

ALASKA LEGISLATURE COMMITTEE FILES, 1989-1990 8672
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The valuation of the firm's office equipment, accepted by the court, was based on replacement cost, arrived at by reference to Robert's corporate insurance policy. Robert relied on a valuation by William Borchardt, manager of Arctic Office Products, for the equipment's fair market value. Upon questioning from the bench, Mr. Borchardt indicated that his valuation was based on the fair market value at the time of trial in 1986, not the value as of October 24, 1984, the date agreed on for valuation.

Again, it was clear error to accept Margaret's valuation of the equipment. Reliance on the replacement cost of the equipment was not in accordance with acceptable valuation methods. The trial court should have looked to the fair market value of the equipment. Cf. Hayes v. Hayes, 756 P.2d 298, 299 (Alaska 1988) (rejecting valuation of business based on insurance funded buy out agreement). However, Mr. Borchardt's valuation was of no evidentiary value. On remand the trial court should ascertain or estimate the fair market value of the equipment as of October 24, 1984.

Robert also objected to Margaret's valuation of his firm's work in progress. It was valued at \$155,584, based on data from the Altman-Weil survey for year ending

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1984.⁵ Robert used records of his law firm to value work in progress at \$60,935. This figure was based on records the firm began keeping in May 1985 and calculations based on work in progress as of February 28, 1985. Robert's expert worked backwards from these figures to determine work in progress on October 24, 1984.

Relying on a national survey when actual figures are available is an abuse of discretion. If the trial court found Robert's figures unreliable, it could have obtained reliable figures to value the work in progress. Based on the foregoing, we have a definite and firm conviction that a mistake was made in valuing Robert's law firm's tangible assets. Therefore, we remand the valuation for redetermination.

B. TRIAL COURT'S AWARD OF ALIMONY.

Margaret was awarded \$3,000 per month alimony. The "rehabilitative alimony" was to be paid for six years "to assist her in the transition from being a participant in an economic partnership to supporting herself." Margaret contends that the court's award of alimony in this amount

5. The Altman-Weil survey estimates work in progress as of the end of the fiscal year. The trial court's acceptance of this figure is puzzling. The trial court did not rely on Altman-Weil's valuation for accounts receivable. This selective use of data resulted in Robert's practice being overvalued.

was justified by the need to equalize her earnings with Robert's. Robert challenges this award. He argues that it is unjust, unnecessary and contrary to decisions of this court.

An award of alimony is within the trial court's discretion and will be set aside only if it is unjust or unnecessary. Messina v. Messina, 583 P.2d 804 (Alaska 1978). Recently, we reiterated our position that alimony is not "just and necessary" when the property division can adequately provide for the "reasonable needs of the spouse seeking alimony." Hilliker v. Hilliker, 755 P.2d 1111, 1112 (Alaska 1988) (and cases cited therein). Rehabilitative alimony may be awarded for a specific purpose and a short duration even with an adequate property division, Bussell v. Bussell, 623 P.2d 1221, 1224 (Alaska 1981), but is limited to job training or other means directly related to entry or advancement within the work force. Schanck v. Schanck, 717 P.2d 1, 5 (Alaska 1986). The party seeking rehabilitative alimony must intend to use it for such purposes. Miller v. Miller, 739 P.2d 163, 165 (Alaska 1987). Absent such an intent, rehabilitative alimony should not be awarded. Id.⁶

6. In addition to rehabilitative alimony, this court has recognized reorientation alimony. Dixon v. Dixon, 747 P.2d 1169 (Alaska 1987). The purpose of reorientation alimony is to allow the requesting spouse an opportunity to adjust to the changed financial circumstances accompanying a

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Applying the foregoing analysis to this case, we conclude that the trial court's award of rehabilitative alimony was an abuse of discretion. Margaret has a college degree and was employed at the time of the trial. She disclaimed any need for or intent to seek retraining. Absent any intention to pursue training, Margaret was not entitled to rehabilitative alimony. See Miller, 739 P.2d at 165.

Margaret argues that the award is not unjust and unnecessary because it equalizes her income with Robert's. She reasons that it is fair to award alimony in this case because of the difference between her earning capacity and Robert's. However, differences in earning capacity should be taken into account in the property division. Merrill v. Merrill, 368 P.2d 546, 547-48 n.4 (Alaska 1962). As observed in Dixon v. Dixon, 747 P.2d 1169, 1173 (Alaska 1987), in some cases it may be appropriate to give a larger

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divorce. Dixon, 747 P.2d at 1173. However, reorientation alimony is only appropriate when the property settlement will not adequately meet the parties' reasonable needs. Dixon, 747 P.2d at 1172-1174.

The trial court could have meant to award reorientation alimony in this case. However, the award of alimony here cannot stand as reorientation alimony. There is sufficient property available to meet her reasonable needs. Hilliker v. Hilliker, 755 P.2d 1111, 1112 (Alaska 1988). Therefore, an award of reorientation alimony would be an abuse of discretion.

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share of the marital estate to the spouse with the smaller earning capacity.⁷ 747 P.2d at 1173.

C. TRIAL COURT'S AWARD OF CHILD SUPPORT.

Robert objects to the trial court's award to Margaret of \$1,000 per child per month for child support. Additionally, Robert was ordered to pay 100% of the children's medical and dental expenses.⁸ In awarding child support, the trial court stated in its Findings of Fact and Conclusions of Law:

7. The children have enjoyed a standard of living commensurate with their father's earnings. Defendant is financially able to pay and should pay the amount of \$1,000 per month per child for a total of \$3,000 per month as child support for the support and maintenance of the three minor children of the parties. These child support payments should be paid through the Child Support Enforcement Agency in Anchorage, Alaska on the first day of each month beginning May 1, 1987.

8. Defendant is financially able to pay and should pay all medical, surgical, hospital, dental and

7. This is not to say that Margaret must be provided with property which will produce an amount of income sufficient to support a standard of living comparable to that which was enjoyed during the marriage. Both parties to a divorce must reorganize financially. Hilliker v. Hilliker, 755 P.2d 1111, 1113 n.2 (Alaska 1988) (citing Monsma v. Monsma, 618 P.2d 559, 560 (Alaska 1980); Allen v. Allen, 554 P.2d 393, 395-96 (Alaska 1976)).

8. Robert does not object to paying the full medical and dental expenses of the children.

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orthodontic expenses of the minor children.

Margaret testified that without any "fluff" each child's expenses were \$833 per month. This figure only covered expenses; it did not allow for trips or vacations. Margaret arrived at this figure by taking monthly expenses for herself and the three children and dividing by four and multiplying by three. Margaret asked that child support be set at \$1,000 per child per month to allow her to provide the children with "extracurricular enjoyment." She presented no evidence to support an amount above \$833 per child per month.

Robert testified that the expenses were \$515 per child. His figures were arrived at by examining the monthly expenditures and attempting to filter out what were actually Margaret's expenses. He argues that he is shouldering the total out-of-pocket expenses of the children, and thus the award is contrary to the decisions of this court.

Child support awards are within the broad discretion of the trial court. Pattee v. Pattee, 744 P.2d 658, 662 (Alaska 1987). They are not to be set aside unless the trial court has abused its discretion, i.e., unless based on the record as a whole this court is left with a "definite and firm conviction that a mistake has been made." Hunt v. Hunt, 698 P.2d 1168, 1172 (Alaska 1985).

Awards of child support are to be based on the total cost of supporting the children and the relative

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financial abilities of both parents. Pattee, 744 P.2d at 662; Hunt, 698 P.2d at 1172. The first step is to assess the reasonable needs of the children, including their station in life. Cf. Hunt, 698 P.2d at 1173. Second, the trial court is to assess the relative financial ability of the parents to meet the children's needs. Id. Third, the court determines whether the relative financial abilities justify placing a greater burden on one parent and a lesser burden on the other. Id. at 1172.

Applying the foregoing analysis to this case, a review of the record as a whole leads us to a definite and firm conviction that a mistake has been made. Robert was ordered to pay 100% of the child's out-of-pocket expenses based solely on his financial ability to pay. No mention was made of Margaret's ability to share in meeting the children's needs.⁹ Child support is to be equitably assessed based on both parents' ability to meet the reasonable needs of the children. See Hunt, 698 P.2d at 1172-73. Margaret concedes that she can expect substantial

9. Robert's income before taxes was accepted by the court to be \$197,000 per year. Robert claimed his income was approximately \$180,000. Margaret earned \$22,000 per year working for the Anchorage Olympic Organizing Committee. Margaret can expect substantial pre-tax income from investing property awarded her in this case. There was no discussion in the Findings of Fact and Conclusions of Law regarding the assessment of Margaret's ability to meet a share of the children's expenses.

investment income from the property. Although this is not as great as Robert's income, it does not justify placing the entire burden for out-of-pocket expenses on him. He may have to carry a greater burden, but not the total burden.¹⁰ Hunt, 698 P.2d at 1172. Additionally, Robert was ordered to pay the full medical and dental expenses of the children.

The trial court failed to properly determine the ability of both parents to provide for the reasonable needs of the children. Thus, the award of child support must be remanded for redetermination.

The trial court also failed to properly assess the children's reasonable needs. Instead, it fixed the level of support at \$1,000 per child per month without evidence to support a figure greater than \$833 per child per month.¹¹

10. As Hunt indicates, the relative financial ability of the parties may justify placing a greater burden on one parent and a lesser burden on the other. 698 P.2d at 1172. This suggests that when feasible some burden should be placed on the parent who is disadvantaged financially.

11. The trial court's award would have required Robert to pay \$36,000 per year in child support. Had this case been decided under Alaska R. Civ. P. 90.3 (effective August 1, 1987), Robert's total child support would have been \$19,800 per year. This figure is arrived at by multiplying \$60,000 (the rule's presumed upper limit) by .33 (the factor used for three children). Alaska R. Civ. P. 90.3(a)(2)(c), (c)(2). Any additional amount of support would require justification. Alaska R. Civ. P. 90.3(c)(2). Robert would also be entitled to a credit for medical and dental expenses he paid. Alaska R. Civ. P. 90.3(d).

On remand we direct the trial court to determine the proper child support level under the guidelines established in Civil Rule 90.3. Although this case arose before the effective date of Civil Rule 90.3, the legislature has made it clear that pre-Civil Rule 90.3 child support awards are subject to redetermination under Civil Rule 90.3. See AS 25.24.170(b). By applying the Civil Rule 90.3 guidelines on remand, the trial court will avoid an almost certain motion to modify any award made under pre-Civil Rule 90.3 guidelines.

D. ATTORNEY FEES.

Robert was ordered to pay two-thirds of Margaret's actual attorney fees and costs, approximately \$80,000.

Margaret contends that Robert waived review of this issue by failing to argue it properly in his brief. We need not address this contention, since "[b]ecause this case must be remanded, the trial court's attorney[] fees determination must be vacated. . . ." Brooks v. Brooks, 733 P.2d 1044, 1058 (Alaska 1987). However, Margaret is entitled to receive presently the amount included in the trial court's award to compensate her for increased litigation costs attributable to Robert's conduct.¹² On

12. The trial court noted in its findings that
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remand, the trial court shall segregate its award, identifying separately the amount it included to so compensate Margaret. Judgment for that amount may be entered.

III. CONCLUSION

Because Robert's professional goodwill is not marketable, the trial court's inclusion of his professional goodwill in the marital estate is REVERSED. The trial court's valuation of the tangible assets of Robert's law firm is REVERSED and REMANDED for redetermination.

The trial court abused its discretion in awarding Margaret alimony. There is adequate property to meet her needs. Therefore, the alimony award must be REVERSED.

The trial court abused its discretion by not assessing the ability of both parents to provide for the children's reasonable needs. Additionally, the trial court awarded an amount of child support not substantiated by the evidence. Therefore, the child support award must be REVERSED and REMANDED for redetermination of a proper amount, in accordance with Civil Rule 90.3.

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Robert's "conduct during the course of this case and immediately preceding it has unnecessarily increased these costs." However, the trial court did not identify the amount of or place a value on the costs unnecessarily increased.

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The award of attorney fees and costs must be
VACATED.

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RABINOWITZ, Justice, dissenting.

I dissent from the majority's determination of the goodwill issue. In my opinion, the superior court properly determined that Robert's professional corporation may have goodwill and that it should be included in the marital estate.

As the majority points out,¹ this court held in Rostel v. Rostel² that a professional practice's goodwill is a divisible marital asset.³ Although some courts have held to the contrary,⁴ this view remains the majority view⁵ and, in my opinion and that of several commentators,⁶ the better view:

1. Maj. op. at 4.

2. 622 P.2d 429 (Alaska 1981).

3. Id. at 430-31.

4. See, e.g., Powell v. Powell, 648 P.2d 218, 222-24 (Kan. 1982); Nail v. Nail, 486 S.W.2d 761, 763-64 (Tex. 1972); Holbrook v. Holbrook, 309 N.W.2d 343, 354-55 (Wis. App. 1981).

5. In re Marriage of Kapusta, 491 N.E.2d 48, 51 (Ill. App. 1986) (citing Annotation, Accountability for Good Will of Professional Practice in Actions Arising from Divorce or Separation, 52 A.L.R.3d 1344 (1973)); Prahinski v. Prahinski, 540 A.2d 833, 842 (Md. App.) (citing authorities), cert. granted, 546 A.2d 490 (Md. 1988).

6. See, e.g., 2 H. Clark, The Law of Domestic Relations in the United States § 16.5, at 199 (2d ed. 1987); L. Golden, Equitable Distribution of Property § 6.21, at 188 (1983 & Supp. 1988) (hereinafter "L. Golden"); Note, Treating Professional Goodwill as Marital Property in Equitable Distribution States, 58 N.Y.U. L. Rev. 554, 555 (1983) (authored by Carmen Valle Patel); Comment, Identifying, Valuing, and Dividing Professional Goodwill as Community Property at Dissolution of the Marital

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Including goodwill within the marital estate is consonant with the policies of equitable distribution. Goodwill represents the probability of future earnings based on circumstances created during the marriage. It reflects the value of a demonstrated capacity to draw business, i.e., the individual has already built up a following. After divorce the professional practice will continue to benefit from the goodwill generated while the parties were married. Much of the economic value of the practice produced during the marriage may be reflected in its goodwill. It would be inequitable to ignore the contribution of the other spouse to the development of that economic resource.

There is one crucial distinction between a professional practice, on the one hand, and the education, degree, and license which are its necessary predicates. The latter are intellectual accomplishments, personal achievements of the holder. The practice is a commercial enterprise, a business. It provides income upon which the family depends. Equitable distribution assumes marriage is a partnership, with both parties contributing to its economic well-being. If the financial foundation of that partnership, the source of income, is placed beyond the reach of one of the spouses, the theory loses its meaning.

If equitable distribution does not apply to a professional business, is there any reason to apply it to any business? Valuation problems are not confined to the professions (even assuming that professions can be defined with precision). If something is property it comes within the statute, whether it is difficult to value or not. It is contrary to the spirit and policy of the statute to say that because the value of the practice, possibly the most substantial asset

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Community, 56 Tul. L. Rev. 313, 313 (1981) (authored by Bryan Mauldin) (hereinafter "Mauldin Comment").

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of the marriage, cannot be measured with certainty it will be given no value at all. If equitable distribution is to have vitality then such items must be included within its scope.^{7/}

To the extent that Moffitt v. Moffitt⁸ did implicitly alter our position on professional goodwill as expressed in Rostel, I think that any alteration was a mistake, and that the better view is that professional goodwill need not be marketable to be considered in dividing the marital assets.

In this regard, I find persuasive the criticisms leveled by commentators against Moffitt and other similar cases:

Several recent cases have adopted a limited form of divisibility, holding that goodwill is divisible only if it exists apart from the owner's individual reputation and future earning capacity. Moffitt v. Moffitt, 749 P.2d 343 (Alaska 1988); Wilson v. Wilson, 741 S.W.2d 640 (Ark. 1987); [Prahinski v. Prahinski, 540 A.2d 833, 843 (Md. App.), cert. granted, 546 A.2d 490 (Md. 1988)]; Taylor v. Taylor, 386 N.W.2d 851 (Neb. 1986); see Buckl v. Buckl, 542 A.2d 65 (Pa. Super. 1988). These cases display a curious inconsistency. Assume that an educated wife uses her own time and effort doing free public relations work for the husband's business, causing its reputation to increase significantly. If the business is a close corporation practicing under a trade name, then the wife's efforts have increased the corporation's goodwill, and she will be compensated for her efforts. See, e.g., In re Brooks, 742 S.W.2d 585 (Mo. App. 1987); Buckl. But if the wife makes exactly the

7. L. Golden § 6.21, at 189.

8. Moffitt v. Moffitt, 749 P.2d 343 (Alaska 1988).

same contributions to the husband's solo professional practice, the goodwill will not be property and the wife will not be compensated. The court will solemnly assure her that unlike the wife in the first situation, her efforts went only to increase her husband's personal reputation and future earning capacity, neither of which constitutes marital property. Thus, whether or not the wife receives compensation for her valuable efforts depends upon the type of business the husband conducts and the form in which he conducts it.

It is difficult to explain this difference of result on any defensible grounds. Some courts have noted that business goodwill is immediately realizable, while professional goodwill is not, see Buckl, but even these courts have generally held in other contexts that an asset need not be immediately realizable in order to constitute marital property. For instance, retirement benefits generally cannot be transferred before maturity, but courts in most states have nevertheless found them to be marital property.^{9/}

Other courts have noted that an award of unrealizable goodwill can be unfair to the owning spouse, because it may force him to pay the nonowning spouse her share by means of a promissory note, thus forcing him to remain employed in order to make the payments. E.g., Moffitt. The alternative, however, is to deny the nonowning spouse any rights in an asset of great economic worth which as a matter of economic fact will substantially benefit the owning spouse in the future. Possible difficulties in arranging means of payment should not justify

9. Alaska is among these states. See Laing v. Laing, 741 P.2d 649, 655-56 (Alaska 1987) (nonvested pensions are marital assets subject to division by divorce court); Monsma v. Monsma, 618 P.2d 559, 560-61 (Alaska 1980) (vested federal civil service retirement benefits are a divisible marital asset).

depriving either spouse of their legitimate marital property rights.^{10/}

10. L. Golden § 6.21, supp. at 107 (citation forms altered; Prahinski citation inserted). See also Comment, Hanson v. Hanson, Mitchell v. Mitchell: The Division of Professional Goodwill upon Marital Dissolution, 11 Harv. Women's L.J. 147 (1988) (authored by Jane A. Materazzo).

The problem perceived because of the intangible and potentially nonliquid character of professional goodwill is magnified as courts are faced with astonishingly high valuations. Where the value of the non-professional spouse's interest in the professional goodwill exceeds the combined value of the professional spouse's share of all tangible community assets, the courts are faced with an additional problem: How is the professional spouse going to obtain the cash necessary to make the ordered compensatory payment? It has been noted that "[i]n very few cases will the goodwill be a liquid asset similar to the items used to offset its value in a division of community property such as stock, real property or bank accounts." At dissolution, all the assets of the practice, including the goodwill, must necessarily be awarded to the licensed professional spouse. The non-professional spouse's interest in the goodwill must be compensated with other property. Not only is the professional spouse faced with the forced liquidation of tangibles in order to pay the necessary compensation, but there may not be enough tangibles to liquidate.

However, this is also the precise situation in which the non-professional spouse needs the greatest protection. If his share in the professional goodwill is left uncompensated and there is also little tangible property to be awarded, the non-professional spouse will be left with few assets while the professional spouse enjoys continued possession of a very valuable asset. This would amount to a perpetuation of the economic superiority of the professional or working spouse over the non-professional or non-working spouse which community property is intended to remedy. Clearly the role of the court is not to

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In the instant case, there was extensive evidence presented as to Margaret's direct and indirect contributions to the success of Robert's law practice. Margaret's brief presents an accurate characterization of these efforts:

When Robert Richmond opened his own law practice, Margaret Richmond was there to assist him. She worked as a secretary in the law office. When law clerks and associates were hired, she housed and fed them, and washed their clothes. She frequently entertained employees and clients of the law firm, giving annual New Year's Eve parties and "surprise" birthday parties for Robert

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force the professional spouse into bankruptcy or forced sale of his practice, nor is this a necessary result. It is equally unnecessary for the court to deny the non-professional spouse a fair division of property by intentionally undervaluing the professional goodwill.

