly many items of property similarly do not have.

Secondly, the court noted that the degree "is personal to the holder." *Id.* This, in itself, is not enough to deny property status, since a usufruct, for example, is undeniably personal to the holder. The court added, however, that the degree "terminates on [the] death of the holder and is not inheritable." *Id.* Again, this reasoning is faulty in that a usufruct, which is undoubtedly a property right, also terminates on the death of the usufructuary and is not inheritable.

The next point made by the court, relying upon traditional notions of what is "property," is that the degree "cannot be assigned, sold, transferred, conveyed, or pledged." *Id.* Once again, this reason is not in itself sufficient to deny property status to the professional education. The corpus of a "spend-thrift trust," for example, may not be assigned, sold, transferred, conveyed, or pledged by anyone—the trustees, the income beneficiaries, or the principal beneficiaries. Nevertheless, the corpus is undeniably property and gives rise to the property rights in the beneficiaries. Thus, non-transferrability should not be sufficient.

The court also notes that an education or degree "may not be acquired by the mere expenditure of money." *Id.* This is true, since one cannot buy an education or degree but must combine education expenses with diligence and work. Again, however, this factor should not be sufficient to deny property status, since a laborer, for example, unquestionably has a property right in his wages, yet does not acquire these wages by the mere expenditure of money.

Finally, the court observes that the degree is "simply an intellectual achievement that may potentially assist in the future acquisition of property." Suppose, however, that instead of pursuing a professional education the "student" spouse chooses to write a book. Is this book not an intellectual achievement which the writer hopes will help him to acquire property in the future? It certainly is, yet the law will recognize a property right of the author in his product.

Thus, the court in *Graham* used a "traditional" property analysis in concluding that a professional degree is not property. Yet, as discussed above, each reason given is insufficient in that other things exist which are classified as property despite the fact that they do not comport with the various criteria cited by the *Graham* majority. By and large, the *Graham* analysis is precisely the analysis used in the other cases which deny property status to the professional education.
erty. In fact, several other things have already been recognized as property by Louisiana courts, though they may not be instinctively recognized as such by a layman.

**Patrimony**

The Louisiana Supreme Court has recently stated that a "patrimonial asset" means *property* "in ordinary language,"\(^\text{42}\) for purposes of determining what is property subject to judicial partition upon dissolution of the community. Thus, a finding that the education is a patrimonial asset will be equivalent to a finding that the education is property regardless of the "theoretical nature of the right."\(^\text{43}\)

"Patrimony, according to traditional civilian doctrine, is an economic unit consisting of the sum total of a person’s assets and liabilities."\(^\text{44}\) Aubry and Rau, credited with formulating the "classical" theory of patrimony, have written that "the idea of patrimony is logically deduced from the idea of personality . . . the patrimony is the emanation of personality, and the expression of the juridical capacity with which a person, as such, is invested."\(^\text{45}\) The French consider a person’s patrimony to be made up of the sum total of the person’s "patrimonial rights and obligations, *i.e.*, elements susceptible of pecuniary evaluation."\(^\text{46}\) All rights and obligations which are *not* susceptible of pecuniary evaluation are extra-patrimonial.\(^\text{47}\)

Thé Louisiana law dealing with patrimony has until recently been "a most neglected part of the law jurisprudentially."\(^\text{48}\) However, recent decisions of the supreme court have emphasized the importance of the concept. In *Creech v. Capitol Mack*,\(^\text{49}\) former Justice Barham defined "patrimony" as "the total mass of existing or potential rights and liabilities

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42. Due v. Due, 342 So. 2d 161, 163 (La. 1977).
43. *Id.*
47. *Id.* at § 84.
49. 287 So. 2d 497 (La. 1973).
attached to a person for the satisfaction of his economic needs." The preceding discussion leads one to conclude that, in Louisiana, if an existing or potential asset or right is susceptible of pecuniary valuation, it is a patrimonial asset or right and is thus "property."