. . . .

The solution is not bankruptcy, forced sale of the practice, undervaluation of professional goodwill, or unequal division of the community. The financial interests of both spouses require a far less onerous remedy which is readily available since it frequently is used and is certainly within the courts' discretionary powers. A court, upon assigning a fair value to the professional goodwill and making an appropriate division of tangibles, need only, where necessary to avoid hardship, order periodic payments or the execution of a promissory note payable in installments over a term sufficient to meet the balance due plus interest accrued on the compensation for the non-professional spouse's interest in the goodwill. Such a method meets the financial needs of both spouses.

Mauldin Comment, 56 Tul. L. Rev. at 328-30 (footnotes omitted; emphasis added).

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Richmond. She handled the remodeling of the law office building. She volunteered for community service activities [in part as an effort] to promote the public image of the law firm. . . .

In addition to her efforts on behalf of the law firm, Margaret Richmond managed the family home and the family finances. She agreed to stay at home and care for their three children so that Robert Richmond could continue with developing the law practice and legal career. The specific agreement between the parties was that Robert Richmond's only responsibility was to bring home money from the law practice and that Margaret Richmond would "do everything else." Accordingly, Margaret Richmond acquired money from her parents to [assist in the purchase of the family home]. She acted as business manager for the Richmonds' real estate, managing an apartment building, purchasing [and setting up for rental] a condominium in Hawaii, and remodeling the family home. Margaret Richmond's job was full time as an equal participant in the Margaret and Robert Richmond partnership.

(Citations to trial transcript omitted.)

I agree with Margaret that her contribution to the goodwill of Robert's law practice should be recognized in the marital property division:

After divorce, the law practice will continue to benefit from that goodwill as it had during the marriage. Much of the economic value produced during an attorney's marriage will inhere in the goodwill of the law practice. It would be inequitable to ignore the contribution of the non-attorney spouse to the development of that economic resource. An individual practitioner's inability to sell a law practice does not eliminate existence of goodwill and its value as an asset to be considered in equitable distribution. Obviously, equitable distribution does not require conveyance or transfer

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of any particular asset. The other spouse, in this case the wife, is entitled to have that asset considered as any other property acquired during the marriage partnership.^{11/}

The majority opinion states that "it is clear that Robert's goodwill¹² is unmarketable. . . . [and that] uncontroverted evidence established that his law practice's goodwill could not be sold."¹³ If Robert were dissolving or withdrawing from a solo law practice, I could agree that any goodwill in Robert's practice could not be sold.¹⁴ However, this would not

11. Dugan v. Dugan, 457 A.2d 1, 6 (N.J. 1983). Accord In re Marriage of Fenton, 184 Cal. Rptr. 597, 600-02 (Cal. App. 1982).

12. I cannot agree with the majority's use of the words "Robert's goodwill." The issue here is not the goodwill possessed by Robert, but rather the goodwill (if any) possessed by Robert's law practice.

13. Maj. op. at 6.

14. See Geffen v. Moss, 125 Cal. Rptr. 687 (Cal. App. 1975) (sale of goodwill of sole legal practitioner's practice unenforceable as against public policy).

In Litman v. Litman, 463 N.Y.S.2d 24 (N.Y. App. Div. 1983), aff'g 453 N.Y.S.2d 1003 (N.Y. Sup. Ct. 1982), aff'd, 463 N.E.2d 34 (N.Y. 1984), the appellate court reversed the trial court's decision that "since a lawyer is enjoined by the Code of Professional Responsibility . . . from selling his or her practice, it is unfair to subject the practice to equitable distribution upon dissolution of the lawyer's marriage." 463 N.Y.S.2d at 25 (citation omitted). The court held that, though the firm need not be sold, the husband would have to compensate the wife for her share of the equity in the firm. Id.

lead me to conclude that an ongoing solo law practice lacks goodwill for marital division purposes.¹⁵

The fact is, however, that Robert is not a sole practitioner, but rather the sole shareholder of an ongoing multi-lawyer professional corporation, Richmond and Associates.¹⁶ Thus, by expressing no opinion as to whether a multi-lawyer law firm has professional goodwill, the majority opinion fails to decide the central issue presented to this court on the issue of goodwill.¹⁷

In my opinion, both a solo practitioner (operating either as a sole proprietorship or as a professional corporation) and a multi-lawyer law firm (operating either as a partnership or

15. The courts are divided on the question of whether a law practice operated as a sole proprietorship may have goodwill divisible for marital estate purposes. Compare Dugan v. Dugan, 457 A.2d 1, 6 (N.J. 1983); In re Marriage of Freedman, 665 P.2d 902, 904-05 (Wash. App. 1983) (both holding that goodwill may exist and be divided upon divorce) with Prahinski v. Prahinski, 540 A.2d 833, 843-44 (Md. App.), cert. granted, 546 A.2d 490 (Md. 1988); Beasley v. Beasley, 518 A.2d 545, 552 (Pa. Super. 1986) (both holding that there is no divisible goodwill).

16. See also In re Marriage of Lopez, 113 Cal. Rptr. 58, 63 (Cal. App. 1974) (solo attorney formed partnership with two associates by selling interests in firm which included goodwill), disapproved on other grounds, In re Marriage of Morrison, 573 P.2d 41 (Cal. 1978). In the instant case one of the associates in Robert's firm became a partner, and the firm is now Richmond & Quinn.

17. Thus, I cannot agree with the majority that "[t]he uncontroverted evidence established that his law practice's goodwill could not be sold." Maj. op. at 6.

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as a professional corporation) may have goodwill.¹⁸ If it does, it should be considered in valuing the marital estate for the reasons that I have expressed above. Although the courts are deeply divided on the question of whether the goodwill of a sole legal practitioner's practice is a divisible marital asset,¹⁹ the majority of courts that have considered the question of whether the goodwill of a multi-lawyer law firm is a divisible asset have answered that question in the affirmative.²⁰

18. The existence and value of goodwill must be determined regardless of whether it is "that of a sole practitioner, a professional partnership or a professional corporation." In re Marriage of Lopez, 113 Cal. Rptr. at 68.

19. See supra note 15.

20. See Molloy v. Molloy, 761 P.2d 138, 139-41 (Ariz. App. 1988) (goodwill of incorporated law firm is a marital asset subject to distribution); Todd v. Todd, 78 Cal. Rptr. 131, 135-36 (Cal. App. 1969) (goodwill of partnership divisible); In re Marriage of Brooks, 756 P.2d 161, 162-63 (Wash. App. 1988) (goodwill of incorporated law firm may be valued even though assigned no value in the corporate bylaws). But see Holbrook v. Holbrook, 309 N.W.2d 343, 354-55 (Wis. App. 1981) (goodwill or intangible value of partnership interest in law firm not an asset subject to division).

regarding the trading of the stocks, the record clearly shows that Erick took no active interest in the maintenance, management or control of the stocks. Erick admitted at trial that he did not give the stock broker any instructions concerning the account, nor could he identify a single transaction in which he had been involved.

There is also no real indication that Erick's contributions to the marital community allowed Debra to preserve her inheritance. In fact, the opposite appears to be true. The record indicates that Debra's inheritance allowed the parties to acquire substantial marital assets. Debra contributed over \$78,000 of her inheritance directly into the marital estate. Moreover, it was the availability of Debra's inheritance that allowed the parties to acquire the mortgage on the Eagle River house, an asset that was awarded to Erick. Debra also worked throughout the course of the Julsen's thirteen year marriage, earning \$20,000 to \$30,000 annually.

[9] Even assuming, *arguendo*, that Erick's contributions did benefit Debra's inheritance, it does not necessarily follow that invasion is required. Our prior cases do not hold, as Erick apparently assumes, that "benefit to separate property" mandates invasion. Rather, *Vanover* and its progeny merely indicate that where such circumstances exist, the trial court may in its discretion, determine that the equities require that all or part of the separate property be subject to distribution. See *Brooks*, 733 P.2d at 1053-54; *Burrell v. Burrell*, 537 P.2d 1, 3, 6 (Alaska 1975); *Vanover*, 496 P.2d at 648.

5. See *supra* note 4.

6. In *Burrell*, 537 P.2d at 2-3, Homer had inherited a 1/4 interest in a trust estate worth \$1,167,000. The trial court held that the inheritance constituted a non-marital asset and declined to invade it in making the property division. *Id.* at 3. On review, we did not question the trial court's theory that the inheritance was to be classified as a non-marital asset, but held, on the assumption that the inheritance should be deemed property acquired before coverture, that "a just division of the property ... required invasion of [Homer] separate property, ... and the award of some portion of ... [it] to [Teresa]." *Id.* at 6 & n. 15 (footnotes omitted).

In the case at bar, the trial court specifically found that "no reason exists to justify invasion of [Debra's inheritance]." In light of the fact that Erick received over \$225,000 in marital assets, is only 40 years old and earns over \$50,000 a year, we perceive no abuse of discretion in the trial court's refusal to invade Debra's inheritance. Such a determination is not clearly unjust.

Erick's third argument is that an inheritance received during marriage constitutes, as a matter of law, a marital asset. Erick's argument essentially is that under the plain meaning of AS 25.24.160(a)(4)⁵, any asset acquired during marriage by either spouse is a marital asset subject to distribution. Consequently, since Debra acquired her inheritance during the marriage, it must be deemed a marital asset.

Although we have had the issue of whether an inheritance received during marriage constitutes property acquired during marriage before us on several prior occasions, we have never actually decided the matter.⁶

Looking to other jurisdictions for guidance shows that a substantial majority of states deem inherited property to be the separate non-marital property of the inheriting spouse. *Hussey v. Hussey*, 280 S.C. 418, 312 S.E.2d 267, 270 (1984). By statute, twenty-one states and the District of Columbia either define inherited property as separate property or exclude it from the definition of marital property. See L. Golden, *Equitable Distribution of Property* § 5.20, at 113-14 (1983). *Accord*, Uniform Marital Property Act § 4, reprinted in 9A U.L.A. 29 (Supp.1986).⁷ Other jurisdictions

More recently in *Gabaig*, we intimated that property inherited during marriage should be treated as a non-marital asset, but since the point was not argued we had no occasion to rule on the matter. 717 P.2d at 842 & n. 17. In that case, we upheld the trial court's property division awarding Dorothy only one-third of the marital assets even though all the other factors indicated that a more equal division would be equitable. *Id.* Our rationale in *Gabaig* for upholding the husband's greater share was that "he inherited it." *Id.* at 843.

7. UMPA § 4(g)(1) provides in part:

Property acquired by a spouse during marriage ... is individual property if acquired:

Sec. 25.24.120. Defenses to adultery. In a divorce action for adultery, the following defenses may be made:

- (1) procurement;
- (2) connivance;
- (3) the act has been expressly forgiven or impliedly forgiven by the voluntary cohabitation of the parties after knowledge of the act;
- (4) the plaintiff is also guilty of adultery and without procurement or connivance of the defendant and not forgiven as provided in the defenses to adultery; or
- (5) the action has not been commenced within two years after the discovery of the act by the plaintiff. (§ 12.11 ch 101 SLA 1962)

Revisor's notes. — Formerly AS 09.55.180. Renumbered in 1983. Collateral references. — Connivance, 3 Am. Jur. POF, pp. 371-378.

Sec. 25.24.130. Defenses to other divorce grounds. When the divorce action is for any of the grounds provided in AS 25.24.050(4)-(6), the defense of procurement or that the defendant has been expressly forgiven may be made. When the divorce action is for the ground provided in AS 25.24.050(3), the defense of procurement or that the defendant has been expressly forgiven or that the action was not brought within two years after conviction may be made. (§ 12.12 ch 101 SLA 1962)

Revisor's notes. — Formerly AS 09.55.190. Renumbered in 1983. Collateral references. — What constitutes reconciliation of separated spouses, 35 ALR2d 746.

★ **Sec. 25.24.140. Orders during action.** (a) During the pendency of the action, the court may provide by order

- (1) that one spouse pay an amount of money as may be necessary to enable the other spouse to prosecute or defend the action;
- (2) for the care, custody, and maintenance of the minor children of the marriage during the pendency of the action;
- (3) for the freedom of one spouse from the control of the other spouse during the pendency of the action;
- (b) The court may restrain either or both parties from disposing of the property of either party during the pendency of the action. (§ 12.13 ch 101 SLA 1962; am § 71 ch 127 SLA 1974)

Revisor's notes. — Formerly AS 09.55.200. Renumbered in 1983. and child to maintain each other, see AS 25.20.030.
Cross references. — For duty of parent

Revisor's notes. — Formerly AS 09.55.231. Renumbered in 1983.

Cross references. — For jurisdiction of court to consider child custody, see AS 25.30.020.

Effect of amendments. — The 1982 amendment, in subsection (a), inserted "including visitation by grandparents and other persons" in the middle of paragraph (2).

NOTES TO DECISIONS

Jurisdiction. — The superior court has no jurisdiction to make the "child custody determination" that is a prerequisite to the entry of a decree of dissolution under AS 25.24.230(a) unless one of the conditions listed in AS 25.30.020(a) exists.

Layne v. Niles, Sup. Ct. Op. No. 2396 (File No. 5887), 632 P.2d 234 (1981).

Cited in Szmyd v. Szmyd, Sup. Ct. Op. No. 2472 (File No. 5854) 641 P.2d 14 (1982).

Sec. 25.24.210. Petition for dissolution. (a) The caption in a petition for dissolution of marriage under AS 25.24.200 — 25.24.260 shall be styled substantially "In the Matter of the Dissolution of the Marriage of and"

(b) The petition shall be filed with the superior court and shall either

(1) recite that the conditions enumerated under AS 25.24.200(a) exist and shall be signed and verified by both of the petitioners or by one petitioner, if that petitioner personally serves the petition on the other spouse in accordance with the Alaska Rules of Civil Procedure in anticipation that the spouse will comply with AS 25.24.200(c); or

(2) recite that the conditions enumerated under AS 25.24.200(b) exist and be signed and verified by one of the petitioners.

(c) The petition shall state that the spouse or spouses executing the petition consent to the jurisdiction of the court.

(d) The petition shall request that the marriage be dissolved and that the prior name of a spouse be restored, if desired by that spouse.

(e) If the petition is brought by both spouses under AS 25.24.200(a), the petition shall state in detail the terms of agreement as between the spouses with regard to the custody of children, child support, visitation, spousal support and tax consequences, if any, division of property, and allocation of debts, and, in addition, shall state

- (1) the respective occupations of the spouses;
- (2) the income, assets, and liabilities of the respective spouses at the time of filing the petition;
- (3) the date and place of the marriage;
- (4) the name, date of birth, and current custodial status of each minor child born of the marriage or adopted by the petitioners;
- (5) whether the wife is pregnant;
- (6) other facts and circumstances which the petitioners believe should be considered; and
- (7) any other relief sought by the spouses. (§ 1 ch 260 SLA 1976)

Revisor's notes. — Formerly AS
09.55.232. Renumbered in 1983.

Sec. 25.24.220. Hearing. (a) After a petition for dissolution is filed under the provisions of AS 25.24.210, a hearing shall be scheduled in accordance with the Alaska Rules of Civil Procedure.

(b) If the petition is brought by both spouses under AS 25.24.200(a), both the husband and wife are required to attend the hearing personally and not through counsel unless the court, for good cause, provides otherwise, or unless a spouse has complied with AS 25.24.200(c), in which case only the spouse filing the petition is required to attend. Either spouse may have counsel at the hearing.

(c) If the petition is brought by one spouse under AS 25.24.200(b), that spouse shall submit proof of diligent inquiry as to the whereabouts of the absent spouse and provide notice by publication, posting, or other means as ordered by the court in accordance with the Alaska Rules of Civil Procedure.

(d) If the petition is brought by both spouses under AS 25.24.200(a), the court shall examine the petitioners or petitioner present and consider whether

(1) the spouses fully understand the nature and consequences of their action;

(2) the agreements between the spouses concerning child custody, child support, and visitation are fair, just, and equitable as between the spouses and in the best interests of the children of the marriage;

(3) the agreements between the spouses relating to the division of property, child support, and the allocation of obligations are fair, just, and equitable; and

(4) the conditions in AS 25.24.200(a) have been met.

(e) If the petition is brought by one spouse under AS 25.24.200(b), the court shall examine the petitioner and consider whether the petitioner understands the nature and consequences of the action and whether the conditions in AS 25.24.200(b) have been met.

(f) The court may appoint a guardian ad litem to represent the best interests of the child. Appointment of a guardian ad litem or attorney for the child shall be made under the terms of AS 25.24.310.

(g) The court may amend the agreements between the spouses relating to child custody, child support, visitation, spousal support, division of the property, and allocation of obligations, but only if both petitioners concur in the amendment. (§ 1 ch 260 SLA 1976)

Revisor's notes. — Formerly AS
09.55.233. Renumbered in 1983.

Sec. 25.24.230. Judgment. (a) If the petition is brought by one or both spouses under AS 25.24.200(a), the court may grant the spouses a final decree of dissolution and shall provide the other relief as pro-

vided in this section if the court, upon consideration of the information contained in the petition and the testimony of the spouse or spouses at the hearing, finds that

(1) the spouses understand fully the nature and consequences of their action;

(2) the agreements between the spouses concerning child custody, child support, visitation, spousal support and tax consequences, if any, division of property, and allocation of obligations are not grossly unfair, unjust, or inequitable and are in the best interests of the children of the marriage, if any; and

(3) the conditions in AS 25.24.200(a) have been met.

(b) If the petition is brought by one spouse under AS 25.24.200(b), the court may grant the spouses a final decree of dissolution and restore the petitioner's prior name, when so requested, if the court, upon consideration of affidavits supplied by the spouse and the testimony of the spouse at the hearing, finds that

(1) the spouse present at the hearing understands fully the nature and consequences of the action; and

(2) the conditions in AS 25.24.200(b) have been met.

(c) The court shall dismiss or continue an action brought under AS 25.24.200 — 25.24.260 before findings are made if

(1) a representative of the minor children objects to a term of any of the agreements between the spouses;

(2) either of the spouses withdraws from any of the agreements required under AS 25.24.200(a); or

(3) the petition alleges that the conditions in AS 25.24.200(b) exist, but the whereabouts of the absent spouse becomes known to the other spouse or the court before findings are made.

(d) The court shall deny the relief sought in an action brought under AS 25.24.200 — 25.24.260 if the court does not make the findings requisite under (a) and (b) of this section.

(e) If the petition is brought by both spouses under AS 25.24.200(a), the court shall restore either spouse's prior name, if so requested, and shall fully and specifically set out in the decree the agreements of the spouses relating to child custody, child support, visitation, spousal support, division of property, and the allocation of the obligations of the spouses; and the court shall order the performance of those agreements. The court shall also state, in the decree, whether child support payments are to be made through the child support enforcement agency. If the petition is brought by one spouse under AS 25.24.200(b), the decree shall state that it does not bar future action on the issues not resolved in the decree.

(f) Notwithstanding any other provisions of AS 25.24.200 — 25.24.260, the court may not award as between the spouses any real or personal property acquired by the spouses before the date of the marriage, unless the spouses expressly agree otherwise or the court deter-

mines that such property should be made available, by sale or other conveyance, to ensure that the children's best interests are provided for. If the court determines that the children's best interests require an award of premarital property but the spouses do not agree, the action shall be dismissed or continued. (§ 1 ch 260 SLA 1976)

Revisor's notes. — Formerly AS 09.55.234. Renumbered in 1983.
Cross references. — For jurisdiction of court to make child custody determination, see AS 25.30.020(a).

NOTES TO DECISIONS

Jurisdiction to make child custody determination. — The superior court has no jurisdiction to make the "child custody determination" that is a prerequisite to the entry of a decree of dissolution under subsection (a) unless one of the conditions listed in AS 25.30.020(a) exists. *Layne v. Niles*, Sup. Ct. Op. No. 2396 (File No. 5887), 632 P.2d 234 (1981).

Sec. 25.24.240. Effect and modification of decree. (a) A decree of dissolution issued under AS 25.24.200 — 25.24.260 shall have the same force and effect as a decree granted under AS 25.24.010 — 25.24.180.

(b) A decree of dissolution granted under AS 25.24.200 — 25.24.260 may be modified or enlarged as prescribed by AS 25.24.150 — 25.24.170. (§ 1 ch 260 SLA 1976)

Revisor's notes. — Formerly AS 09.55.235. Renumbered in 1983.

Sec. 25.24.250. Forms. (a) The Department of Law, in cooperation with the administrator of the Alaska Court System, shall prepare forms and instructions for use by persons wishing to obtain a dissolution of their marriage under AS 25.24.200 — 25.24.260 and wishing to utilize the services of the child support enforcement agency. These forms shall conform to the requirements of the Alaska Rules of Civil Procedure, except that information appearing on the forms in legible handwriting shall be acceptable.

(b) Forms prepared under (a) of this section shall be made available to the public at each office of the division of social services of the Department of Health and Social Services, and every superior court, and wherever else considered necessary by the Department of Law. (§ 1 ch 260 SLA 1976)

Revisor's notes. — Formerly AS 09.55.236. Renumbered in 1983.

Sec. 25.24.260. Miscellaneous. No spouse may be precluded from filing an action for divorce under AS 25.24.010 — 25.24.180 upon dismissal or denial of a petition filed under AS 25.24.200 — 25.24.260. (§ 1 ch 260 SLA 1976)

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comprised of three stages: (1) determining what property is eligible for distribution, (2) determining the value of that property, and (3) making an equitable division. Our analysis in this case has been concerned with part (1) of the above process. With respect to the five-plex, the Arizona townhouse, and the airplane, stage (2) has already been carried out. No valuation has yet been made of the Gambell 1 property, however, and that must be accomplished on remand. Following that, the superior court is directed to make an equitable division based upon the full equity value of each item of property.²⁰

[6] The "principal factors" to be weighed by the superior court in reaching a division of property are:

- (a) the ages of the parties;
- (b) their earning capacity;
- (c) the duration of the marriage;
- (d) the conduct of the parties during marriage;
- (e) their "station in life";
- (f) the circumstances and necessities of each;
- (g) their health;
- (h) their financial condition;
- (i) the time and manner of acquisition of the property in question;
- (j) the value of the property at the time of division;
- (k) the income-producing capacity of the property.

Merrill v. Merrill, 368 P.2d 546, 647-48 n. 4 (Alaska 1962). These *Merrill* factors have been consistently reiterated by this court in subsequent opinions.²¹ The *Merrill* criteria will be of increased usefulness to a trial court in its determination of an equitable division of property, if the court begins its consideration of the *Merrill* factors with the presumption that the most equitable divi-

21. *Hinchey v. Hinchey*, 625 P.2d 297, 304-05 (Alaska 1981); *Burrell v. Burrell*, 537 P.2d 1, 4 (Alaska 1975); *Vanover v. Vanover*, 496 P.2d 644, 645 (Alaska 1972); *Stroecker v. Stroecker*, 428 P.2d 384, 386 (Alaska 1967); *Groff v. Groff*, 408 P.2d 998, 1001 (Alaska 1965).

sion of the property is an equal division. This starting point is intended to provide a grounding point by which the relevance of the *Merrill* factors may be determined.

In the past we have held that there is no requirement that the ultimate division made by the trial court must be an equal one. *Rostel v. Rostel*, 622 P.2d 429, 432 (Alaska 1981); *Hurn v. Hurn*, 541 P.2d 360 (Alaska 1975). In no sense do we intend to modify these decisions. The trial courts will still retain broad discretion in assigning weight to the various factual elements highlighted in *Merrill*.²²

D. Conclusion

With respect to the four items of property discussed in Part B of this opinion, we reverse and remand this case to the superior court for a redetermination of the division of property in conformity with this opinion.²³

AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings not inconsistent with this opinion.



STATE of Alaska, DEPARTMENT OF
LABOR, WAGE AND HOUR
DIVISION, Appellant,

v.

UNIVERSITY OF ALASKA, Appellee.

No. 5942.

Supreme Court of Alaska.

May 20, 1983.

Wage claim was filed with the Department of Labor by university counsel, pro-

22. The criteria in *Merrill* are not exhaustive, and thus the trial court is free to consider additional factors which may be relevant in a particular case.

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NOTICE: This opinion is subject to formal correction before publication in the Pacific Reporter. Readers are requested to bring typographical or other formal errors to the attention of the Clerk of the Appellate Courts, 303 K Street, Anchorage, Alaska 99501, in order that corrections may be made prior to permanent publication.

THE SUPREME COURT OF THE STATE OF ALASKA

CYRIL R. WANAMAKER,)	
)	
Appellant,	)	Supreme Court No. S-2841
)	
v.	)	1JU-82-1372 CIVIL
)	
JUDITH LEE SCOTT	)	<u>O P I N I O N</u>
(WANAMAKER),)	
)	
Appellee.	)	[No. 3566 - March 2, 1990]
_____)	

Appeal from the Superior Court of the State of Alaska, First Judicial District, Juneau
Rodger W. Pegues, Judge.

Appearances: David C. Crosby, Council & Crosby, Juneau, for Appellant. Anthony M. Sholty, Faulkner, Banfield, Doogan & Holmes, Juneau, for Appellee.

Before: Matthews, Chief Justice, Rabinowitz, Burke, Compton, and Moore, Justices.

RABINOWITZ, Justice.

INTRODUCTION.

Randy Wanamaker appeals from the attorney's fees portion of the superior court's modification order which granted his former wife, Judith Scott, custody of their minor child. He does not contest the change of custody.

Randy argues that the superior court lacked subject matter jurisdiction as to the modification motion under the Uniform Child Custody Jurisdiction Act, AS 25.30.010-.910 (UCCJA), and the federal Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A (PKPA). It is Randy's position that Washington, the state in which the original custody decree was issued, has "continuing jurisdiction" to the exclusion of the courts of Alaska. In regard to the award of attorney's fees, Randy contends that the court abused its discretion in holding he exhibited "bad faith and vexatious conduct" in opposing Judith's motion to change custody.

FACTS.

In 1976 the parties obtained a divorce in the state of Washington. Custody of their 2½ year old child, Jennifer, was awarded to Judith. Randy subsequently moved from Washington to Juneau. In 1981 Randy obtained a custody modification order from

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the Washington Superior Court which awarded him custody of Jennifer.¹

Between 1981 and 1987 Jennifer lived with Randy in Juneau. Throughout this 1981-1987 period Jennifer visited with her mother for about three to four weeks per year in Washington, with about two to three weeks of this being summer visitation. Judith resided in the Seattle area from 1981 at least through May of 1987.

In December of 1986 Randy filed a motion in the superior court of Alaska to modify Judith's visitation so that it would not take place in the presence of Carlos Rojas, who had since been divorced from Judith. The parties stipulated in May of 1987 that visitation would be conducted out of Rojas' presence. Then on May 18, 1987, Judith filed motions in the superior court of Alaska for modification of the 1981 Washington custody order and for temporary custody. Randy opposed these motions on substantive, not jurisdictional grounds.

The superior court denied Judith's motion for temporary custody, but subsequently granted Judith's motion to modify custody. The court awarded Judith custody of Jennifer because of

1. The basis for the modification award was: 1) domestic violence between Judith and her husband, Carlos Rojas; 2) an unstable childhood environment which was evidenced both by numerous residence changes, and the delegation by Judith of child-care responsibilities to other persons for extended periods of time; and 3) financial problems on the part of Judith.

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its conclusion that Judith would better foster an open and loving parent-child relationship with the non-custodial parent, and that Jennifer had a strong preference to live with her mother. The court also found that the reasons which caused the Washington court to remove Jennifer from Judith's custody in 1981 no longer existed. Judith was also awarded \$17,126.50 in full attorney's fees on the basis of Randy's "bad faith and vexatious conduct" in opposing the motion for change of custody.

Randy appeals on three grounds. First, he argues that under the Uniform Child Custody Jurisdiction Act the superior court improperly exercised subject matter jurisdiction. He argues that the UCCJA, which in relevant part has been enacted in Alaska and Washington, required the superior court to defer to Washington's "continuing" modification jurisdiction. Second, Randy contends that the federal Parental Kidnapping Prevention Act mandates the same conclusion. Finally, Randy takes the position that the superior court committed reversible error in finding that he exhibited "bad faith and vexatious conduct" in his opposition to Judith's motion to modify custody.

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II. DID THE SUPERIOR COURT HAVE JURISDICTION TO MODIFY THE CUSTODY PROVISIONS OF THE WASHINGTON DECREE?

The provisions of UCCJA, as adopted in Alaska and Washington, determine which court has subject matter jurisdiction over custody matters.² Briefly stated, the superior court lacked jurisdiction to modify the subject custody decree if, as of the date Alaska jurisdiction was invoked,³ the Washington court retained jurisdiction to modify its original 1976 custody decree. AS 25.30.130(a);⁴ Szmyd v. Szmyd, 641 P.2d 14, 16, 17 (Alaska

2. See Nicholaus v. Nicholaus, 756 P.2d 1338, 1342 (Wyo. 1988); Gomez v. Gomez, 446 N.Y.S.2d 127, 129 (N.Y. App. 1982), aff'd, 452 N.Y.S.2d (N.Y. 1982). As a court which does not have subject matter jurisdiction is without power to decide a case, this issue cannot be waived, and can be raised at any point during the litigation. Mundy & Mundy, Inc. v. Adams, 602 P.2d 1021, 1024 (N.M. 1979); see also Nicholaus, 756 P.2d at 1342; State v. Buckley, 734 P.2d 1047, 1049 (Ariz. App. 1987); Gomez, 446 N.Y.S.2d at 129. Thus, no matter how disingenuous it may be for a party which has previously invoked a state's jurisdiction later to challenge it in a related case, this court must ensure that the superior court's order is not "void." See Nicholaus, 756 P.2d at 1340, 1342. Neither the fact that Randy has previously attempted to invoke the superior court's jurisdiction to modify Judith's visitation privileges, nor the fact that Randy raises these jurisdictional issues for the first time on appeal obviates this court's responsibility to determine whether the superior court had subject matter jurisdiction.

3. Jurisdiction is evaluated as of the date invoked - May 18, 1987 in the case at bar. See State ex rel. Laws v. Higgins, 734 S.W.2d 274, 278 (Mo. App. 1987).

4. Alaska Statute 25.30.130(a) provides:

(a) If a court of another state has made a custody decree, a superior court of this state may not modify that decree unless (1) it appears to

(footnote continued)

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1982) (jurisdictional prerequisites of the UCCJA apply to motions before a superior court to modify custody decrees). As Washington is no longer Jennifer's home state, the essential inquiry is whether a Washington court would assume jurisdiction over the modification request pursuant to RCW 26.27.030(1)(b):

(footnote continued)

the court of this state that the court which rendered the decree does not now have jurisdiction under jurisdictional prerequisites substantially in accordance with this chapter or has declined to assume jurisdiction to modify the decree, and (2) the court of this state has jurisdiction.

Section 14 of the UCCJA is substantively identical. The official commentary to section 14 reads in part as follows:

Courts which render a custody decree normally retain continuing jurisdiction to modify the decree under local law. Courts in other states have in the past often assumed jurisdiction to modify the out-of-state decree themselves without regard to the preexisting jurisdiction of the other state. In order to achieve greater stability of custody arrangements and avoid forum shopping, subsection (a) declares that other states will defer to the continuing jurisdiction of the court of another state as long as that state has jurisdiction under the standards of this Act. In other words, all petitions for modification are to be addressed to the prior state if that state has sufficient contact with the case to satisfy section 3. The fact that the court had previously considered the case may be one factor favoring its continued jurisdiction. If, however, all the persons involved have moved away or the contact with the state has otherwise become slight, modification jurisdiction would shift elsewhere.

9 U.L.A. Child Custody Jurisdiction Act, § 14, at 292 (1988) (citations omitted).

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RCW 26.27.030. Jurisdiction. (1) A court of this state which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if the conditions as set forth in any of the following paragraphs are met:

(a) This state (i) is the home state of the child at the time of commencement of the proceeding, or (ii) had been the child's home state within six months before commencement of the proceeding and the child is absent from this state because of his removal or retention by a person claiming his custody or for other reasons, and a parent or person acting as parent continues to live in this state; or

(b) It is in the best interest of the child that a court of this state assume jurisdiction because (i) the child and his parents, or the child and at least one contestant, have a significant connection with this state, and (ii) there is available in this state substantial evidence concerning the child's present or future care, protection, training, and personal relationships;

. . . .

(3) Physical presence of the child, while desirable, is not a prerequisite for jurisdiction to determine his custody.

We conclude that on the facts before us the courts of Washington would have held that they lacked jurisdiction at the time Judith made her 1987 custody motion. Alaska, not Washington, then had the most significant connection to Jennifer. In re Custody of Thorensen, 730 P.2d 1380, 1388 (Wash. App. 1986).

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In Thorensen a child and two parents lived in Florida at least between 1976 (when the child was born) and 1980. Id. at 1382. A custody order was issued by a Florida court in favor of the mother in 1979. Id. The father then moved for modification in 1980, again in Florida. Id. The Florida court issued an order granting custody to the state. This order was never enforced, as the mother had earlier fled the state with the child. Id. In 1986 the mother petitioned a Washington superior court to modify the 1980 order, and preclude enforcement of a related 1986 Florida order. Id. The Washington court asserted jurisdiction over the mother's motion to modify on grounds that the state of Washington had developed the most significant connections with the child. Id. at 1386, 1388. At the time of the modification motion the child had resided in Washington for the previous two years, and had not lived in Florida for five years. The Thorensen court noted that jurisdiction would vest in the court with the "maximum" contacts to the child, and concluded, "Florida court records from 5 years ago, when [the child] was only 4 years old, have little bearing on the present and future of the 10-year-old child with education records, medical records, and living arrangements in the state of Washington for the last 2 years." Id. at 1388. The Thorensen court concluded

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that Washington, the "home state," was the most appropriate forum.⁵

III. WAS THE SUPERIOR COURT PRECLUDED FROM HEARING JUDITH'S MODIFICATION MOTION BY THE PROVISIONS OF THE FEDERAL PARENTAL KIDNAPPING PREVENTION ACT?

Under the Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A, a non-decree state court may not modify a custody order as long as the decree state has jurisdiction.⁶ Since we have

5. See also 9 U.L.A. Child Custody Jurisdiction Act, § 3, 144-45 (1988); Trask v. Trask, 727 P.2d 88, 91 (N.M. App. 1986); Olson v. Olson, 494 A.2d 737, 744 (1985); Swire v. Swire, 494 A.2d 1035, 1039 (N.J. Super. 1985); Hudson v. Hudson, 670 P.2d 287, 292 (Wash. App. 1983); L.F. v. G.W.F., 443 A.2d 751, 753-56 (N.J. Super. 1982); In re Reynolds, 441 N.E.2d 1141, 1144-45 (Ohio App. 1982); Siegel v. Siegel, 417 N.E.2d 1312, 1313, 1317-19 (Ill. 1981); Hegler v. Hegler, 383 So.2d 1134, 1135-37 (Fla. App. 1980); Pierce v. Pierce, 287 N.W.2d 879, 883 (Iowa 1980); Honigsberg v. Goad, 550 S.W.2d 471, 472 (Ky. 1976). But see, e.g., Kendall v. Whalen, 526 A.2d 588, 590 (Me. 1987); Kumar v. Superior Court, 652 P.2d 1003, 1009 (Cal. 1982); Jefferson v. Downs, 436 N.Y.S.2d 169, 171 (N.Y. Sup. 1981). See generally Bodenheimer, Interstate Custody: Initial Jurisdiction and Continuing Jurisdiction Under the Uniform Child Custody Jurisdiction Act, 14 Fam. L.Q. 203 (1981); Progress Under the Uniform Child Custody Jurisdiction Act and Remaining Problems: Punitive Decrees, Joint Custody, and Excessive Modifications, 65 Cal. L. Rev. 978 (1977).

6. 28 U.S.C. § 1738A(f) reads:

A court of a state may modify a [custody order of another state], if

. . . .

(2) the court of the other state no longer has jurisdiction

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concluded that the Washington courts would not have jurisdiction, the federal bar does not apply.

IV. DID THE SUPERIOR COURT ERR IN AWARDING JUDITH FULL ATTORNEY'S FEES IN CONNECTION WITH THE MOTION TO MODIFY CUSTODY?

The superior court awarded Judith her full attorney's fees incurred in connection with the custody modification motion. The superior court's award was based on its finding that Randy had "engaged in bad faith and vexatious conduct in his attempts to retain custody" of his daughter.⁷

In motions to amend or enforce a visitation or custody order, attorney's fees will be assessed only against litigants who have acted willfully and without just excuse. See L.L.M. v. P.M., 754 P.2d 262, 265 (Alaska 1988). Our review of the record in this case leads us to the conclusion that the superior court erred in its overall conclusion that an award of attorney's fees

7. The superior court found that Randy had attempted to mislead the court in regard to Jennifer's custodial preference, and his reasons for limiting Judith's visitations with Jennifer. Additionally, the superior court found that Randy had pressured Jennifer to change her custodial preference, and that Randy had mischaracterized a counselor's analysis of Jennifer's relationship with her mother. The court also found that Randy had been unreasonable in failing to transfer to Judith certain of Jennifer's bank records and personal belongings following entry of the custody modification order. The superior court further found that Randy's "obduracy" made court intervention on this issue necessary.

against Randy was appropriate.⁸ Such a holding on these facts would run counter to the rationale we adopted in L.L.M., that a party who reasonably and in good faith⁹ believes his or her actions are justified by the best interests of the child¹⁰ should

8. At the hearing on modification of custody, Randy testified that Jennifer "told me that she wanted to live with her mother as long as she could." However, Randy apparently felt Jennifer had been pressured and was confused. Against this background, his putting Jennifer's preference in issue was not vexatious or in bad faith. Neither did Randy's efforts to persuade Jennifer to consider options of shared custody amount, in this context, to undue pressure. Finally, we conclude that Randy's characterization of Jennifer's and Judith's "peer" relationship does find support in counselor Nancy Karcarand's affidavit. Our review of the record thus does not reveal support for the superior court's holding of bad faith and vexatious conduct by Randy in connection with the motion for modification. We note that Judith has recovered full attorney's fees on her motion to order transfer of Jennifer's property and records, which recovery is not at issue in this appeal.

9. At the close of the custody modification hearing the superior court announced its ruling, stating in part:

I think part of the reason for the disputes is simply a different appreciation by the listener of what is being said, what is being intended. That happens all the time, and there isn't any attempt to mislead or deceive or to lie.

Concerning Randy's motives, the superior court stated: "I don't consider him to be ill-motivated. I don't think that at all. I think he's always been well-motivated."

10. In its modification decision the superior court found in part, that:

Some six years ago, Randy and his present wife (Karen) took Jennifer as a then distraught child into their home, provided her with nurture and support, helped her to progress from failing

(footnote continued)

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not be deterred from taking appropriate action by the possibility of an award of attorney's fees and costs. 754 P.2d at 265.

AFFIRMED in part, REVERSED in part.

(footnote continued)

grades to solid B's and A's, and with the assistance of counseling, helped her grow from a problem-bent child to an outgoing perky, self-confident teenager of advanced maturity. There is, therefore, no question that they are, in Ms. Karacand's phrase, functionally competent parents. . . .

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tion, decide that it is in the public interest to establish another election procedure, there is no constitutional obstacle to that course of action. Those who reside or own property in the area to be annexed have no vested right to insist that annexation take place only with their consent. The subject of expansion of municipal boundaries is legitimately the concern of the state as a whole, and not just that of the local community.³⁴ There has been no infringement or deprivation of rights protected by the Fourteenth Amendment.

The Fifteenth Amendment and the Supreme Court's decision in the Gomillion³⁵ case are not pertinent. They are concerned with the denial of a citizen's right to vote because of his race or color. That factor is not involved in this case.

[8] In a companion case (No. 71) a number of residents of the District commenced an action against the District and its board of directors to compel the latter, by mandatory injunction, to hold an election in order that new directors could be elected—the terms of the others having expired. The City of Anchorage moved to intervene, claiming that because the District had been annexed to the city and thus dissolved by operation of law, no purpose could be served by the election of new directors who would have no functions to perform. The court dismissed the action, holding that its decision in the prior action brought by the City for a declaratory judgment was controlling.

What we have said above as to the validity and effect of the annexation of the Fairview District to the City of Anchorage disposes of this second appeal. There would be no sense in requiring the election of a board of directors for a public utility district which no longer was in existence.

The judgments are affirmed.