The following enumeration of things which Louisiana courts have held to be property will demonstrate how the above "test" for "patrimoniality" or "property" was or could have been applied. First, the Louisiana Supreme Court has recognized, and it is now settled law, that a cause of action for personal injury is property. Clearly, a cause of action for personal injury is an existing right which accrues at the time of injury, and it is certainly capable of being valued in terms of damages. Thus, a cause of action, though it is incorporeal and somewhat theoretical in nature, is correctly recognized as property in Louisiana. The French agree that accrued causes of action are patrimonial assets.

Secondly, the interests of the community in pension plans, retirement annuities, and profit-sharing plans have been recognized as property by Louisiana courts, despite the relative difficulty in evaluating such concepts. These concepts are examples of potential rights which, though difficult to evaluate, are nevertheless susceptible of such evaluation.

Thirdly, the right of the community in a contingent fee contract has been held to be property. This too is

50. Id. at 504.
51. The court in Creech recognized that susceptibility of evaluation is the theoretical test of whether an asset or liability is patrimonial. Id.
52. The interest of the community in such property will be considered in the following section. See text at notes 71-83, infra.
55. Id. at § 75.
59. Due v. Due, 342 So. 2d 161 (La. 1977).
"theoretical" property, a potential right which is susceptible of pecuniary valuation at a later time.

Fourthly, the ability to work and the right to pursue employment and to conduct business are property rights in Louisiana. This is so despite serious dispute among legal scholars. Carbonnier, for example, wrote that inasmuch as patrimony includes future acquisitions, credit may and should be extended to an impecunious individual who has the ability to work. Thus, Carbonnier believes that a person's ability to work should be regarded as a patrimonial asset. Professor Yiannopoulos disagrees, and feels that a person's ability to work, "in contrast to earned salaries," is not a patrimonial asset. Nevertheless, Louisiana courts have in fact held such things to be property as existing rights. Though intangibles, such as enjoyment of one's work, may be present in an attempt to evaluate such rights, it is clear that one's right to work may almost always be evaluated by consideration of the earnings resulting from such work.

Next, Louisiana courts have recognized that the goodwill of a business is a property right. This right may easily be evaluated by simply assuming that the value it commands in a sale of the business is in fact its value.

Finally, and perhaps most strangely, an author's rights in his unpublished letters were recognized as a property right by a Louisiana court. Perhaps this right would be the most difficult to evaluate in a pecuniary manner of all the aforementioned property rights.

**The Professional Education as a Patrimonial Asset**

As is readily seen from a consideration of the foregoing discussion, quite a few incorporeal, intangible, "theoretical"
rights have been properly recognized as property by Louisiana courts. While a layman might not immediately consider his ability to work or his interests in his private letters to be property, the law will nevertheless recognize property rights in such things. The question is whether the professional education, or its concomitant increase in earning potential, may be properly considered as a patrimonial asset and thus property.

Legal scholarship and jurisprudence indicate that two basic requirements must be met for such a finding: first, the education or the earning potential must be an existing or potential asset or right; secondly, this asset or right must be susceptible of pecuniary valuation. As to the first requirement, the earning capacity resulting from a professional education is certainly a potential right, though the better view would be to recognize the education as an existing asset. Either way, this first requirement is satisfied. As to the second requirement, the education or the earning potential will admittedly be difficult to value. However, many of the forms of property discussed above are somewhat difficult to value, a factor which should not and does not affect their recognition as property. In the case of earning potential, it would be incongruous to consider this asset insusceptible of pecuniary valuation when, if the student spouse were to die shortly after graduation as a result of a delict, a court would be able to value the very same earning potential in reaching a determination of damages for lost earnings. A more detailed analysis of factors which must be considered by a court in valuing the education will be deferred until later. It is submitted, however, that the education or

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68. Note also the similarity between this concept and the "right to pursue employment" concept which was recognized as a property right in West v. Town of Winnsboro, 252 La. 605, 211 So. 2d 665 (1968).