34. Cf. *Hunter v. City of Pittsburgh*, 207 U.S. 161, 28 S.Ct. 40, 52 L.Ed. 151 (1907); *Mount Pleasant v. Beckwith*, 100 U.S. 514, 524-525, 25 L.Ed. 699, 701 (1880).

Charles C. MERRILL, Appellant,

v.

Margaret F. MERRILL, Appellee.

No. 77.

Supreme Court of Alaska.

Feb. 6, 1962.

Wife's action for divorce in which the Superior Court of the Third Judicial District, J. Earl Cooper, J., granted the wife a divorce and awarded her \$35,000 and the husband appealed. The Supreme Court, Arend, J., held that the findings were insufficient to show the basis on which \$35,000 award was made and the cause would be remanded for making appropriate findings and if this could not be done, the trial court should grant a new trial.

Judgment vacated and cause remanded with directions.

1. Divorce ⇨252, 286

Division of property between parties in divorce action rests in discretion of trial judge and Supreme Court will not disturb division unless clearly unjust. A.C.L.A. 1949, § 56-5-13.

2. Divorce ⇨285

Supreme Court when called upon to review division of property in divorce action needs to know the ultimate facts found. A.C.L.A. 1949, § 56-5-13.

3. Trial ⇨394(1)

Requirement that in all cases tried on facts without jury court shall find facts specially and state separately its conclusions of law is mandatory, and must be reasonably complied with. Alaska Rules of Civil Procedure, rule 52(a).

4. Trial ⇨395(2)

Trial court, when case is heard without jury, has duty to show by sufficiently de-

35. *Gomillion v. Lightfoot*, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960).

tailed and explicit findings, basis of its decision to enable reviewing court to determine grounds upon which it reached its decision. Alaska Rules of Civil Procedure, rule 52(a); Fed. Rules Civ. Proc. rule 52(a), 28 U.S.C.A.

5. Appeal and Error ⇨989, 996, 1122(1)

Supreme Court's function is not to weigh evidence, draw reasonable inferences, make findings and determine result.

6. Divorce ⇨253, 287

Findings of trial court in divorce action were insufficient to show basis of \$35,000 award to wife in lieu of any other right or interest in property of parties and case would be remanded for purpose of making appropriate findings or for new trial if additional findings were not possible.

Arthur D. Talbot, Anchorage, for appellant.

Neil S. Mackay, Anchorage, for appellee.

Before NESBETT, C. J., and DIMOND and AREND, JJ.

AREND, Justice.

This is a divorce action in which the trial court granted the plaintiff wife a divorce from the defendant, Charles C. Merrill, and awarded her the sum of \$35,000, apparently in lieu of any right or interest in certain property of the parties. The defendant, as the appellant here, contends that the award was excessive and unjust and states that this presents the only issue on which he seeks review.

About two months after it tried the case, the court made and filed its findings of fact. These were to the effect that the parties married in 1952; that no issue had been born of the marriage; that certain property rights of the parties needed to be adjudicat-

ed; and that it became impossible for the parties to continue to live together as husband and wife because of an incompatibility of temperament between them.¹ On the basis of those findings, the court then made its conclusions of law that the plaintiff should "execute a quitclaim deed to the property owned by the parties"; and that the defendant husband should execute a deed of trust to the property of the parties, in the amount of \$35,000, to a designated trustee, with the husband as trustor and the wife as beneficiary. The husband was also required to execute a promissory note for \$35,000, along with the deed of trust, the note to be repaid at the monthly rate of \$175, without interest.² A decree was entered accordingly and this appeal followed.

In his brief on appeal the defendant states that he is unable to say precisely upon what basis the court arrived at the \$35,000 figure, as the findings of fact are silent on the subject. We have the same complaint to make.

[1, 2] Section 56-5-13 A.C.L.A.1949 empowers the trial court to provide, *inter alia*, in the divorce decree

"For the division between the parties of their joint property, or the separate property of each, in such manner as may be just, and without regard as to which of the parties is the owner of such property * * *." (Emphasis supplied.)

Under the wording of this statute, the division of property between the parties in a divorce action rests in the discretion of the trial judge, and we should not disturb such division unless clearly unjust.³ When called upon, as here, to review the justness of the division of property in a divorce action, we need to be informed by the trial court what it found to be the ultimate facts⁴ upon which it based its conclusion

1. There is nothing in the findings to indicate that either party was to blame for the incompatibility of temperament.

2. The conclusions of law do not indicate whether the deed of trust was to serve as security for the note, nor do they designate the payee of the note.

3. See Crouch v. Crouch, 63 Cal.App.2d 747, 147 P.2d 678, 682 (1944); Harris v. Harris, 169 Kan. 339, 219 P.2d 454 (1950); Kirsch v. Kirsch, 192 Wash. 156, 73 P.2d 356 (1937).

4. It has been held that the principal factors to be considered by the trial court

that the property should be divided as it has decreed.

[3] To take care of just such a situation as we have before us here, Rule 52(a) of the Rules of Civil Procedure was promulgated to provide that "in all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon."⁵ The rule is mandatory and must be reasonably complied with.⁶

[4] As one well recognized authority points out, findings of fact under Rule 52(a) have a threefold purpose: "as an aid in the trial judge's process of adjudication; for the purposes of res judicata and estoppel by judgment; and as an aid to the appellate court on review."⁷ To particularize, the requirement that the trial judge file findings of fact gives assurance that he has exercised care in ascertaining the facts, and has employed both skill and judgment in reducing his thoughts on contested matters to precise and pertinent findings while the evidence is still fresh in his mind.⁸ Further, under Rule 52(a), it is the

in determining the question of alimony or division of property as between the parties are the respective ages of the parties; their earning ability; the duration and conduct of each during the marriage; their station in life; the circumstances and necessities of each; their health and physical condition; their financial circumstances, including the time and manner of acquisition of the property in question, its value at the time and its income producing capacity if any. *Ruff v. Ruff*, 78 N.D. 775, 52 N.W.2d 107, 111 (1952); *Kressly v. Kressly*, 77 S.D. 143, 87 N.W.2d 601, 603-604 (1953); 2 *Nelson, Divorce and Annulment*, § 14.135 (2d ed. 1945).

5. An identical provision in Rule 52(a) of the Federal Rules of Civil Procedure, 28 U.S.C.A. has been operative in the federal district courts since 1938. The federal rules were extended to the Territory of Alaska in 1946 and remained with us until they were superseded by our

duty of the trial court by sufficiently detailed and explicit findings "to give the appellate court a clear understanding of the basis of the trial court's decision, and to enable it to determine the ground on which the trial court reached its decision."⁹

[5, 6] From our study of the briefs and record we do not reach the ready conclusion of the trial court that the \$35,000 award to the appellee was justified under the facts. It is quite possible that adequate findings would remove our doubts in this respect. As the case stands now we would have to assume the role of the trial court, weigh the evidence, draw reasonable inferences, make findings and determine the result. That is not our function or obligation. Therefore, the judgment in favor of the plaintiff with respect to the \$35,000 awarded to her is vacated and the cause remanded to the superior court for the purpose of making appropriate findings of fact in the light of this opinion.¹⁰ If this cannot be done, then the superior court shall, in lieu of making further findings of fact, grant a new trial.

So ordered.

own Rules of Civil Procedure in 1939 under statehood.

6. *Maher v. Hendrickson*, 188 F.2d 700 (7th Cir. 1951).
7. 5 Moore, *Federal Practice* para. 52.06 [1], at 2653 (2d ed. 1951).
8. *United States v. Forness*, 125 F.2d 92S, 942-943 (2d Cir. 1942), cert. denied, 316 U.S. 694, 62 S.Ct. 1293, 86 L.Ed. 1764 (1942).
9. *Irish v. United States*, 225 F.2d 3, 8 (9th Cir. 1955); *United States v. Horsfall*, 270 F.2d 107 (10th Cir. 1959).
10. We do not mean to intimate that findings must be made on all of the matters enumerated in the fourth note to this opinion or that no others need be made. We hold only that the findings should be sufficient to indicate the factual basis for the ultimate conclusion. See *Keller v. Everglades Drainage Dist.*, 319 U.S. 415, 422, 63 S.Ct. 1141, 87 L.Ed. 1485, 1489 (1943).

John PASLEY, d/b/a Pas
Appellant
v.

Phyllis E. BARBER
No. 128.

Supreme Court of
Feb. 6, 1960

Action by broker to
sions. From an adverse
Superior Court for the
Fourth Judicial District C
Hepp, J., the broker app
preme Court, Nesbett, C
that broker was not entitl
where sale fell through l
was unable to convey go

Remanded with dire
ment for the defendant;

Arend, J., dissented i

1. Brokers ⇐61(1, 4)

If an employed broke
chaser ready, willing an
terms specified, broker is
mission even though sale
cause the seller or perso
ker is unable to convey
where broker knew or sh
of defects in the title.

2. Brokers ⇐61(4)
Principal and Agent ⇐

Where broker's agen
a bookkeeper for defend
was familiar with her bu
ker was properly denied
mission on ground his s
should have known that
unable to convey clear
erty listed for sale becau
in divorce litigation.

3. Brokers ⇐61(4)
Principal and Agent ⇐

Where broker's age
employed as bookkeeper for
ness, broker was properl
sions where the agent wr

have reached the same result by judicial decision. See *Bailey v. Bailey*, 250 Ga. 15, 295 S.E.2d 304, 305 (1982); *Van Newkirk v. Van Newkirk*, 212 Neb. 730, 325 N.W.2d 832, 834 (1982); *Anderson v. Anderson*, 282 S.C. 162, 318 S.E.2d 566, 567 (1984); *Hussey*, 312 S.E.2d at 270. See generally, Golden, *supra* § 5.20, at 113-14; 1 J. McCahey, *Valuation and Distribution of Marital Property* § 18.05[4], at 18-72 to 18-75 (1986).

The policy considerations underlying this view have been stated as follows:

The philosophy underlying equitable distribution is that marriage is a partnership and both spouses contribute, either directly or indirectly to the acquisition of property obtained during the marriage. If property is acquired without the joint efforts of the parties such property arguably should not be subject to division. For this reason, and because most inheritances are from family members and may have strong sentimental value, many states ... categorize inherited property as separate property.

Golden, *supra*, § 5.19, at 113 (footnote omitted). Other rationales variously identified include (a) tradition; (b) a belief that property which does not come into the marriage through the spouses' mutual efforts owes nothing to the marriage and is not intended to be shared; (c) the recognition that marital property is or should be only that property which arises from or to some extent is augmented by the efforts of the marital parties; and (d) the fact that inclusion of inherited property in the marital estate removes it from the natural line of

(1) by gift or a disposition at death made by a third person to the spouse and not to both spouses.

9A U.L.A. at 29.

8. We have repeatedly stated that unless words have been given a peculiar meaning, by virtue of statutory definition or judicial construction, they are to be construed in accordance with their common usage. *E.g.*, *Division of Elections v. Johnstone*, 669 P.2d 537, 539 (Alaska 1985); *Lynch v. McCann*, 478 P.2d 835, 837 (Alaska 1970). See also AS 01.10.040 ("words and phrases shall be construed according to ... their common and approved usage").

In this regard, *Black's Law Dictionary* 23 (5th ed. 1979) defines acquired as follows:

succession, thus thwarting the intent of the person who acquired the property and passed it on to the inheriting spouse. See *Bailey*, 295 S.E.2d at 305; *Hussey*, 312 S.E.2d at 270.

[10] We find the majority rule and the policy considerations underlying it persuasive for several reasons. First, it is in line with our view of equitable distribution in general, which recognizes the partnership theory of marriage and considers the mutual effort and tangible contributions of the parties rather than the mere existence of the marital relationship. See, *e.g.*, *Brooks*, 738 P.2d at 1053-54. Second, it accords the term acquired its ordinary and common meaning.⁸ Therefore, we hold that for the purposes of equitable division, an inheritance received by one spouse⁹ during marriage is not property acquired during coverture within the meaning of AS 25.24.160(a)(4), but constitutes a non-marital asset of the inheriting spouse. As such, an inheritance will not be subject to distribution unless a balancing of the equities requires it. Because the equities require no invasion here, the trial court's decision on this issue is affirmed.

2. Child Custody

Erick's second assertion of error is that the trial court based its decision to deny joint custody on inadequate findings.

[11] Child custody disputes are among the most difficult a trial court faces. *McDanold v. McDanold*, 718 P.2d 467, 468 (Alaska 1986). Trial courts are, therefore,

To gain ... usually by one's own exertions; ... to obtain by search, endeavor, investment, practice or purchase, ...

Likewise, the *Random House College Dictionary* 13 (Rev. ed. 1984) defines acquired as "to gain oneself through one's actions or efforts." As commonly used, then, the word acquired presupposes some effort, endeavor or action in the acquisition of the property, and thus, does not include property, like inheritances, which are received gratuitously from a third party.

9. Property inherited by both spouses jointly, of course, constitutes marital property subject to division.

vested with broad discretion where custody should be also, *Craig v. McBride*, (Alaska 1982); *Horutz v. 397, 399* (Alaska 1977). will reverse a trial court custody issue only if the record shows an abuse of discretion. *E.g. McClain* P.2d 381, 384 (Alaska 1983). discretion may be found if the trial court considered improper or otherwise considered statutorily-manipulated or otherwise improperly weighed certain factors in its determination. 1

[12] We find none of the grounds present here. The trial court's decision is not manifestly erroneous to the extent necessary to reverse the trial court's decision of joint custody." This decision is supported by the record.

In *McClain*, we stated that it is apparent, ... that cooperation between the parents is essential if joint custody is to be in the best interests of the child. P.2d at 386. In *Smith v. Smith*, 282, 283 (Alaska 1983), we affirmed the trial court's rejection of joint custody. The trial court's finding that the parties were unable to cooperate. In light of *Smith*, we conclude that the trial court did not abuse its discretion in denying joint custody. The trial court's determination was not in the best interests.¹⁰ The trial court's determination is affirmed.

III. CONCLUSION

For the reasons discussed above, we reverse the trial court's valuation of the property and REMAND the case to the trial court for a new valuation. The trial court's judgment is affirmed.

10. Although Judge Carlson did not make express findings on all the issues, the record reflects that he gave the issue and considered them in reaching his decision to the case. Indeed, we do

NOTES

NELSON V. NELSON: A PROPOSAL FOR EQUITABLE DISTRIBUTION OF THE PROFESSIONAL DEGREE

I. INTRODUCTION: THE STATUS OF THE PROFESSIONAL DEGREE IN MARITAL DISSOLUTION IN ALASKA

Is a professional degree or license, earned by one party during a marriage, to be considered marital property subject to division upon marital dissolution? The Supreme Court of Alaska has joined the growing number of jurisdictions that have addressed this question, holding in *Nelson v. Nelson*¹ that a professional degree or license is *not* marital property. Under this holding, the spouse in Alaska who contributes to her² husband's professional education, and thus his earning potential, cannot be directly compensated for her investment. The contributing spouse must rely on the court's discretion in granting alimony,³ if the court finds such an award both "just and necessary,"⁴ or in considering her contributions when distributing the general marital property.⁵

On *Nelson's* facts, the court's refusal to recognize the professional degree as property did not prevent an equitable result, but in other factual situations the holding threatens to have that effect unless it is modified. The court compensated the wife in *Nelson* by awarding her

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1. 736 P.2d 1145 (Alaska 1987).

2. The contributing spouse is assumed to be the wife, because in the vast majority of cases on record this is the situation. Exceptions include *Lyons v. Lyons*, 403 Mass. 1003, 526 N.E.2d 1063 (1988); *McGowan v. McGowan*, 142 A.D.2d 355, 535 N.Y.S.2d 990 (1988); *Freyer v. Freyer*, 138 Misc.2d 158, 524 N.Y.S.2d 147 (1987); *Cronin v. Cronin*, 131 Misc.2d 879, 502 N.Y.S.2d 368 (1986).

3. The terms "alimony" and "maintenance" are used interchangeably in this article.

4. ALASKA STAT. § 25.24.160(a) (Supp. 1988). The statute provides in pertinent part:

In a judgment in an action for divorce . . . the court may provide . . . (2) for the recovery by one party from the other of an amount of money for maintenance, in gross or in installments, as may be just and necessary without regard to which of the parties is in fault. . . .

5. *Nelson*, 736 P.2d at 1147.

half of the substantial assets the couple had accumulated during their seventeen-year marriage, pointing out that in the case of a long marriage the wife "receives a return which may exceed the amount of her contributions to [her husband's] education," and that the wife can receive a "return of her investment" by sharing in the accumulated marital property.⁶ The *Nelson* court was thus able to compensate the wife without dealing with the ramifications of the professional-degree-as-property issue.⁷

The court, however, expressly reserved the question of whether a remedy exists to compensate the contributing spouse in the more common situation of a brief marriage during which one spouse has worked to enable the other to study full-time, with the result that the couple has not acquired any substantial assets that can be divided upon divorce.⁸ In such a case, the wife's situation upon dissolution is made more inequitable by the possibility that, because she is obviously self-supporting, the court will not find an award of maintenance "necessary." Moreover, since in Alaska marital dissolutions are accomplished without regard to fault,⁹ the contributing spouse who may be the more innocent of the parties can no longer make financial claims on the basis of fault.¹⁰ Thus, the contributing spouse may leave the marriage with nothing, while her husband takes with him the valuable asset of future earning potential as a professional.

Alaska's courts will eventually be called upon to address the manifest inequity in such a situation. The policy behind Alaska's statute is clear: the court is to make every effort to balance the equities between the parties.¹¹ To broadly assert, as the court did in *Nelson*, that a

6. *Id.* at 1146 (quoting *Lesman v. Lesman*, 88 A.D.2d 153, 158, 452 N.Y.S.2d 935, 939 (1982)).

7. In cases of long-term marriages, courts in other jurisdictions have taken a facts-first approach similar to the approach used in *Nelson*, avoiding meaningful confrontation with the issue of how a remedy would be found in a different factual situation. See *Wisner v. Wisner*, 129 Ariz. 333, 631 P.2d 115 (Ct. App. 1981); *In re Marriage of Aufmuth*, 89 Cal. App. 3d 446, 152 Cal. Rptr. 668 (Ct. App. 1979), *overruled on other grounds*, *In re Marriage of Lucas*, 27 Cal. 3d 808, 614 P.2d 285, 166 Cal. Rptr. 853 (1979); *Todd v. Todd*, 272 Cal. App. 2d 786, 78 Cal. Rptr. 131 (Ct. App. 1969); *Vaclav v. Vaclav*, 96 Mich. App. 584, 293 N.W.2d 613 (1980); *Diment v. Diment*, 531 P.2d 1071 (Okla. Ct. App. 1974).

8. *Nelson*, 736 P.2d at 1147. In *Rhodes v. Rhodes*, 754 P.2d 1333 (Alaska 1988), the supreme court held that the fact that the work of one spouse has contributed to the earning potential of the other must be considered as a "relevant factor" in making an equitable division of property. 754 P.2d at 1335. In *Rhodes*, as in *Nelson*, there were marital assets that could be divided. The court still has made no provision for compensating the contributing spouse in an assetless marriage where the contributing spouse can be considered as self-supporting.

9. See ALASKA STAT. § 25.24.160(a) (Supp. 1988).

10. ALASKA STAT. § 25.24.160(2), (4) (Supp. 1988).

11. ALASKA STAT. § 25.24.160(a) (Supp. 1988). The statute provides:

professional degree is not property subject to equitable distribution, without making other provision for the contributing spouse where the degree is the family's only asset, is to permit one party to leave the marriage enriched at the expense of the other — a signal that further balancing needs to be done.

Ideally, the Alaska Supreme Court should effect this balancing by recognizing the professional degree as marital property and by valuing it according to a labor theory of value.¹² Alternative workable remedies exist, however, that do not necessitate designating the degree as property, and which are possible under Alaska law. These remedies include equitable relief by means of quasi-contract and in gross restitutionary maintenance awards. As long as *Nelson* controls, the courts should consider applying these remedies when the situation envisioned in, but not addressed by, *Nelson* arises.