69. In Due v. Due, 342 So. 2d 161 (La. 1977), the Louisiana Supreme Court recognized the husband's contingent fee contracts as property without regard to the actual value of the contracts. Noting that "[a]n attorney's rights under a contingent contract, whatever their nature [i.e., whether "existing" or "potential"], clearly have pecuniary value," the court held the contracts to be patrimonial assets and thus "property," without an inquiry into the actual value of the contracts. Id. at 165.

70. See, e.g., Robinson v. Graves, 343 So. 2d 147 (La. 1977). In Robinson, the court noted that damages for loss of future earnings are proper even though "somewhat speculative" in nature. Id. at 149.
earning potential is a potential right that is susceptible of pecuniary valuation, and is thus a patrimonial asset, or "property."

The Professional Education as Community Property

Having established that the professional education should be regarded as property, three further inquiries must be considered and resolved. First, when should such property be classified as community property? Secondly, when the education is recognized as community property subject to judicial partition, how can it be partitioned in light of its apparent inherent insusceptibility of partition either in kind or by licitation? Finally, if it is partitionable, how should a court compute its value?

Classification as Separate or Community Property

Articles 2334\(^{71}\) and 2402\(^{72}\) of the Louisiana Civil Code dic-
tate which "property" or "effects" are considered community and which are considered separate. In pertinent part, article 2334 provides that separate property of the spouses includes property brought into the marriage, property acquired during the marriage with separate funds, or property acquired through inheritance or donation made to the spouse particularly.\footnote{LA. Civ. Code art. 2402.} Community property consists of all property acquired in any manner during the marriage other than those acquisitions which are expressly designated as separate property under the article.\footnote{LA. Civ. Code art. 2334.} Article 2402 elaborates upon what acquisitions are considered community property. In this case, the key language in article 2402 provides that "the produce of the reciprocal industry and labor of both husband and wife"\footnote{LA. Civ. Code art. 2402 provides:}
is community property.

Under Act 627 of 1978,\footnote{Act 627 enacted a major reform of matrimonial regimes law.} the pertinent provisions to the case at hand are basically the same. Section 2838 provides that things acquired during the community's existence "through

The declaration may be general as to all such property or it may specify property to which it shall or shall not apply. If the declaration so provides, it may apply generally to property which may be acquired in the future, but a contrary declaration of withdrawal of her authority or consent by the wife may be made and recorded.

72. \footnote{LA. Civ. Code art. 2402.} This partnership or community consists of the profits of all the effects of which the husband has the administration and enjoyment, either of right or in fact, of the produce of the reciprocal industry and labor of both husband and wife, and of the estate which they may acquire during the marriage, either by donations made jointly to them both, or by purchase, or in any other similar way, even although the purchase be only in the name of one of the two and not of both, because in that case the period of time when the purchase is made is alone attended to, and not the person who made the purchase. But damages resulting from personal injuries to the wife shall not form part of this community, but shall always be and remain the separate property of the wife and recoverable by herself alone; provided where the injuries sustained by the wife result in her death, the right to recover damages shall be as now provided for by existing laws.

73. The other types of separate property, for example the wife's earnings while living separate and apart or damages for offenses or quasi-offenses, are clearly not relevant in this context.

74. \footnote{LA. Civ. Code art. 2334.}
75. \footnote{LA. Civ. Code art. 2402.}
the effort, skill or industry of either spouse” are community property. This provision may be somewhat broader than the provision of article 2402 in that “things acquired” through community effort, skill or industry is literally broader than the “produce” of such activities.

In applying these provisions to the professional education in order to determine its classification, one must, of course, consider the particular facts in a given situation. If, for example, the spouses marry after the completion of the student’s education, it is clear that the property right arising from the education should be considered the separate property of the graduate spouse since it would be “property brought into the marriage.” However, in situations in which at least some, or all, of the education is “acquired” during the existence of the community, the education should to the extent acquired during marriage be considered community property, as a “thing acquired” or the “produce” of the reciprocal industry and labor of both spouses. Thus, if the student spouse begins his professional education prior to marriage but completes it during the existence of the community, the property right arising there-

77. LA. R.S. 9:2838 (Supp. 1978) provides:
   Each spouse owns a present undivided one-half interest in the community property. The community property comprises:
   (1) Things acquired during the legal regime through the effort, skill, or industry of either spouse;
   (2) Things acquired with community assets;
   (3) Things acquired with separate and community assets unless classified as separate in R.S. 9:2839. When things so acquired are classified as community property, reimbursement is due from community assets for the amount of the separate investment;
   (4) Things donated or bequeathed to the spouses jointly;
   (5) Fruits and revenues of community property;
   (6) Fruits and revenues of separate property except as otherwise provided in R.S. 9:2839;
   (7) Damages awarded for loss of or injury to a community asset;
   (8) All other things not classified as separate property by other provisions of this Part.
   Property possessed by either spouse during the community regime is presumed to be community property, but neither spouse shall be precluded from proving its separate character.

from should be community property in proportion to the
"amount" of the education which is acquired due to the indus-
try or effort of the student spouse and the investment of com-
munity funds by the supporting spouse.

It is submitted that the community will always have a
property interest in a professional education acquired wholly or
partially during its existence, even if the education is funded
by the separate funds of the student spouse, since the com-
munity industry and labor of the supporting spouse is always
expended in acquiring the education.79 A professional educa-
tion is not property which can simply be purchased; it requires
the investment of long hours of study and effort on the part of
the student spouse in addition to whatever funds are needed for
books, tuition, and other fees. The provisions of article 2334
and section 2839 of Act 62780 that state that things acquired
by the spouse with separate funds or assets are separate property
obviously do not contemplate a situation where community
labor and industry is also expended in the acquisition of the
thing. The solution to this problem may be derived by analogy
to the treatment of life insurance policies in Louisiana law. The
jurisprudence is uniform in recognizing that a life insurance
policy purchased during the existence of the community is
community property, regardless of the funds used to acquire
it.81 If the policy were acquired with separate funds, the spouse

79. The Louisiana Supreme Court in Due v. Due, 342 So. 2d 834 (La. 1976),
expressed a belief that articles 2402, 2334, and 2405, when read together, declare the
legislature's intent that "all property [in the broad sense of the word] is to form part
of the community, if acquired during the marriage . . . ." Id. at 165 (emphasis
added).

80. LA. R.S. 9:2839 (Supp. 1978) provides in pertinent part:
A spouse owns his or her separate property to the exclusion of the other.
The separate property of the spouses comprises:

(3) Things acquired with separate and community assets when the
amount of the community investment is inconsequential. In such cases reim-
bursement is due from the separate estate for the amount of the community
investment.

Note that, in the case of a professional education, the community "investment"
of the labor and industry of the student spouse can hardly be called "inconsequential."

81. Thigpen v. Thigpen, 231 La. 206, 91 So. 2d 12 (1956); Succession of Mendoza,
288 So. 2d 673 (La. App. 4th Cir. 1974).
whose separate funds were expended may be entitled to a reimbursement,\textsuperscript{82} but this does not affect the classification of the policy as community property. Likewise, a similar finding would be justified in regard to the professional education: the property right is community property to the extent acquired during the community since it is a product of community labor and industry, and any investment in its acquisition with the separate funds of either spouse should give rise to a right of reimbursement but should not affect the classification of the property.\textsuperscript{83}

Perhaps the preceding principles may be more clearly explained through the use of hypotheticals. Assume the following facts, which will then be subjected to several variations: the husband earns a law degree in three years, during which time he attended school and did not work.

\textit{Variation One:} The husband completes his three-year study and acquires his law degree \textit{prior} to marriage. As mentioned previously, in this instance the legal education should be his separate property as property "brought into the marriage."