II. NELSON V. NELSON

June and Clairborne Nelson were married for seventeen years prior to their divorce in 1985. June had worked full-time to enable Clairborne to finish the last two years of his bachelor's degree in business accounting. While he was in school, Clairborne also worked part-time and received tuition aid because of his earlier military service. After graduation, Clairborne went to work for ARCO and June cared for their three children. She worked outside the home from time to time as well, most recently as a part-time pilot for a local airline.¹³ The couple had accumulated assets valued by the trial court at \$196,343. June petitioned the court to declare her husband's degree a "human capital asset" and thus part of the marital property, and to compensate her contribution to that degree by adding a portion of its value to her half of the property division.¹⁴ The Alaska Supreme Court held that the lower court had not erred in dividing the marital assets equally,¹⁵ or in failing to consider the degree as a marital asset.¹⁶

In a judgment in an action for divorce . . . the court may provide (4) for the division between the parties of their property, whether joint or separate, acquired only during coverture, in the manner as may be just, and without regard to which of the parties is in fault; however, the court, in making the division, may invade the property of either spouse acquired before marriage when the balancing of the equities between the parties requires it; and to accomplish this end the judgment may require that one or both of the parties assign, deliver, or convey any of their real or personal property to the other party

Id. (emphasis added).

12. See *infra* note 58 and accompanying text.

13. *Nelson*, 736 P.2d at 1146.

14. *Id.* at 1145-46.

15. *Id.* at 1147.

16. *Id.* at 1146.

The court acknowledged that other jurisdictions have recognized that one spouse has "a compensable property interest in the enhanced earning potential arising out of the other spouse's degree."¹⁷ The court, however, distinguished *Nelson* on the basis of the facts typically present in such cases and absent in *Nelson*: the relatively brief marriage during which no immediately available assets exist because one spouse has worked to enable the other to obtain a professional education. The court pointed out that Clairborne's degree was not a specialized postgraduate degree, that he had contributed as well by working and receiving tuition aid, and that the length of the Nelsons' marriage had allowed June to realize her expectations by participating in the fruits of her husband's enhanced earning potential.¹⁸ On these facts, the court found that an equal division of the general marital assets by the trial court was not inequitable.¹⁹ Moreover, the court declared that a professional degree is not marital property subject to division under any circumstances.²⁰

III. THE CONCEPT OF THE DEGREE AS PROPERTY

A. *In re Marriage of Graham*: The Property Anomaly

By holding that a professional degree is not marital property subject to division, the *Nelson* court espoused the view expressed by a majority of jurisdictions,²¹ most of which follow the reasoning of the

17. *Id.* at 1146 (citing *In re Marriage of Horstmann*, 263 N.W.2d 885, 891 (Iowa 1978); *Woodworth v. Woodworth*, 126 Mich. App. 258, 259, 337 N.W.2d 332, 334 (1983)). Other cases which recognize a property interest in the professional degree, the minority position at the present time, include *Reen v. Reen*, 8 Fam. L. Rptr. 2193 (Mass. Probate & Fam. Ct. Hampden Div. Dec. 23, 1981); *Daniels v. Daniels*, 165 Mich. App. 726, 731, 418 N.W.2d 924, 927 (1988); *Wilkins v. Wilkins*, 149 Mich. App. 779, 791, 386 N.W.2d 677, 682 (1986); *Thomas v. Thomas*, 131 Mich. App. 830, 831, 346 N.W.2d 595, 596, *overruled on other grounds*, 419 Mich. 942, 355 N.W.2d 617 (1984); *Vaclav v. Vaclav*, 96 Mich. App. 584, 592, 293 N.W.2d 613, 617 (1980); *McGowan v. McGowan*, 142 A.D.2d 355, 357, 535 N.Y.S.2d 990, 991 (1988); *O'Brien v. O'Brien*, 66 N.Y.2d 576, 580-81, 498 N.Y.S.2d 743, 746, 489 N.E.2d 712, 715 (1985) (medical license is marital property); *Daniels v. Daniels*, 20 Ohio Op. 458, 459, 185 N.E.2d 773, 775 (1961) (medical license found analogous to a franchise and constitutes property that court may consider in determining alimony award).

18. *Nelson*, 736 P.2d at 1147.

19. *Id.*

20. *Id.* at 1146.

21. *Jones v. Jones*, 454 So. 2d 1006, 1009 (Ala. Ct. Civ. App. 1984); *Pyeatte v. Pyeatte*, 135 Ariz. 346, 351, 661 P.2d 196, 201 (Ct. App. 1982); *Meinholz v. Meinholz*, 283 Ark. 509, 512, 678 S.W.2d 348, 349 (1984); *In re Marriage of Aufmuth*, 89 Cal. App. 3d 446, 461, 152 Cal. Rptr. 668, 677 (Ct. App.), *overruled on other grounds*, *In re Marriage of Lucas*, 27 Cal. 3d 808, 614 P.2d 285, 166 Cal. Rptr. 853 (1979); *In re Marriage of Graham*, 194 Colo. 429, 432, 574 P.2d 75, 77 (1978); *Wright v. Wright*, 469 A.2d 803, 806 (Del. Fam. Ct. 1983); *Hughes v. Hughes*, 438 So. 2d 146, 150 (Fla. Dist. Ct. App. 1983); *In re Marriage of Weinstein*, 128 Ill. App.

leading case, *In re Marriage of Graham*.²² *Nelson* cited with approval the *Graham* court's rationale for refusing to classify a professional degree as marital property:

An educational degree, such as an M.B.A., is simply not encompassed even by the broad views of the concept of "property." It does not have an exchange value or any objective transferable value on an open market. It is personal to the holder. It terminates on death of the holder and is not inheritable. It cannot be assigned, sold, transferred, conveyed, or pledged. An advanced degree is a cumulative product of many years of previous education, combined with diligence and hard work. It may not be acquired by the mere

Jd 234, 244, 470 N.E.2d 551, 559 (1984); *In re Marriage of McManama*, 386 N.E.2d 953, 955 (Ind. Ct. App. 1979), *vacated on other grounds*, 399 N.E.2d 371 (1980); *In re Marriage of Francis*, 442 N.W.2d 59, 62 (Iowa 1989); *In re Marriage of Wagner*, 435 N.W.2d 372, 375 (Iowa 1988); *McGowan v. McGowan*, 663 S.W.2d 219, 223 (Ky. Ct. App. 1983); *Archer v. Archer*, 303 Md. 347, 358, 493 A.2d 1074, 1080 (1985); *Drapek v. Drapek*, 399 Mass. 240, 244, 503 N.E.2d 946, 949 (1987); *Moss v. Moss*, 80 Mich. App. 693, 695, 264 N.W.2d 97, 98 (1978); *DeLa Rosa v. DeLa Rosa*, 309 N.W.2d 755, App. 693, 695, 264 N.W.2d 97, 98 (1978); *Lowrey v. Lowrey*, 633 S.W.2d 157, 160 (Mo. Ct. App. 1982); *Ruben v. Ruben*, 123 N.H. 358, 361, 461 A.2d 733, 735 (1983); *Lynn v. Lynn*, 91 N.J. 510, 517, 453 A.2d 539, 542 (1982); *Muckelroy v. Muckelroy*, 84 N.M. 14, 15, 498 P.2d 1357, 1358 (1972); *Lesman v. Lesman*, 88 A.D.2d 153, 158, 452 N.Y.S.2d 935, 939 (1982); *Geer v. Geer*, 84 N.C. App. 471, 478, 353 S.E.2d 427, 431 (1987); *Nastrom v. Nastrom*, 262 N.W.2d 487, 493 (N.D. 1978); *Stevens v. Stevens*, 23 Ohio St. 3d 115, 117, 492 N.E.2d 131, 135 (1986); *Adair v. Adair*, 670 P.2d 1002, 1003 (Okla. Ct. App. 1983); *Lehmicke v. Lehmicke*, 339 Pa. Super. 559, 566, 489 A.2d 782, 786 (1985); *Heath v. Heath*, 295 S.C. 312, 314, 368 S.E.2d 222, 223 (Ct. App. 1988); *Wehrkamp v. Wehrkamp*, 357 N.W.2d 264, 266 (S.D. 1984); *Frausto v. Frausto*, 611 S.W.2d 656, 659 (Tex. Ct. Civ. App. 1980); *Johnson v. Johnson*, 771 P.2d 696, 697 (Utah 1989); *Sorensen v. Sorensen*, 769 P.2d 820, 826 (Utah 1989); *Hoak v. Hoak*, 370 S.E.2d 473, 477 (W.Va. 1988); *In re Marriage of Lundberg*, 107 Wis. 2d 1, 10, 318 N.W.2d 918, 922 (1982); *Grosskopf v. Grosskopf*, 677 P.2d 814, 822 (Wyo. 1984).

22. 194 Colo. 429, 574 P.2d 75 (1978). The following states have specifically adopted the *Graham* language: Alaska, Arizona, California, Florida, Illinois, Iowa, Kentucky, Maryland, New Jersey, Ohio, Oklahoma, Pennsylvania, South Dakota, Utah, Wisconsin. See *Nelson v. Nelson*, 736 P.2d 1145, 1146-47 (Alaska 1987); *Wisner v. Wisner*, 129 Ariz. 333, 339-40, 631 P.2d 115, 121-22 (Ct. App. 1981); *In re Marriage of Aufmuth*, 89 Cal. App. 3d 446, 461 n.5, 152 Cal. Rptr. 668, 678 n.5 (Ct. App.), *overruled on other grounds*, *In re Marriage of Lucas*, 27 Cal. 3d 808, 614 P.2d 285, 166 Cal. Rptr. 853 (1979); *Hughes v. Hughes*, 438 So. 2d 146, 147 (Fla. Dist. Ct. App. 1983); *In re Marriage of Goldstein*, 97 Ill. App. 3d 1023, 1027, 423 N.E.2d 1201, 1203 (1981); *In re Marriage of Horstmann*, 263 N.W.2d 885, 891 (Iowa 1978); *Inman v. Inman*, 578 S.W.2d 266, 268 (Ky. Ct. App. 1979), *rev'd*, 648 S.W.2d 847 (1982) (The Kentucky Supreme Court adopted the *Graham* language which had been rejected by the lower court.); *Archer v. Archer*, 303 Md. 347, 351, 493 A.2d 1074, 1076 (1985); *Mahoney v. Mahoney*, 91 N.J. 488, 496, 453 A.2d 527, 531 (1982); *Stevens v. Stevens*, 23 Ohio St. 3d 115, 117-18, 492 N.E.2d 131, 133 (1986); *Hubbard v. Hubbard*, 603 P.2d 747, 750 (Okla. 1979); *Hodge v. Hodge*, 513 Pa. 264, 268, 520 A.2d 15, 17 (1986); *Saint-Pierre v. Saint-Pierre*, 357 N.W.2d 250, 259 (S.D. 1984); *Gardner v. Gardner*, 748 P.2d 1076, 1080 (Utah 1988); *In re Marriage of Lundberg*, 107 Wis. 2d 1, 8, 118 N.W.2d 918, 921 (1982).

expenditure of money. It is simply an intellectual achievement that may potentially assist in the future acquisition of property. In our view, it has none of the attributes of property in the usual sense of that term.²³

Graham involved a six-year marriage during which the wife supported her husband in his pursuit of a master's degree in business administration. As is common in such situations, the couple had accumulated no marital assets,²⁴ so Anne Graham could not be compensated by a property division as June Nelson was. The Colorado court, noting that Anne Graham had not sought maintenance, said that a trial court could consider one spouse's contribution to the education of the other in awarding maintenance.²⁵ As the dissent pointed out, however, Colorado's statute restricted the court's power to award maintenance in cases where the spouse seeking it is incapable of self-support.²⁶ The *Graham* court's refusal to recognize the professional degree as property, combined with statutory inflexibility as to the awarding of alimony, deprives the self-supporting contributing spouse of any compensation — a clearly inequitable resolution in such a situation.²⁷

B. Historical Perspective on the Law of Property

The view of property espoused by the *Graham* court represents the once-dominant physicalist conception of property as articulated by William Blackstone in the eighteenth century.²⁸ Blackstone based his law of property on a taxonomy of things — things which could be perceived by the senses, and rights issuing out of those things.²⁹ Blackstone's concept recognized as property only things over which absolute dominion and control could be exercised.³⁰ A central aspect of this control was the alienability of property.

23. *Graham*, 194 Colo. at 432, 574 P.2d at 77, cited in *Nelson*, 736 P.2d at 1146-47.

24. *Id.* at 431, 574 P.2d at 76.

25. *Id.* at 433, 574 P.2d at 78.

26. *Id.* at 435, 574 P.2d at 78-79 (Carrigan, J., dissenting).

27. Recognizing the harshness of this potential result, the Colorado Supreme Court subsequently ruled that, in cases where there is insufficient marital property to divide, the maintenance statute's requirement of "reasonable need" must be interpreted broadly enough to encompass the working spouse's reasonable expectations after years of deferring the acquisition of marital property and postponing her own career goals in order to assist the other spouse through career training. *In re Marriage of Olar*, 747 P.2d 676, 681-82 (Colo. 1987).

28. 2 W. BLACKSTONE, COMMENTARIES (1765).

29. Vandeveldt, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 BUFFALO L. REV. 325, 311 (1980). This article offers an excellent summary of the development of new property concepts.

30. *Id.* at 331.

During the nineteenth century, as protection of intangible forms of wealth became increasingly important to litigants, courts began to define property in terms of the right to value, rather than the absolute right to a given thing. Various forms of nonphysical property were thus created, especially in equity jurisprudence, under which valuable interests had to be designated as property in order to qualify for equitable protection.³¹ Among the personal rights recognized as property during this time was the goodwill of a business, which formerly had been recognized only as an incident of real property.³² By the end of the century, property no longer denoted exclusively rights over things, but rights to any valuable interest as well.³³

Accordingly, a modern concept of property developed which defines property as a set of legal relations between people with respect to valuable interests.³⁴ This view was adopted by the Restatement of Property in 1936. The Restatement definition begins: "The word 'property' is used in this Restatement to denote legal relations between persons with respect to a thing. The thing may be an object having physical existence or it may be any kind of an intangible such as a patent right or a chose in action."³⁵ The Restatement then describes the legal relations which constitute property in terms of four elements (rights, privileges, powers and immunities), with their correlatives (absence of rights, duties, liabilities and disabilities).³⁶ The property owner possesses a "bundle of rights,"³⁷ and ownership does not depend on having all of the available rights in the bundle, one of which is alienability. The property is no less valuable if it happens to be inalienable.³⁸

This modern definition, which unlike Blackstone's is not self-limiting, could theoretically embrace all valuable interests. In practice, however, judicial selection of the interests which are to receive the

31. *Id.* at 334 (citing the rule in equity first stated in *Gee v. Pritchard*, 2 Swanst. 402, 36 Eng. Rep. 670 (1818)).

32. *See id.* at 335-36.

33. Among the other interests held to be property by courts during the late nineteenth and early twentieth centuries were the right to use news one has gathered, *International News Serv. v. Associated Press*, 248 U.S. 215, 237-38 (1918), and the right to a tax exemption on tribal land, *Choate v. Trapp*, 224 U.S. 665, 673 (1912).

34. See Reich, *The New Property*, 73 YALE L.J. 733 (1964), for a perceptive and thorough analysis of rights and status as the modern individual's wealth, or property.

35. RESTATEMENT OF PROPERTY ch. 1 introductory note (1936) (emphasis added).

36. *Id.* §§ 1-4.

37. J. DUKEMINER & J. KRIER, PROPERTY 158 (2d ed. 1988).

38. An example of property that cannot be transferred by the owner is an inalienable life estate of which the owner is life tenant. See J. L. SIMS & A. SMITH, THE LAW OF FUTURE INTERESTS § 1157 (2d ed. 1956).

protection of the property laws is based on public policy considerations. Public policy thus serves as the limiting principle that determines what valuable interests are denominated as property. Community property and equitable distribution statutes reflect public policy favoring recognition and protection of all valuable interests acquired by spouses during marriage. The modern definition of property permits recognition that, in many young families, a professional degree or license, with its enhanced earning potential, is the major marital asset.³⁹ A narrow view of marital property ignores the public policy expressed by the social and legislative history of the equitable dissolution statutes.⁴⁰ Ideally, the implications of the legislated policy of equitable distribution should be as important to courts as precedent in designating what is to constitute marital property.⁴¹

C. Alimony versus Property Award

Why have courts such as the Colorado Supreme Court in *Graham* avoided the accepted concept of property, reverting instead to a narrow, anachronistic definition that ill accords with equitable distribution policy, in order to support their conclusion that the professional degree is not marital property? The answer may lie partly in the conservative nature of the judiciary in general; claims that a professional degree should be considered as marital property are relatively new,⁴² and, except for New York's Equitable Marriage Distribution Law,⁴³ no state statutes specify that professional degrees must be considered

39. Krauskopf, *Recompense for Financing Spouse's Education: Legal Protection for the Marital Investor in Human Capital*, 28 U. KAN. L. REV. 379, 411 (1980).

40. See generally I. ELLMAN, P. KURTZ & A. STANTON, *FAMILY LAW*, 291-300 (1986). See also Gailor & McGill, *The Equitable Distribution of Professional Degrees upon Divorce in North Carolina*, 10 CAMPBELL L. REV. 69, 80 (1987).

41. The public policy that both parties to a marital dissolution are to receive an equitable share of the assets accumulated during marriage underlies the property division statutes of the 42 equitable distribution jurisdictions (including the District of Columbia) and the nine community property states, which are Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington and Wisconsin.

42. The earliest claim found is *Colvert v. Colvert*, 568 P.2d 623 (Okla. 1977). Hubbard v. Hubbard, 603 P.2d 747, 752 (Okla. 1977).

43. N.Y. DOM. REL. LAW § 236 (McKinney 1980-81). Under this statute, New York courts have found that marital property encompasses not only professional degrees and licenses, but also the skills of an artisan, actor, professional athlete or any person whose expertise has enabled him to become an exceptional wage earner. See *Golub v. Golub*, 139 Misc. 2d 440, 444, 527 N.Y.S.2d 946, 949 (Sup. Ct. 1988) (increase during marriage in value of wife's career as model and actress was marital property, in view of husband's contributions to increase). See also *McAlpine v. McAlpine*, 143 Misc. 2d 30, 31-33, 539 N.Y.S.2d 680, 681-82 (Sup. Ct. 1989) (husband's award of fellowship in Society of Actuaries was marital asset, but since wife had not contributed to its attainment she could not share in any enhanced earning capacity).

as marital property.⁴⁴ Thus, courts can choose to interpret such statutes narrowly to find that the legislature did not intend professional degrees to be included as marital property subject to equitable division.⁴⁵

The primary reason for these courts' conservatism, however, appears to be their unwillingness to undertake the valuation problems a professional degree represents, especially to grapple with the issue of future earning potential.⁴⁶ Yet, recognizing the inequities in allowing a contributing spouse who is capable of self-support to go totally without compensation, courts in the *Graham* line have allowed the husband's future earning potential to be considered in awarding alimony, while still denying that the degree itself is a divisible marital asset.⁴⁷ One appellate court has even held that the lower court's erroneous award of a property settlement representing a valuation of the husband's degree could be sustained if it were recharacterized as a provision for additional alimony.⁴⁸ In these jurisdictions, alimony becomes the back door by which the contributing spouse can be compensated with some future earnings, without designating the degree or earning potential as property.

44. Some statutes do require the courts to consider, in awarding maintenance or property, "the contribution by one party to the education, training, or increased earning power of the other." WIS. STAT. ANN. §§ 767.26(9), 767.25(5) (West 1981). Statutes with similar provisions include CAL. CIV. CODE § 4801(a)(1)(B)(2) (West Supp. 1989); DEL. CODE ANN. tit. 13, § 1512(c)(6) (Supp. 1988); FLA. STAT. ANN. § 61.075 (1)(d), (e) (West Supp. 1989); GA. CODE ANN. § 19-6-5(a)(6) (1982); IND. CODE ANN. § 31-1-11.5-11(d) (Burns 1987 & Supp. 1989); IOWA CODE ANN. § 598.21(1)(c) (West 1989); N.J. STAT. ANN. § 2A:34-23.1(h) (West Supp. 1989) (award of alimony); N.C. GEN. STAT. § 50-20(c)(7) (1987); OR. REV. STAT. ANN. § 107.105(1)(d) (1983); 23 PA. CONS. STAT. ANN. § 501(h)(6) (Purdon Supp. 1989); TENN. CODE ANN. § 36-5-101(d)(9) (1983 & Supp. 1988). See *Haugan v. Haugan*, 117 Wis. 2d 200, 207-12, 343 N.W.2d 796, 804 (1984) (even though wife was not in need, she could be awarded maintenance to compensate her for contribution to husband's education). A few statutes do not mention the contribution of one spouse to the education of the other, but do require consideration of a spouse's "interruption of [a] personal career or educational opportunities." See, e.g., NEB. REV. STAT. § 42-365 (1988); N.J. STAT. ANN. § 2A:34-23(b)(8) (West Supp. 1989) (equitable distribution of property).