\textit{Variation Two:} The spouses marry after the husband’s first year of law school. During the next two years, the wife

\textsuperscript{82} The principle of reimbursement is based upon \textit{La. Civ. Code} art. 2408, which provides as follows:

When the separate property of either the husband or the wife has been increased or improved during the marriage, the other spouse, or his or her heirs, shall be entitled to the reward of one half of the value of the increase or ameliorations, if it be proved that the increase or ameliorations be the result of the common labor, expenses or industry; but there shall be no reward due, if it be proved that the increase is due only to the ordinary course of things, to the rise in the value of property, or to the chances of trade.

Though the article addresses itself only to the situation where the \textit{separate} property of either spouse has been improved during the marriage, the jurisprudence has long recognized that the article also requires a reimbursement to a spouse whose separate funds have "improved" the community. \textit{See Succession of Videau}, 197 So. 2d 655 (La. App. 4th Cir.), \textit{cert. denied} 250 La. 920, 199 So. 2d 922 (1967).


\textsuperscript{83} Of course, if the investment of separate funds is a donation, no right of reimbursement is appropriate.
works, though the actual school tuition, fees, etc., are provided by the husband's parents. In this situation, "two-years worth" of the husband's community labor and industry have been expended in quest of the law degree. One of the years, however, was expended by the husband "on his own time." Thus, the community interest should be recognized as two-thirds of the value of the property right in the education. The husband may be entitled to a reimbursement for the two years of funds if he can prove that the funds were his separate property as donations made to him particularly. This factor, however, will not disturb the community classification to the extent of the expenditure of community labor and industry in its acquisition.

**Variation Three:** The spouses marry prior to the husband's entering law school and divorce shortly after his completion of his education. Clearly, the entire value of the professional education is community property in this situation.

**Variation Four:** The spouses marry prior to the husband's entering law school. In December of his senior year, the husband accepts a high-paying job with a prestigious law firm. In January, he abandons his wife. She gets a legal separation from bed and board in March. He completes his education in May. They divorce two years later.

In this situation, the community interest should be recognized to the extent of the husband's investment of community labor and industry, despite the fact that the education was not completed at the time the community was dissolved. This solution finds authority through an analogy to the cases of *Sims v. Sims* and *Due v. Due*.

In *Sims*, the wife's share of the community interest in the husband's pension plan was recognized despite the fact that, at the time of divorce, the husband's rights to the pension had not yet vested. In *Due*, the wife's share of the community interest in the husband's contingency fee contracts was recognized even though the husband was not yet entitled to any proceeds from the contracts and in fact

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84. As mentioned previously, the evaluation of the professional education will be considered in a later section. See text at notes 93-94, *infra*.
85. 358 So. 2d 919 (La. 1978).
86. 342 So. 2d 161 (La. 1977).
would never be entitled to any proceeds if the actions upon which the contracts were based did not succeed. Thus, in the instant situation, the community interest in the professional education should be recognized even though at the time of dissolution the husband enjoys no benefits therefrom and in fact may never complete the education. In the latter case, of course, the “community interest” would be of no value where the professional education is not completed, much as Mrs. Due’s interests in her husband’s contingency fee contracts are worthless if the actions do not succeed.

**Partition of the Community Professional Education**

The preceding section has demonstrated how part or all of the property right in a professional education may be classified as community property. Nevertheless, as has been pointed out, the courts may run into problems if they try to partition this asset in settlement of property rights, since an education is evidently not partitionable in kind or by licitation.\(^5\)

It is submitted, however, that the provisions dealing with judicial partition should be read in conjunction with article 2406 of the Civil Code in order to reach an alternative method of partition. Article 2406 provides that, upon dissolution, the

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87. This is not to say that the education one receives short of a professional degree cannot enhance his earning potential. A year or two of law school, for example, could be quite valuable to a person in securing a higher-paying job in business. However, recalling that the basic premise of this paper equates professional “education” with a professional “degree” or “license,” it is submitted that any education falling short of the ultimate goal of a degree or license should not be recognized as “property.” A year of law school, for example, does not confer any “existing or potential right” and thus is not a patrimonial asset, regardless of any practical value that the education may confer.

88. See text at notes 13-15, supra.

89. LA. Civ. CODE art. 2406 provides:

> The effects which compose the partnership or community of gains, are divided into two equal portions between the husband and the wife, or between their heirs, at the dissolution of the marriage; and it is the same with respect to the profits arising from the effects which both husband and wife brought reciprocally in marriage, and which have been administered by the husband, or by husband and wife conjointly, although what has been thus brought in marriage, by either the husband or the wife, be more considerable than what has been brought by the other, or even although one of the two did not bring anything at all.
"effects" which compose the community of gains "are divided into two equal portions between the husband and the wife." Thus this language is susceptible of the interpretation that, as Professor Pascal has noted, each spouse upon dissolution is entitled to "realize his interest in terms of half the assets rather than a half interest in all of them." Thus, reading article 2406 together with the partition provisions of the Code of Civil Procedure, one may be justified in concluding that, in a situation such as this one where certain property may not be partitioned in kind or by licitation, the alternative is to apply article 2406 and recognize each spouse as owner of half the assets. This approach would basically be equivalent to the "aggregate theory" in that the student spouse could, for example, be "awarded" his education and a community automobile while the supporting spouse would receive other community property which is equal in value to the husband's awarded assets. Of course, this determination must be based upon a valuation of the professional education, which is the subject of the following section.

Valuation of the Community Professional Education

Not only is a valuation needed in order to effectuate a judicial partition, but it is also necessary in that, to be a patrimonial asset, and thus property, the professional education must be susceptible of pecuniary evaluation.

As mentioned previously, an analogy may be drawn in this regard to personal injury claims in which courts are frequently called upon to establish values for loss of prospective earnings. Louisiana courts have noted that damages for loss of future earnings are proper even though they are somewhat speculative in character. In such cases, the valuation is made by the trier of fact based upon all of the circumstances of the parties. Obviously, the true value of the professional education lies in

90. LA. CIV. CODE art. 2406.
92. LA. CODE Civ. P. arts. 4601-08.
94. Richardson v. DeVille, 204 So. 2d 411 (La. App. 3d Cir. 1967).
the graduate's increase in earning potential, which is simply a determinant in "prospective earnings." There is no reason why a Louisiana court should evaluate the loss to the community in the form of damages when the graduate spouse is killed, yet refuse to evaluate the related value to the community in the form of a partition of property rights when the community is dissolved other than by death.

The point of the preceding discussion is that the professional education can be valued, not that the actual value of the education upon dissolution of the community other than by death should be the same as the value of lost potential earnings when the community is dissolved by death. As mentioned above, the circumstances of the case determine the valuation. Certainly the recognition of the community's interest in future earnings is based upon the assumption that the community would have continued had the spouse not been killed or disabled, and thus, his earnings would have been community property. The circumstances are quite different when, for example, the community is terminated by divorce so that the spouse's future earnings would be his separate property. It should be noted, however, that an evaluation of the professional degree in terms of future earnings is not an attempt to improperly partition future separate earnings; the evaluation merely recognizes earning potential as the value to which the spouses originally looked in making the investment of community labor and funds.

What are some of the circumstances which should be considered by the trial judge in determining the value of the professional education? In addition to life expectancy and the earning capacity associated with the profession, both of which may be established by expert testimony, it is submitted that two additional criteria should be considered.

First, and most importantly, the judge should recognize that the value of the education to the graduate spouse decreases over time as he builds up practice experience. For example, it can hardly be said that the earning potential of a lawyer with twenty-five years experience is based to any significant degree upon his formal education. Thus, in a situation where the community is dissolved at such a time, the remain-
ing value of the professional education will be insignificant, and possibly zero. In addition, even if the community is dissolved shortly after the completion of the student spouse’s education, it is plain that the value of the professional education is not equal to the full value of the spouse’s earning capacity, because the earning capacity is a function of education and experience, with the importance of the education diminishing over time.