45. See *Hodge v. Hodge*, 337 Pa. Super. 151, 155-57, 486 A.2d 951, 952-54 (Super. Ct. 1984), *aff'd*, 513 Pa. 264, 520 A.2d 15 (1986).

46. See *infra* Section IV.A.

47. See *Archer v. Archer*, 303 Md. 347, 493 A.2d 1074 (1985); *Drapek v. Drapek*, 399 Mass. 240, 244-47, 503 N.E.2d 946, 949-50 (1987); *Rayburn v. Rayburn*, 738 P.2d 238, 240 (Utah Ct. App. 1987).

48. *Petersen v. Petersen*, 737 P.2d 237, 242 (Utah Ct. App. 1987).

While this solution may appear on its face to be equitable, the use of alimony rather than a property settlement has important disadvantages for the contributing spouse.⁴⁹ Alimony is taxable income which is terminable upon the remarriage of the recipient or the death of either party. Alimony is conventionally not paid in a lump sum but over a period of years, posing the risks to the recipient of collection problems and possible modification or termination by the court.⁵⁰ Alimony awards interfere with the important goal of finality of litigation, causing unnecessary expenditure of judicial resources. The protracted nature of alimony payments also means that the recipient cannot use the money as flexibly as she could a lump sum property award, toward financing her own education or starting a business, for example. Most importantly, alimony is not a matter of right; its propriety and amount are discretionary with the court in all jurisdictions, based by statutory mandate on the court's concept of need or necessity in the particular case.⁵¹ The contributing spouse is thus completely at the mercy of the court and her ex-spouse over a period of years.⁵²

In contrast, a fair division of property is generally seen by courts as equitably necessary, not discretionary.⁵³ A property award is final and not terminable on the recipient's death or remarriage.⁵⁴ Such an award does not constitute taxable income. Moreover, the award is generally nonmodifiable, so that once the property settlement agreement is reached the parties need not return to court.⁵⁵

49. H. CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 650 (2d ed. 1988).

50. *Id.* at 653.

51. *Id.* at 644. See, e.g., ALASKA STAT. § 25.24.160 (Supp. 1988), and text *supra* at note 4. Given these disadvantages, the fact that alimony is not dischargeable if the payor goes bankrupt seems small consolation to the contributing spouse.

52. Even though fault has largely been eliminated as a ground for divorce, some courts still consider it a relevant factor in the alimony decision. See, e.g., Chapman v. Chapman, 498 S.W.2d 134, 138 (Ky. 1973) (fault is not to be considered in determining whether a spouse is entitled to maintenance, but it may be considered in determining the amount to be awarded); Mahne v. Mahne, 147 N.J. Super. 326, 329, 371 A.2d 314, 315, cert. denied, 75 N.J. 22, 379 A.2d 253 (1977); Hegge v. Hegge, 236 N.W.2d 910, 916 (N.D. 1975). Some statutes also explicitly state that the court is to consider fault (often expressed as "the conduct of the parties") in awarding alimony. See FIA. STAT. ANN. § 61.08(1) (West Supp. 1980); GA. CODE ANN. § 19-6-1(b) (1982); MASS. ANN. LAWS ch. 208, § 34 (Law. Co-op. 1989); MO. REV. STAT. § 452.335(2)(9) (West Supp. 1989); N.C. GEN. STAT. § 50-16.2 (1988); 23 PA. CONS. STAT. ANN. § 501(b)(14) (Purdon Supp. 1989); W. VA. CODE § 48-2-15(i) (1986).

53. Moore, *Should a Professional Degree be Considered a Marital Asset Upon Divorce?*, 15 AKRON L. REV. 543, 551-52 (1982).

54. *Id.*

55. See, e.g., Gailor & McGill, *supra* note 40, at 82-86; Note, Horstmann v. Horstmann: Present Right to Practice a Profession as Marital Property, 56 DENVER L.J. 677, 681-84 (1979).

The policy behind equitable distribution of marital assets is that marriage is an economic partnership, and that the couple's investments in the marital property should be divided as fairly as possible. Valuing the professional degree indirectly by means of an alimony award may seem to achieve an equitable resolution for the contributing spouse in some situations, but it poses unacceptable risks and disadvantages for the recipient, unless certain of the traditional attributes of alimony are altered. Both common judicial solutions to the problem — indirectly valuing the degree through alimony, or refusing to value the degree at all — can severely disadvantage the contributing spouse and thus frustrate the policy on which equitable distribution is founded.

IV. POSSIBLE SOLUTIONS FOR BALANCING THE EQUITIES

A. Valuing the Degree Using a Labor Theory

The problem of how to assign a value to the professional degree or license appears to be the primary concern of courts which, like the Alaska Supreme Court, have denied the degree or license status as marital property. At the root of this concern lies the perceived necessity of finding a way to value the degree-holding spouse's future earning capacity in order to arrive at a full economic valuation of the degree. It is a well-settled principle of economics that the present value of an income-producing entity consists of its future earning capacity.⁵⁶ Valuing a future earning stream, however, while economically desirable, presents two serious problems in the marital dissolution context.

The first problem is that prospective valuation is necessarily speculative. Although abundant statistics exist to provide data for the formulas used to calculate future earning potential attributable to a professional degree,⁵⁷ not all degree holders can earn the average statistical value; and it is not possible to consider fully all the variables that can affect actual future value. Such variables include not only

56. Garfield, *Wrongful Death: Principles Governing Valuation of Economic Loss*, 1967 INS. L.J. 654, 655.

57. A typical calculation is described in Fitzpatrick & Dnucette, *Can the Economic Value of an Education Really Be Measured? A Guide for Marital Property Dissolution*, 21 J. FAM. L. 511, 516-20 (1982). More generally, to determine future earning potential, one must:

1. determine earning capacity after the education has been acquired, to be compared with the earning capacity if the education has not been obtained;
2. subtract out-of-pocket costs and opportunity costs — lost earnings — of the added education, costs which would be incurred anyway;
3. discount future income to present value, selecting a discount rate which factors in elements of risk such as premature death or disability.

Krauskopf, *supra* note 19, at 382-84.

premature death or disability, but unforeseeable changes in market opportunities, or changes of career or profession.⁵⁸ It is true that courts have long engaged in just such speculation in allowing calculations of future earning potential as damages in wrongful death and personal injury actions, and several commentators cite this precedent as justification for valuing the professional degree's future earning potential.⁵⁹ These advocates overlook the fact that in tort, it is the finding of fault that justifies the imposition of damages. With the growing trend toward no-fault divorce, this important policy justification is increasingly inapplicable in marital dissolution law.

The second difficulty is that valuing of the degree in terms of statistically average future earnings could seriously infringe on the student spouse's personal freedom to pursue his career as he wishes, or even to change careers entirely. A graduate of a nationally ranked law school has the option to work in a large law firm in a major city at a high entering salary, yet he may wish to practice public interest law or work for a government agency, or he may have captured a prestigious, but low-paying judicial clerkship. If he chooses any of the less remunerative positions, his earnings will be below the statistical average for his profession. Must he be required to live in a different city, give up a clerkship, or stay in a profession for which he may soon discover he is unsuited, in order to realize the income level projected at the time of the marital dissolution?

Any of these alternatives would represent an unsupportable encroachment on the personal freedom of a spouse who, at least in the eyes of the law, if not in fact, has committed no fault. Placing such a lien on the student spouse's future cannot be justified, even on the grounds that only by so doing can the contributing spouse be fully compensated. Some means of valuation must be employed that establishes a more just balance between these competing interests.

The valuation method that comes the closest to achieving this balance is the labor theory of value, as proposed by Professor Linda

58. Mullenix, *The Valuation of an Educational Degree at Divorce*, 16 *LOY. L.A. L. REV.* 227, 268 (1983).

59. See Gailor & McGill, *supra* note 40, at 97; Moore, *supra* note 53, at 547; Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 *UCLA L. REV.* 1181, 1219 (1981); Krauskopf, *supra* note 39, at 388-89; Case Comment, *Divorce After Professional School: Education and Future Earning Potential May Be Marital Property: In re Marriage of Horstmann*, 44 *MO. L. REV.* 329, 333-36 (1979); Comment, *Professional Education as a Divisible Asset in Marriage Dissolutions*, 64 *IOWA L. REV.* 705 (1979); Case Comment, *Graduate Degree Rejected as Marital Property Subject to Division upon Divorce: In re Marriage of Graham*, 11 *CONN. L. REV.* 62, 71 (1978); Comment, *The Interest of the Community in a Professional Education*, 10 *CAL. W.L. REV.* 590, 605-06 (1974).

Mullenix.⁶⁰ This method is founded on the classic economic theory that the value of any commodity can be expressed in terms of the labor input required to produce it. The labor theory of value was dominant before the advent of modern industrialized society brought to the fore market-oriented theories of value, and it is still a valid means of assessing the value of a nonmarketable asset that has been produced by the application of a single factor of production.⁶¹

According to the labor theory, the measure of the value of the degree as a marital asset is the amount of labor time it took the student spouse to acquire it. Upon divorce, the student spouse owes the marriage the value of this asset, or the time which was spent on its acquisition, rather than on contributions to the family that the student spouse could have otherwise made. This value is determined by awarding the contributing spouse fifty percent of the student spouse's actual post-degree income for the same period of time it took him to acquire the degree. Thus, the contributing spouse who supported the student spouse during a three-year law degree is entitled to fifty percent of the student spouse's income for the three years following the divorce. A court employing this method never has to set an actual monetary value on the degree, so that the need for often conflicting expert valuations is avoided.⁶²

The labor theory of value allows the contributing spouse to be compensated with an amount that exceeds mere restitution, because it is the cost of the degree to the student spouse, and not the wife's contributions, that is being valued. The contributing spouse is fully compensated for her investment in labor expended, even if she does not receive as much money as she would have if the degree were valued in terms of future earnings. The period of payment is confined to the first few years of the student spouse's professional career, when his earning power reflects primarily the degree's value rather than the value of experience and skill acquired over time. Moreover, limitation of the period of payment to a few years minimizes the restrictions on the student spouse's pursuit of his career that would be imposed by an award of a portion of the student spouse's future earnings spanning most if not all of his productive lifetime.

Valuing the degree in terms of labor also provides a means of reimbursing the contributing spouse's opportunity costs without engaging in speculation as to the monetary value of opportunities foregone. The primary opportunity costs incurred by the contributing

60. Mullenix, *supra* note 58, at 274-83. See also Haugan v. Haugan, 117 *Wis. 2d* 200, 214-15, 341 *N.W.2d* 796, 803 (1984).

61. Mullenix, *supra* note 58, at 274-77.

62. *Id.* at 278-79.

spouse are time spent and salary and educational opportunities sacrificed. Receiving fifty percent of the degree-holding spouse's income for the same period of time foregone by the contributing spouse allows her the same kind of benefit she had provided — a sum of money large enough to enable the pursuit of a full-time educational program, or to fund other opportunities of her choice.

Upon declaring that a professional degree or license is marital property subject to equitable distribution, the Alaska Supreme Court should adopt the labor theory of valuation as the preferred method for trial courts to use in valuing the degree or license. This method provides a fair return on the contributing spouse's monetary and opportunity cost investment without placing untenable restrictions on the student spouse's future, and, in addition, it is simple to calculate and to implement. Trial courts should, however, maintain the discretion to adjust the percent of the labor award downward from fifty percent if the equities of the individual case, supported by adequate evidence, require. An example of such a case would be one in which the student spouse was declared ineligible for a scholarship, or was required to borrow money from an outside source at a higher interest rate, because his wife was contributing to the family income.

B. Restitution in Quasi-Contract

If the Alaska Supreme Court chooses to remain among the majority of jurisdictions that do not recognize the professional degree as marital property, alternative means remain for balancing the equities between the contributing spouse and student spouse. A court is not restricted by the terms of the equitable distribution and maintenance statutes, but may resort to its inherent power to grant equitable relief by finding that a quasi-contract, or contract implied in law, existed between the husband and wife.⁶³ The court can thus apply principles of restitution to prevent the unjust enrichment of the student spouse independently of maintenance determinations and without having to designate the degree as marital property.

To grant this remedy, the court must find that one party has received a benefit at the expense of the other, and that it would be unjust for the recipient to retain the benefit without compensating the other party. As long as the conferring of the benefit was neither officious nor gratuitous, its retention is considered unjust.⁶⁴ The Restatement

63. See, e.g., Krauskopf, *supra* note 39, at 389-91.

64. See Mahoney v. Mahoney, 91 N.J. 488, 500, 453 A.2d 527, 533 (1982) ("Where a partner to marriage takes the benefits of his spouse's support in obtaining a professional degree or license with the understanding that future benefits will accrue and more to both of them, and the marriage is then terminated without the supported

of Restitution recognizes that a benefit is unjustly retained when services are performed with the recipient's knowledge because the performer reasonably believes that he will also benefit from the services.⁶⁵

A number of courts have applied the principle of unjust enrichment in the context of marital investment in the education of a spouse,⁶⁶ but a few courts have refused to do so, acting on the presumption that services performed within the marital relationship are gratuitous.⁶⁷ This presumption derives from the traditional common law marital contract, whereby certain mutually beneficial services were to be performed gratuitously by the husband and wife. The common law contract, however, never imposed on either spouse, especially the wife,⁶⁸ the duty of supporting the other during the acquisition of an education. Since by so doing the contributing spouse has performed a service and rendered a benefit not encompassed by the traditional contract, and for which the contract provides no offsetting benefit, she should not be presumed to have provided this service gratuitously.⁶⁹ Instead, the court should look to the contributing spouse's reasonable expectations of the benefit she would in turn receive for performing the service.⁷⁰ Although the contributing spouse cannot share in the eventual earnings realized from the degree, as she had

spouse giving anything in return, an unfairness has occurred that calls for a remedy.").

65. RESTATEMENT OF RESTITUTION § 40(b) (1937).

66. See Pyeatte v. Pyeatte, 135 Ariz. 346, 661 P.2d 196 (Ct. App. 1982); Woodworth v. Woodworth, 126 Mich. App. 258, 337 N.W.2d 332 (1983); DeLa Rosa v. DeLa Rosa, 309 N.W.2d 755 (Minn. 1981); *In re Marriage of Cropp*, 5 Fur. L. Rptr. (BNA) 2957 (D. Minn. 1979); Mahoney v. Mahoney, 91 N.J. 488, 453 A.2d 527 (1982); Adair v. Adair, 670 P.2d 1002 (Okla. Ct. App. 1983). See also Hubbard v. Hubbard, 603 P.2d 747, 749-52 (Okla. 1979) (Oklahoma Supreme Court creates hybrid form of alimony called "cash award in lieu of property settlement," limited to cases where only major marital asset is educational degree).

67. Wisner v. Wisner, 129 Ariz. 333, 341, 631 P.2d 115, 123 (Ct. App. 1981). *Limited to facts of case*, Pyeatte v. Pyeatte, 135 Ariz. 346, 354, 661 P.2d 196, 202 (Ct. App. 1982); Lesman v. Lesman, 88 A.D.2d 153, 158-59, 452 N.Y.S.2d 935, 939 (1982).

68. See Church v. Church, 96 N.M. 388, 395-96, 630 P.2d 1243, 1250-57 (Ct. App. 1981) (wife's claims of providing financial support and educational funds for husband's medical education state a basis for relief because wife had no duty to support (applying Virginia law)).

69. See Krauskopf, *supra* note 39, at 394. See also Woodworth v. Woodworth, 126 Mich. App. 258, 268, 337 N.W.2d 332, 337 (1983) ("Clearly . . . the degree was a family investment, rather than a gift or benefit to the degree holder alone. Treating the degree as such a gift would unjustly enrich the degree holder to the extent that the degree's value exceeds its cost.").

70. DeLa Rosa v. DeLa Rosa, 309 N.W.2d 755, 758 (Minn. 1981) (court awarded extra-statutory equitable remedy on basis that wife had a "reasonable expectation" that she would be rewarded for her efforts in putting husband through medical school by a higher standard of living when he began practicing medicine).

however, conventional alimony is an unsatisfactory means of compensating the contributing spouse.⁷⁸ If the Alaska courts wish to employ this remedy, several characteristics of conventional alimony must be altered to provide the contributing spouse the benefits she would have if there were property to divide.

Any maintenance award which functions as restitution to a contributing spouse should be a lump sum, or in gross, award. This award may be made payable in installments, but should be made nonterminable upon remarriage.⁷⁹ By holding that contributions to the welfare of a spouse may be considered in determining maintenance, courts have recognized that the obligation to make the contributing spouse whole is a function of alimony as valid as the more traditional function of providing support.⁸⁰ Once this compensatory function is acknowledged, the necessity of making the alimony award nonterminable is apparent.⁸¹ Making the award in gross allows the kind of finality present in a property settlement; although the award is of necessity usually made payable in installments, it is not open-ended like conventional alimony and the payments generally terminate within a shorter period of time.

Nothing in Alaska's statute appears to prevent the adoption of in gross maintenance in Alaska.⁸² The Alaska Supreme Court's interpretation of the statute also indicates a flexible approach toward the

Wis. 2d 200, 207-21, 343 N.W.2d 796, 800-06 (1984); *In re Marriage of Lundberg*, 107 Wis. 2d 1, 10-12, 318 N.W.2d 918, 922-23 (1982).

78. See *supra* Section III.C.

79. See *In re Marriage of Francis*, 442 N.W.2d 59, 64 (Iowa 1989). Courts which have employed such a remedy include *Greer v. Greer*, 32 Colo. App. 196, 198-99, 510 P.2d 905, 906-07 (1973); *Moss v. Moss*, 80 Mich. App. 693, 694-95, 264 N.W.2d 97, 98-99 (1978); *Hubbard v. Hubbard*, 603 P.2d 747, 751-52 (Okla. 1979); *Diment v. Diment*, 531 P.2d 1071, 1074 (Okla. Ct. App. 1974); *Washburn v. Washburn*, 101 Wash. 2d 168, 183, 677 P.2d 152, 160 (1984); *In re Marriage of Lundberg*, 107 Wis. 2d 1, 14-15, 318 N.W.2d 918, 924 (1982).

80. See *In re Marriage of Lundberg*, 107 Wis. 2d 1, 12, 318 N.W.2d 918, 923 (1982) ("[M]aintenance payments are no longer limited to situations where the spouse is incapable of self-support. Instead, we view maintenance as a flexible tool . . . to ensure a fair and equitable determination in each individual case."). See also *Greer v. Greer*, 32 Colo. App. 196, 199, 510 P.2d 905, 907 (1973) ("Although referred to as 'alimony,' the lump sum awarded in the present case . . . must be considered as a substitute for, or in lieu of, the wife's rights in the husband's property as distinguished from her rights of future support envisioned by the ordinary award of alimony").

81. Krauskopf, *supra* note 39, at 406.

82. ALASKA STAT. § 25.24.160 (Supp. 1988). "In a judgment in an action for divorce . . . the court may provide . . . (3) for the recovery by one party from the other of an amount of money for maintenance, in gross or in installments, as may be just and necessary without regard to which of the parties is in fault . . ." (emphasis added). See also *Faro v. Faro*, 579 P.2d 1377, 1380 (Alaska 1978) (trial court is vested with broad discretion in making alimony determination).

granting of maintenance that would support such an award. In *Nelson*, the supreme court restated its longstanding preference for securing the financial needs of divorcing spouses by means of property division rather than alimony.⁸³ The court stated, however, that where there is no substantial property to divide, alimony may be awarded if it is found "just and necessary."⁸⁴ The supreme court has supported a broad reading of the statute, stating that the spouse seeking maintenance is not necessarily ineligible for maintenance because she can support herself; she may be eligible if she is "unable to secure employment appropriate to her skills and interests."⁸⁵ The concept of "appropriate employment," rather than any kind of employment for the contributing spouse, reflects an interpretation of the statutory requirement of necessity that is broad enough to permit rehabilitative alimony for the education of a supporting spouse,⁸⁶ and to allow a contributing spouse to receive alimony even if she is self-supporting.⁸⁷

The court thus appears to regard the requirement of necessity as one of reasonable necessity in the light of the applicant's situation and reasonable expectations. Given its progressive concept of the function of alimony, it seems likely that the supreme court would uphold an award of in gross nonterminable maintenance in a situation of the type reserved in *Nelson*.