The second major consideration should be the extent of other community assets at the time of dissolution. If, for example, the community is dissolved after fifteen years and the assets of the community are substantial due primarily to the professional success of the “student spouse,” perhaps, as the Kentucky court noted in the Inman case, the community will in fact have realized the value of the professional education.

By way of summarizing the discussion up to this point, assume the following hypothetical. Husband and wife are married after the first year of husband’s three-year legal education. Wife earns $600 per month working at a bank to support the husband in his last two years of law school. Six months after his graduation, at which time he is gainfully employed, husband abandons wife. Shortly thereafter, wife gets a separation from bed and board and seeks a judicial partition of community property. However, at this time, the spouses have yet to accumulate any significant assets.

It is clear that in such a situation the property interest in the professional education is the only significant asset of the community. Inasmuch as two-thirds of the asset was acquired during the existence of the community, the community is entitled to two-thirds of the value of the education. The supporting spouse will then be entitled to her one-half share. Assume that the trial judge determines that the value of the education, in light of all the circumstances, is $18,000. Under the concepts

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95. See text at notes 35-39, supra.
96. Louisiana Civil Code article 138(5) provides that abandonment is cause for a separation from bed and board.
97. This is the actual figure determined by the Iowa trial court in In re Marriage of Horstmann, 263 N.W.2d 885 (Iowa 1978), to be the value of a legal education under similar factual circumstances.
discussed earlier, the judge could “award” the $18,000 education to the student spouse and award $18,000-worth of other assets to award the wife. It is submitted that, in this situation, the court could order the student spouse to pay one-half of the community’s $12,000 share of the education, or $6,000, to the supporting spouse, either in a lump sum or over time, in settlement of her property rights. This solution is reached through analogy to the Sims and Due cases in that the court is empowered to recognize a spouse’s community rights even though those rights may not be susceptible of satisfaction at the time of the rendition of the judgment. Thus, the fact that the spouses had yet to realize sufficient assets in order for the judge to allow a set-off of assets under article 2406 should not prejudice the supporting spouse’s right to have her property interests recognized and eventually satisfied.

Conclusion

The purpose of this comment has been to demonstrate that, as a patrimonial asset, a professional education is a property right which may be classified as community property under appropriate circumstances. Such a determination is necessary in order to protect the supporting spouse and to avoid the “windfall of contribution” to the earning capacity of the student spouse. Though the property right arising from a professional education is admittedly somewhat theoretical in nature, “traditional notions of what constitutes ‘property’”.

98. See text at note 88, supra.
99. See text at notes 85-87, supra.
100. At least one court has recognized that the supporting spouse’s interests may be protected by considering the student spouse’s increased earning potential in awarding alimony. Colvert v. Colvert, 568 P.2d 623 (Okla. 1977). In Louisiana, earning capacity is certainly relevant in determining alimony awards, as an element of “ability to pay.” It should be emphasized, however, that the patrimonial nature of a professional education requires its recognition as “property” by the courts of this state, and that any attempt to circumvent this result by an adjustment of alimony awards should be ineffective. Nevertheless, courts should be aware of the interrelationship of property distributions and alimony awards in these cases due to the common “earning capacity” element, and should be careful that there is no “double dipping,” i.e., that the supporting spouse does not realize the value of the investment’s earning capacity in both awards.
101. See note 41, supra.
should not be viewed as being too narrow\textsuperscript{102} to extend to the education since, as has been shown, it is a valuable patrimonial asset. It is time that the courts become sensitive to the economic realities of an investment in a professional education.

\textit{James Joseph Sullivan}

\textsuperscript{102} In \textit{Due v. Due}, 342 So. 2d 161 (La. 1977), the Louisiana Supreme Court stated that the term “property” is used “in the broad sense of the term” in determining that property which should be classified as community property. \textit{Id.} at 165 (emphasis added).