V. CONCLUSION

The time will come when an Alaska court will be confronted with a marital dissolution in which one spouse, during a short-term marriage with no significant assets, made possible the acquisition of a professional degree by the other spouse. The Alaska Supreme Court, which in *Nelson v. Nelson* refused to recognize a professional degree as marital property, has not provided the lower courts with guidance as to how to carry out the policy behind Alaska's equitable distribution statute in such a situation.

Without acknowledging that the degree is property and, thus, without disturbing *Nelson*, a trial court can provide restitutionary

83. *Nelson*, 736 P.2d 1145, 1147 (Alaska 1987). See also *Bussell v. Bussell*, 623 P.2d 1221, 1224 (Alaska 1981); *Malone v. Malone*, 587 P.2d 1167, 1168 (Alaska 1978); *Messina v. Messina*, 583 P.2d 804, 805 (Alaska 1978).

84. *Nelson*, 736 P.2d at 1147 (quoting ALASKA STAT. § 25.24.160 (3)).

85. *Messina v. Messina*, 583 P.2d 804, 805 (Alaska 1978) (citing UNIF. MARRIAGE & DIVORCE ACT § 308, 9A U.L.A. 347 (1973)).

86. *Bussell v. Bussell*, 623 P.2d 1221, 1224 (Alaska 1981) (award of rehabilitative alimony upheld as not clearly unjust when of limited duration and for a specified purpose).

87. Colorado, since *Graham*, has joined Alaska in holding that the contributing spouse's "appropriate employment" is one of the factors to be considered in determining maintenance. *In re Marriage of Olar*, 747 P.2d 676, 681 (Colo. 1987).

compensation for the contributing spouse by either of two means: employing a theory of unjust enrichment in quasi-contract, or granting a lump-sum maintenance award that is nonterminable and nonmodifiable. Ultimately, however, the supreme court should acknowledge that a professional degree is the kind of valuable interest encompassed by the modern concept of property. Such recognition need not lead inevitably to a speculative valuation based on the degree-holding spouse's future earning potential, nor should it be prevented by the fact that the degree itself is not alienable. By adopting the nonspeculative labor theory of value, the court can avoid valuing the degree in monetary terms entirely. The labor theory, which values the degree according to the time invested by the contributing spouse toward its achievement by the student spouse, compensates the contributing spouse in the fairest manner possible without unduly restricting the future freedom of the student spouse.

Celia Grasty Jones

LATEST

PARLA HUNTINGTON

Insert

Sec. 17. AS25.24 is amended by adding a new section to read:

Article 4. General Provisions

Sec. 25.24.400 Definition. In this chapter, "career assets" means the ability of a spouse to earn money, including marketable and unmarketable good will, resulting from that spouse's education, profession, or employment, that was acquired during marriage.

AS 25.24.150 is amended by adding a new subsection to read:

(f) In an action to modify, vacate, or enforce a custody or visitation decree. the court may, upon application by either party, award attorney fees and costs. In determining the award of attorney fees and costs, the court shall consider the relative financial resources of the parties, and the absence of good faith.

PROPOSED AMENDMENTS TO SB 450

Page 1, line 6, following "to":

Insert "the reporting and investigation of"

--- additional change in the title

Page 1, line 6, following "neglect":

Insert "and to training persons required to report child abuse or neglect"

Page 3, lines 20 - 29, and page 4, lines 1 - 4:

Delete all material.

Insert

(f) If a law enforcement agency determines that a child has been abused or neglected, and (1) that the harm was caused by a teacher or other person employed by the school in which the child is enrolled as a student, (2) that the harm occurred on the premises of the school in which the child is enrolled as a student, or (3) that the harm occurred during an activity sponsored by the school in which the child is enrolled as a student, the law enforcement agency shall, at the conclusion of the investigation, notify the chief administrative officer of the school or district in which the child is enrolled. The notification must set out the factual basis for the law enforcement agency's determination. Within 10 days of receiving notification from the law enforcement agency under this subsection about a person in the teaching profession, as defined in AS 14.20.370, the chief administrative officer shall file a report with the Professional Teaching Practices Commission that sets out the name of the teacher and the information received from a law enforcement agency under this subsection.

Page 4, line 17, following "department":

Insert "or school district"

Page 4, line 26:

Delete "and"

Page 4, line 28, following "neglect":

Insert

";(5) the role of a person required to report child abuse or neglect, and their employing agency, after the report has been made; and

(6) the manner in which cases of child abuse or neglect are investigated by the department and law enforcement agencies following notification of suspected abuse or neglect"

Page 5, line 17, following "abuse":

Insert "committed"

Page 5, line 19, following "abuse":

Insert "committed"

Page 6, line 4, following "custodian.":

Insert

A school official may be present during the interview unless

- (1) the child objects; or
- (2) the department or law enforcement agency determines that the presence of the school official will disrupt, or interfere with, the investigation.

Page 6, line 14,

delete "recklessly" 2

add "with criminal negligence"

Page 8, lines 13 - 16:

Delete all material.

Insert

(12) "maltreatment" means behavior that harms or threatens a child's ^{health or} welfare and includes conduct that results in a controlled substance, as defined in AS 11.71.900, being found in a newborn child's blood or urine, unless the administration of the controlled substance to the mother or child was authorized under AS 17.30.

Page 8, line 20:

Delete ", with due regard to the child's culture."

Page 8, line 24

delete definition of "recklessly"
add definition of "criminal negligence"

Page 8, lines ~~28~~ 29

~~delete everything after "AS 11.41.40-11.41.45"~~

Page 8 line 28 after "abuse"
insert "intentionally performed in the presence of a child"

FISCAL NOTE

REQUEST:

Revision Date	<u>1/31/90</u>	Agency Affected:	<u>Alaska Court System</u>
Title:	<u>An act related to divorce and dissolution</u>	BRU:	<u>Trial Courts</u>
Sponsor:	<u>Rules/Governor</u>	Components:	
Requestor:	<u>Senate Judiciary</u>		

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 90	FY 91	FY 92	FY 93	FY 94	FY 95
Personal Services		50.4	60.4	50.4	50.4	60.4
Travel		12.9	10.0	10.0	10.0	10.0
Contractual						
Supplies						
Equipment		2.6				
Land & Structures						
Grants & Claims						
TOTAL OPERATING	0.0	65.9	60.4	60.4	60.4	60.4

CAPITAL						
----------------	--	--	--	--	--	--

REVENUE						
----------------	--	--	--	--	--	--

FUNDING: (Thousands of Dollars)

General Funds	0.0	65.9	60.4	60.4	60.4	60.4
Federal Funds						
Other						
TOTAL	0.0	65.9	60.4	60.4	60.4	60.4

POSITIONS:

Full-time		1.0	1.0	1.0	1.0	1.0
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

See attached analysis.

Prepared by: Jan Strandberg, General Counsel

Division: Alaska Court System

Phone: 284-8228

Date: 01/31/90

Approved by: Arthur H. Snowden, II, Administrative Director

Agency: Alaska Court System

Date: 01/31/90

Distribution (by preparer):

Legislative Finance

Legislative Sponsor

Requestor

Office of Management & Budget

Impacted Agency(ies)

ALASKA COURT SYSTEM
FISCAL ANALYSIS

Summary of FY 89 Filings - Dissolution of Marriage

<u>Court</u>	<u>Number of Filings</u>	<u>Estimated # of Cases Involving Children (1)</u>	<u>Estimated # of Cases Requiring Custody Investigation (2)</u>
Anchorage	1,445	868	97
Fairbanks	475	318	32
Palmer	187	125	13
Kenai	150	101	10
Kodiak	81	41	4
Juneau	173	118	12
Ketchikan	126	84	8
Sitka	51	34	3
Wrangell/ Petersburg	21	14	1
Others	<u>68</u>	<u>48</u>	<u>5</u>
Total	<u>2,756</u>	<u>1,847</u>	<u>186</u>

(1) Two-thirds of dissolution cases are estimated to involve children.

(2) Ten percent of dissolution cases involving children are estimated to require custody investigations.

Although the estimated increase in dissolutions that will require custody investigations is principally centered in Anchorage and Fairbanks, each of the other superior courts is expected to be impacted as well. To meet these needs on a statewide basis, one new custody investigator will be hired in Anchorage to provide services to Anchorage, Fairbanks and other communities on an as needed basis.

ALASKA COURT SYSTEM
FISCAL ANALYSIS

HB 195 - Divorce and Dissolution

	<u>Salary</u>	<u>Benefits</u>	<u>Total</u>
<u>Personal Services</u>			
Custody Investigator, Range 18A, Anchorage, PFT - 12 months	\$37,648	\$12,900	<u>\$50,448</u>
<u>Travel</u>			
Custody Investigator travel-			
Monthly service to Fairbanks, Kenai and Kodiak. Quarterly service to Ketchikan, Sitka, Wrangell, & Petersburg			10,000
Forms Committee meeting- (one time cost)			
Cost of Dissolution Forms Committee meeting in Anchorage for two days with one and one-half days of in-transit time.			<u>2,900</u>
Total Travel			<u>12,900</u>
<u>Equipment: (one time cost)</u>			
Desk, chair, filing cabinet, and typewriter for new employee			<u>2,574</u>
Total First Year Cost			<u>\$65,922</u>

FISCAL NOTE

REQUEST:

Revision Date: _____
Title: An act related to divorce and
dissolution
Sponsor: _____
Requestor: House Finance

Agency Affected: Alaska Court System
BRU: Trial Courts
Components: _____

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-

CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
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REVENUE	-0-	-0-	-0-	-0-	-0-	-0-
---------	-----	-----	-----	-----	-----	-----

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

Prepared by: House Finance Committee Phone: 465-3727
Division: Co-Chairman Ron Larson Date: 4/28/89
Co-Chairman Lyman Hoffman
Approved by Commissioner: _____ Date: _____
Agency: _____

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

STATE OF ALASKA 1989 LEGISLATIVE SESSION
FISCAL NOTE

REQUEST: _____ Bill Version: HB 195
 _____ Publish Date: _____
 Revision Date: 3/10/89 Agency Affected: Alaska Court System
 Title: An act related to divorce and BRU: Trial Courts
 dissolution
 Sponsor: Components:
 Requestor: _____

EXPENDITURES/REVENUES:		(Thousands of Dollars)				
OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
Personal Services	51.1	51.1	51.1	51.1	51.1
Travel	12.9	10.0	10.0	10.0	10.0
Contractual
Supplies
Equipment	2.5	. . . .	. . . .	. . . .	. . . .
Land & Structures
Grants & Claims
TOTAL OPERATING	0.0	66.5	61.1	61.1	61.1	61.1

CAPITAL

REVENUE

FUNDING:		(Thousands of Dollars)				
General Funds	0.0	66.5	61.1	61.1	61.1	61.1
Federal Funds	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Other	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
TOTAL	0.0	66.5	61.1	61.1	61.1	61.1

POSITIONS:						
Full-time	. . . .	2.0	2.0	2.0	2.0	2.0
Part-time	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Temporary	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .

ANALYSIS: (Attach a separate page if necessary)

See attached analysis.

Prepared by: *Jan Strandberg* Jan Strandberg, General Counsel Phone: 264-8228
 Division: Alaska Court System Date: 03/10/89
 Approved by: *Stephanie Cole, for* Arthur H. Snowden, II, Administrative Director Date: 03/10/89
 Agency: Alaska Court System

- Distribution (by preparer):
 Legislative Finance
 Legislative Sponsor
 Requestor
 Office of Management & Budget
 Impacted Agency(ies)
 Senate Secretary

RECEIVED
MAR 15 1989

LEGISLATIVE FINANCE

ALASKA COURT SYSTEM

FISCAL ANALYSIS

HB 195 - Divorce and Dissolution

<u>Personal Services:</u>	<u>Salary</u>	<u>Benefits</u>	<u>Total</u>
Custody Investigator, Range 18A, Anchorage, PFT - 12 months	\$37,548	\$13,526	\$51,074

Travel:

Custody investigator travel-

Monthly service to Fairbanks, Kenai and
Kodiak. Quarterly service to Ketchikan,
Sitka, Wrangeli, & Petersburg

10,000

Forms Committee meeting- (one time cost)

Cost of Dissolution Forms Committee meeting in
Anchorage for two days with one and one-half days
of in-transit time.

2,900

Total Travel

12,900

Equipment: (one time cost)

Desk, chair, filing cabinet, and typewriter for each
new employee

2,574

Total First Year Cost

\$66,548
=====

ALASKA COURT SYSTEM

FISCAL ANALYSIS

Summary of FY 88 Filings - Dissolution of Marriage

<u>Court</u>	<u>Number of Filings</u>	<u>Estimated # of Cases Involving Children (1)</u>	<u>Estimated # of Cases Requiring Custody Investigation (2)</u>
Anchorage	1,455	975	98
Fairbanks	500	335	34
Palmer	191	128	13
Kenai	131	88	9
Kodiak	50	34	3
Juneau	139	93	9
Ketchikan	73	49	5
Sitka	39	26	3
Wrangell/ Petersburg	26	17	2
Others	76	51	5

- (1) Two-thirds of dissolution cases are estimated to involve children.
- (2) Ten percent of dissolution cases involving children are estimated to require custody investigations.

Although the estimated increase in dissolutions that will require custody investigations is principally centered in Anchorage and Fairbanks, each of the other superior courts is expected to be impacted as well. To meet these needs on a statewide basis, one new custody investigator will be hired in Anchorage to provide services to Anchorage, Fairbanks and other communities on an as needed basis.

The proposed standing master position in Fairbanks has been eliminated with the expectation that increased custody investigation support from Anchorage will partially assist the present judicial staff in absorbing the extra work engendered by heightened scrutiny.

go0949hG
Lauterbach
3/26/90

Original sponsor(s): Rules/Governor

1 IN THE HOUSE

BY THE JUDICIARY COMMITTEE

2 SENATE CS FOR CS FOR HOUSE BILL NO. 195 (Judiciary)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 SIXTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to divorce, dissolution, and annul-
7 ment; and amending Rule 84(a), Alaska Rules of Civil
8 Procedure."

9 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

10 * Section 1. INTENT. By amending AS 25.24.160(a)(2) and (4) in this
11 Act and by referring to those paragraphs in other sections of AS 25.24 in
12 this Act, it is the legislature's intent to codify the principal factors to
13 be weighed by a court in making an equitable division of property or an
14 award of maintenance in a divorce or dissolution proceeding, as enunciated
15 by the Alaska Supreme Court in the case of Merrill v. Merrill, 368 P.2d 546
16 (Alaska 1962), and subsequent opinions. Except for AS 25.24.160(a)(4)(F),
17 the factors codified are intended to restate the principal factors found in
18 case law, not to change them, affect the interpretation given to them, or
19 preclude changes or additions to them by future court rulings.

20 * Sec. 2. AS 25.20 is amended by adding a new section to read:

21 Sec. 25.20.115. ATTORNEY FEE AWARDS IN CUSTODY AND VISITATION
22 MATTERS. In an action to modify, vacate, or enforce that part of an
23 order providing for custody of a child or visitation with a child, the
24 court may, upon request of a party, award attorney fees and costs of
25 the action. In awarding attorney fees and costs under this section,
26 the court shall consider the relative financial resources of the
27 parties and whether the parties have acted in good faith.

28 * Sec. 3. AS 25.24.100 is amended to read:

29 Sec. 25.24.100. RESIDENCY OF MILITARY PERSONNEL. A person

1 serving in a military branch of the United States government who has
2 been continuously stationed at [IN] a military base or installation in
3 the state for at least 30 days is considered [A PERIOD OF ONE YEAR
4 SHALL BE DEEMED] a resident [IN GOOD FAITH] of the state for the
5 purposes of this chapter [AS 25.24.010 - 25.24.180].

6 * Sec. 4. AS 25.24.140 is repealed and reenacted to read:

7 Sec. 25.24.140. ORDERS DURING ACTION. (a) During the pendency
8 of the action, a spouse may, upon application and in appropriate
9 circumstances, be awarded expenses, including

10 (1) attorney fees and costs that reasonably approximate the
11 actual fees and costs required to prosecute or defend the action; in
12 applying this paragraph, the court shall take appropriate steps to
13 ensure that the award of attorney fees does not contribute to an
14 unnecessary escalation in the litigation;

15 (2) reasonable spousal maintenance, including medical
16 expenses; and

17 (3) reasonable support for minor children in the care of
18 the spouse, if there is a legal obligation of the other spouse to
19 provide support.

20 (b) During the pendency of the action, upon application, a
21 spouse is entitled to necessary protective orders, including orders

22 (1) providing for the freedom of each spouse from the
23 control of the other spouse;

24 (2) restraining each spouse from subjecting the other
25 spouse or another person living in the household to domestic violence,
26 as defined in AS 25.35.060;

27 (3) directing one spouse to vacate the marital residence or
28 the home of the other spouse;

29 (4) restraining a spouse from communicating directly or

1 indirectly with the other spouse;

2 (5) restraining a spouse from entering a propelled vehicle
3 in the possession of or occupied by the other spouse; and

4 (6) prohibiting a spouse from disposing of the property of
5 either spouse or marital property without the permission of the other
6 spouse or a court order.

7 (c) After a hearing, if both parties agree, the court may also
8 order that the parties engage in personal or family counseling or
9 mediation. In the order, the court shall provide for the payment of
10 the costs of the counseling or mediation.

11 * Sec. 5. AS 25.24.160(a) is amended to read:

12 (a) In a judgment in an action for divorce or action declaring a
13 marriage void or at any time after judgment, the court may provide

14 (1) for the payment by either or both parties of an amount
15 of money or goods, in gross or installments that may include cost-
16 of-living adjustments, as may be just and proper for the parties to
17 contribute toward the nurture and education of their children, and the
18 court may order the parties to arrange with their employers for an
19 automatic payroll deduction each month or each pay period, if the
20 period is other than monthly, of the amount of the installment; if the
21 employer agrees, the installment shall be forwarded by the employer to
22 the clerk of the superior court that [WHICH] entered the judgment or
23 to the court trustee, and the amount of the installment is exempt from
24 execution;

25 (2) for the recovery by one party from the other of an
26 amount of money for maintenance, for a limited or indefinite period of
27 time, in gross or in installments, as may be just and necessary with-
28 out regard to which of the parties is in fault; an award of mainte-
29 nance must fairly allocate the economic effect of divorce by being

1 based on a consideration of the following factors:

2 (A) the length of the marriage and station in life of
3 the parties during the marriage;

4 (B) the age and health of the parties;

5 (C) the earning capacity of the parties, including
6 their educational backgrounds, training, employment skills, work
7 experiences, length of absence from the job market, and custodial
8 responsibilities for children during the marriage;

9 (D) the financial condition of the parties, including
10 the availability and cost of health insurance;

11 (E) the conduct of the parties, including whether
12 there has been unreasonable depletion of marital assets;

13 (F) the division of property under (4) of this sub-
14 section; and

15 (G) other factors the court determines to be relevant
16 in each individual case;

17 (3) for the delivery to either party of that party's per-
18 sonal property in the possession or control of the other party at the
19 time of giving the judgment;

20 (4) for the division between the parties of their property,
21 including retirement benefits, whether joint or separate, acquired
22 only during marriage [COVERTURE], in a just [THE] manner [AS MAY BE
23 JUST,] and without regard to which of the parties is in fault; howev-
24 er, the court, in making the division, may invade the property, in-
25 cluding retirement benefits, of either spouse acquired before marriage
26 when the balancing of the equities between the parties requires it;
27 and to accomplish this end the judgment may require that one or both
28 of the parties assign, deliver, or convey any of their real or person-
29 al property, including retirement benefits, to the other party; the

1 division of property must fairly allocate the economic effect of
2 divorce by being based on consideration of the following factors:

3 (A) the length of the marriage and station in life of
4 the parties during the marriage;

5 (B) the age and health of the parties;

6 (C) the earning capacity of the parties, including
7 their educational backgrounds, training, employment skills, work
8 experiences, length of absence from the job market, and custodial
9 responsibilities for children during the marriage;

10 (D) the financial condition of the parties, including
11 the availability and cost of health insurance;

12 (E) the conduct of the parties, including whether
13 there has been unreasonable depletion of marital assets;

14 (F) the desirability of awarding the family home, or
15 the right to live in it for a reasonable period of time, to the
16 party who has primary physical custody of children;

17 (G) the circumstances and necessities of each party;

18 (H) the time and manner of acquisition of the property
19 in question; and

20 (I) the income-producing capacity of the property and
21 the value of the property at the time of division

22 [(5) TO CHANGE THE NAME OF ONE OF THE PARTIES].

23 * Sec. 6. AS 25.24 is amended by adding a new section to read:

24 Sec. 25.24.165. CHANGE OF NAME IN DIVORCE OR ANNULMENT. (a) In
25 a judgment in an action for divorce or action declaring a marriage
26 void, the court may change the name of either of the parties.

27 (b) If a party seeks a change of name to a name other than a
28 prior name, the court shall set a date for hearing not less than 40
29 days after filing of the action. Notice of the application for a

1 change of name to a name other than a prior name and the date of the
2 hearing shall be published once each week for four consecutive calen-
3 dar weeks before the hearing in a newspaper of general circulation in
4 the judicial district. The court may also require posting of the
5 notice at locations it considers appropriate. The court shall by
6 judgment authorize the party to assume the new name not less than 30
7 days after issuance of the judgment, if the court is satisfied that no
8 reasonable objection exists to assumption of the new name. Within 10
9 days after issuance of the judgment the party shall publish notice of
10 the approval of the name change in a newspaper of general circulation
11 in the judicial district. The court may also require the posting of a
12 copy of the judgment.

13 * Sec. 7. AS 25.24.200 is amended to read:

14 Sec. 25.24.200. DISSOLUTION OF MARRIAGE. (a) A husband and
15 wife together may petition the superior court for the dissolution of
16 their marriage under AS 25.24.200 - 25.24.260 if the following con-
17 ditions exist at the time of filing the petition:

18 (1) incompatibility of temperament has caused the irremedi-
19 able breakdown of the marriage;

20 (2) if there are minor children of the marriage or the wife
21 is pregnant, and the spouses have agreed on which spouse or third
22 party is to [SHALL] be awarded custody of each minor child of the
23 marriage and the extent of visitation, including visitation by grand-
24 parents and other persons if in the child's best interests, and
25 support to be provided on the children's behalf, whether the payments
26 are to be made through the child support enforcement agency and the
27 tax consequences of that agreement;

28 (3) the spouses have agreed as to the distribution of all
29 jointly owned real and personal property, including retirement

1 benefits, and the payment of spousal maintenance [SUPPORT], if any,
2 and the tax consequences resulting from these payments; the agreement
3 must be fair and just and take into consideration the factors listed
4 in AS 25.24.160(a)(2) and (4) so that the economic effect of disso-
5 lution is fairly allocated; and

6 (4) the spouses have agreed as to the payment of all unpaid
7 obligations incurred by either or both of them, and as to payment of
8 obligations incurred jointly in the future.

9 (b) A husband or wife may separately petition for dissolution of
10 their marriage under AS 25.24.200 - 25.24.260 if the following con-
11 ditions exist at the time of filing the petition:

12 (1) incompatibility of temperament, as evidenced by extend-
13 ed absence or otherwise, has caused the irremediable breakdown of the
14 marriage;

15 (2) the petitioning spouse has been unable to ascertain the
16 other spouse's position in regard to the dissolution of their marriage
17 and in regard to the fair and just division of property, including
18 retirement benefits, spousal maintenance, payment of debts, and cus-
19 tody, support and visitation because the whereabouts of the other
20 spouse is unknown to the petitioning spouse after reasonable efforts
21 have been made to locate the absent spouse; and

22 (3) the other spouse cannot be personally served with
23 process inside or outside the state.

24 (c) Except as provided in AS 25.24.220(i), [NOTHING IN THIS
25 SECTION PROHIBITS] a spouse who has been personally served with a copy
26 of a petition filed [MADE] under (a) of this section may execute [FROM
27 EXECUTING] an appearance, waiver of time to answer, and waiver of
28 notice of hearing. The appearance and waivers must [SHALL] include an
29 acknowledgment signed before an officer authorized to administer an

1 oath or affirmation that the spouse being served has read the peti-
2 tion; assents to the terms relating to custody of the children, child
3 support, visitation, spousal maintenance taking into consideration the
4 factors listed in AS 25.24.160(a)(2), [SUPPORT] and [RESULTANT] tax
5 consequences, division of property, including retirement benefits and
6 taking into consideration the factors listed in AS 25.24.160(a)(4),
7 and allocation of debts; agrees that the conditions otherwise required
8 by (a) of this section exist; agrees that the petition constitutes the
9 entire agreement between the parties; understands fully the nature and
10 consequences of the action; and is not signing the appearance and
11 waivers under duress or coercion.

12 (d) The action created under this section is separate from the
13 action created by AS 25.24.010. The procedures prescribed by AS 25.-
14 24.200 - 25.24.260 do not apply to an action brought under AS 25.24.-
15 010, nor do procedures prescribed under AS 25.24.010 - 25.24.180 apply
16 to an action filed [BROUGHT] under this section, except as specifical-
17 ly provided.

18 * Sec. 8. AS 25.24.200 is amended by adding a new subsection to read:

19 (e) Spousal maintenance and a division of property must fairly
20 allocate the economic effect of dissolution and take into consid-
21 eration the factors listed in AS 25.24.160(a)(2) and (4).

22 * Sec. 9. AS 25.24.210(d) is amended to read:

23 (d) The petition shall request that the marriage be dissolved
24 and that the [PRIOR] name of a spouse be changed [RESTORED], if de-
25 sired by that spouse.

26 * Sec. 10. AS 25.24.210(e) is repealed and reenacted to read:

27 (e) If the petition is filed by both spouses under AS 25.24.-
28 200(a), the petition must state in detail the terms of the agreement
29 between the spouses concerning the custody of children, child support,

1 visitation, spousal maintenance and tax consequences, if any, and fair
2 and just division of property, including retirement benefits. Agree-
3 ments on spousal maintenance and property division must fairly allo-
4 cate the economic effect of dissolution and take into consideration
5 the factors listed in AS 25.24.160(a)(2) and (4). In addition, the
6 petition must state

- 7 (1) the respective occupations of the petitioners;
- 8 (2) the income, assets, and liabilities of the respective
9 petitioners at the time of filing the petition;
- 10 (3) the date and place of the marriage;
- 11 (4) the name, date of birth, and current custodial status
12 of each minor child born of the marriage or adopted by the petition-
13 ers;
- 14 (5) whether the wife is pregnant;
- 15 (6) whether either petitioner requires medical care or
16 treatment;
- 17 (7) whether a domestic violence complaint has been filed
18 during the marriage by a member of the household;
- 19 (8) whether either petitioner has received the advice of
20 legal counsel regarding a divorce or dissolution;
- 21 (9) other facts and circumstances that the petitioners
22 believe should be considered;
- 23 (10) that the petition constitutes the entire agreement
24 between the petitioners; and
- 25 (11) any other relief sought by the petitioners.

26 * Sec. 11. AS 25.24.220(b) is repealed and reenacted to read:

27 (b) Except as provided in (i) of this section, if the petition
28 is filed by both spouses under AS 25.24.200(a), both spouses shall
29 attend the hearing personally and not through counsel. However, if

1 the petition is not subject to (i) of this section, a spouse who
2 complies with AS 25.24.200(c) is not required to attend the hearing.
3 Either spouse may have counsel at the hearing.

4 * Sec. 12. AS 25.24.220(c) is amended to read:

5 (c) If the petition is filed [BROUGHT] by one spouse under
6 AS 25.24.200(b), that spouse shall submit proof of diligent inquiry as
7 to the whereabouts of the absent spouse and provide notice by publica-
8 tion, posting, or other means as ordered by the court under [IN ACCOR-
9 DANCE WITH] the Alaska Rules of Civil Procedure.

10 * Sec. 13. AS 25.24.220(d) is amended to read:

11 (d) If the petition is filed [BROUGHT] by both spouses under
12 AS 25.24.200(a), the court shall examine the petitioners or petitioner
13 present and consider whether

14 (1) the spouses fully understand the nature and conse-
15 quences of their action;

16 (2) the written agreements between the spouses concerning
17 child custody, child support, and visitation are [FAIR,] just [, AND
18 EQUITABLE] as between the spouses and in the best interests of the
19 children of the marriage;

20 (3) the written agreements between the spouses relating to
21 the division of property, including retirement benefits, spousal
22 maintenance [SPOUSAL SUPPORT], and the allocation of obligations are
23 [FAIR,] just; the spousal maintenance and division of property must
24 fairly allocate the economic effect of dissolution and take into
25 consideration the factors listed in AS 25.24.160(a)(2) and (4); [, AND
26 EQUITABLE; AND]

27 (4) the written agreements constitute the entire agreement
28 between the parties; and

29 (5) the conditions in AS 25.24.200(a) have been met.

1 * Sec. 14. AS 25.24.220(e) is amended to read:

2 (e) If the petition is filed [BROUGHT] by one spouse under
3 AS 25.24.200(b), the court shall examine the petitioner and consider
4 whether the petitioner fully understands the nature and consequences
5 of the action and whether the conditions in AS 25.24.200(b) have been
6 met.

7 * Sec. 15. AS 25.24.220(g) is amended to read:

8 (g) The court may amend the written agreements between the
9 spouses relating to child custody, child support, visitation, [SPOUSAL
10 SUPPORT,] division of the property, including retirement benefits,
11 spousal maintenance, and allocation of obligations, but only if both
12 petitioners concur in the amendment in writing or on the record.

13 * Sec. 16. AS 25.24.220 is amended by adding new subsections to read:

14 (h) In its examination of a petitioner under (d) of this sec-
15 tion, the court shall use a heightened level of scrutiny of agreements
16 if

17 (1) one party is represented by counsel and the other is
18 not;

19 (2) a domestic violence complaint has been filed during the
20 marriage by a member of the family or there is evidence of domestic
21 violence during the marriage;

22 (3) there is a minor child of the marriage; or

23 (4) there is a patently inequitable division of the marital
24 estate.

25 (i) If the court finds that a higher level of scrutiny is re-
26 quired by (h) of this section, the court shall examine the written
27 agreements between the spouses to determine that they are just, that
28 they constitute the entire agreement between the parties, and that the
29 agreements concerning child custody, child support, and visitation are

1 in the best interest of the children of the marriage, if any. The
2 court shall require the presence of both spouses at a hearing for this
3 purpose unless the court finds on the record that it would constitute
4 a significant hardship on one of the spouses to appear and that a just
5 agreement has been reached. If one of the spouses cannot attend the
6 hearing because it would constitute a significant hardship, the court
7 may require that spouse to be available by telephone to answer ques-
8 tions, at that spouse's expense.

9 * Sec. 17. AS 25.24.230 is repealed and reenacted to read:

10 Sec. 25.24.230. JUDGMENT. (a) If the petition is filed under
11 AS 25.24.200(a), and is not subject to AS 25.24.220(h), the court may
12 grant the spouses a final decree of dissolution and shall order other
13 relief as provided in this section if the court, upon consideration of
14 the information contained in the petition and the testimony of the
15 spouse or spouses at the hearing, finds that

16 (1) the spouses understand fully the nature and conse-
17 quences of their action;

18 (2) the written agreements between the spouses concerning
19 spousal maintenance and tax consequences, if any, division of proper-
20 ty, including retirement benefits, and allocation of obligations are
21 fair and just and constitute the entire agreement between the parties;

22 (3) the spousal maintenance and division of property fairly
23 allocate the economic effect of dissolution and take into considera-
24 tion the factors listed in AS 25.24.160(a)(2) and (4);

25 (4) each spouse entered into the agreement voluntarily and
26 free from the coercion of another person; and

27 (5) the conditions in AS 25.24.200(a) have been met.

28 (b) If the petition is filed under AS 25.24.200(a) and is sub-
29 ject to AS 25.24.220(h), the court may grant the spouses a final

1 decree of dissolution and shall order other relief as provided in this
2 section if the court, upon consideration of the information contained
3 in the petition and the testimony of the spouse or spouses at the
4 hearing, finds that

5 (1) the spouses understand fully the nature and conse-
6 quences of their action;

7 (2) the written agreements between the spouses concerning
8 child custody, child support, and visitation are in the best interest
9 of the children of the marriage, constitute the entire agreement of
10 the parties on child custody, child support, and visitation, and, as
11 between the spouses, are just;

12 (3) the written agreements between the spouses concerning
13 spousal maintenance and tax consequences, if any, division of proper-
14 ty, including retirement benefits, and allocation of obligations are
15 just and constitute the entire agreement between the parties;

16 (4) the spousal maintenance and division of property fairly
17 allocate the economic effect of dissolution and take into considera-
18 tion the factors listed in AS 25.24.160(a)(2) and (4);

19 (5) each spouse entered the agreement voluntarily and free
20 from the coercion of another person; and

21 (6) the conditions in AS 25.24.200(a) have been met..

22 (c) If the petition is filed by one spouse under AS 25.24.-
23 200(b), the court may grant the spouse a final decree of dissolution
24 and change the petitioner's name, if so requested, if the court, upon
25 consideration of affidavits supplied by the spouse and the testimony
26 of the spouse at the hearing, finds that

27 (1) the spouse present at the hearing understands fully the
28 nature and consequences of the action;

29 (2) the conditions in AS 25.24.200(b) have been met; and

1 (3) the requirements of AS 25.24.165(b) have been sat-
2 isfied, if a change of name is requested.

3 (d) The court shall dismiss a petition or continue action on a
4 petition filed under AS 25.24.200 - 25.24.260 before findings are made
5 if

6 (1) a representative of the minor children objects to a
7 term of an agreement between the spouses;

8 (2) either of the spouses withdraws from an agreement
9 required under AS 25.24.200(a); or

10 (3) the petition alleges that the conditions in AS 25.24.-
11 200(b) exist, but the whereabouts of the absent spouse becomes known
12 to the other spouse or the court before findings are made.

13 (e) The court shall deny the relief sought in a petition filed
14 under AS 25.24.200 - 25.24.260 if the court does not make the findings
15 required under (a) - (c) of this section.

16 (f) If the petition is filed by both spouses under AS 25.24.-
17 200(a), the court shall change either spouse's name, if the spouse
18 seeking a change of name to a name other than a prior name complies
19 with AS 25.24.165(b), and shall fully and specifically set out in the
20 decree the written agreements of the spouses and shall order the
21 performance of those written agreements. The court shall also state,
22 in the decree, whether child support payments are to be made through
23 the child support enforcement agency. If the petition is filed by one
24 spouse under AS 25.24.200(b), the decree must state that it does not
25 bar future action on the issues not resolved in the decree.

26 (g) Notwithstanding other provisions of AS 25.24.200 - 25.24.-
27 260, the court may not award to one spouse real or personal property
28 acquired by the other spouse before the date of the marriage, unless
29 the spouses expressly agree otherwise or the court determines that the

1 property should be made available, by sale or other conveyance, to
2 ensure that the best interests of the children are provided for. If
3 the court determines that the best interests of the children require
4 an award of premarital property, but the spouses do not agree, the
5 court shall dismiss or continue the action.

6 (h) If a judgment under this section distributes benefits to an
7 alternate payee under AS 14.25, AS 22.25, AS 26.05.222 - 26.05.226, or
8 AS 39.35, the judgment must meet the requirements of a qualified
9 domestic relations order under the definition of that phrase that is
10 applicable to those provisions.

11 * Sec. 18. AS 25.24.250 is amended by adding a new subsection to read:

12 (c) Forms or instructions prepared under (a) of this section
13 must specify that the dissolution petition constitutes the entire
14 agreement between the parties and must provide examples of kinds of
15 property and obligations that are subject to distribution.

16 * Sec. 19. AS 25.24.165, as added by sec. 6 of this Act, AS 25.24.-
17 210(d) as amended by sec. 9 of this Act, and AS 25.24.230(c) and 25.24.-
18 230(f) as amended by sec. 17 of this Act, have the effect of amending Rule
19 84(a), Alaska Rules of Civil Procedure, to allow a change of name to a name
20 other than a prior name to be commenced in a complaint for divorce or
21 annulment or a petition for dissolution of marriage.

[deleted]

Original sponsor(s): Rules/Governor

NEW

1 IN THE HOUSE

BY THE JUDICIARY COMMITTEE

2 SENATE CS FOR CS FOR HOUSE BILL NO. 195 (Judiciary)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 SIXTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to divorce, dissolution, and annul-
7 ment; and amending Rule 84(a), Alaska Rules of Civil
8 Procedure."

9 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

10 * Section 1. INTENT. By amending AS 25.24.160(a)(2) and (4) in this
11 Act and by referring to those paragraphs in other sections of AS 25.24 in
12 this Act, it is the legislature's intent to codify the principal factors to
13 be weighed by a court in making an equitable division of property or an
14 award of maintenance in a divorce or dissolution proceeding, ^{as stated in the case} as enunciated
15 by the Alaska Supreme Court in the case of Merrill v. Merrill, 368 P.2d 546
16 (Alaska 1962), and subsequent opinions. Except for AS 25.24.160(a)(4)(F),
17 the factors codified are intended to restate the principal factors found in
18 case law, not to change them, affect the interpretation given to them, or
19 preclude changes or additions to them by future court rulings.

20 * Sec. 2. AS 25.20 is amended by adding a new section to read:

21 Sec. 25.20.115. ATTORNEY FEE AWARDS IN CUSTODY AND VISITATION
22 MATTERS. In an action to modify, vacate, or enforce that part of an
23 order providing for custody of a child or visitation with a child, the
24 court may, upon request of a party, award attorney fees and costs of
25 the action. In awarding attorney fees and costs under this section,
26 the court shall consider the relative financial resources of the
27 parties and whether the parties have acted in good faith.

28 * Sec. 3. AS 25.24.100 is amended to read:

29 Sec. 25.24.100. RESIDENCY OF MILITARY PERSONNEL. A person

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1 serving in a military branch of the United States government who has
2 been continuously stationed at [IN] a military base or installation in
3 the state for at least 30 days is considered [A PERIOD OF ONE YEAR
4 SHALL BE DEEMED] a resident [IN GOOD FAITH] of the state for the
5 purposes of this chapter [AS 25.24.010 - 25.24.180].

6 * Sec. 4. AS 25.24.140 is repealed and reenacted to read:

7 Sec. 25.24.140. ORDERS DURING ACTION. (a) During the pendency
8 of the action, a spouse may, upon application and in appropriate
9 circumstances, be awarded expenses, including

10 (1) attorney fees and costs that reasonably approximate the
11 actual fees and costs required to prosecute or defend the action; in
12 applying this paragraph, the court shall take appropriate steps to
13 ensure that the award of attorney fees does not contribute to an
14 unnecessary escalation in the litigation;

15 (2) reasonable spousal maintenance, including medical
16 expenses; and

17 (3) reasonable support for minor children in the care of
18 the spouse, if there is a legal obligation of the other spouse to
19 provide support.

20 (b) During the pendency of the action, upon application, a
21 spouse is entitled to necessary protective orders, including orders

22 (1) providing for the freedom of each spouse from the
23 control of the other spouse;

24 (2) restraining each spouse from subjecting the other
25 spouse or another person living in the household to domestic violence,
26 as defined in AS 25.35.060;

27 (3) directing one spouse to vacate the marital residence or
28 the home of the other spouse;

29 (4) restraining a spouse from communicating directly or

1 indirectly with the other spouse;

2 (5) restraining a spouse from entering a propelled vehicle
3 in the possession of or occupied by the other spouse; and

4 (6) prohibiting a spouse from disposing of the property of
5 either spouse or marital property without the permission of the other
6 spouse or a court order.

7 (c) After a hearing, if both parties agree, the court may also
8 order that the parties engage in personal or family counseling or
9 mediation. In the order, the court shall provide for the payment of
10 the costs of the counseling or mediation.

11 * Sec. 5. AS 25.24.160(a) is amended to read:

12 (a) In a judgment in an action for divorce or action declaring a
13 marriage void or at any time after judgment, the court may provide

14 (1) for the payment by either or both parties of an amount
15 of money or goods, in gross or installments that may include cost-
16 of-living adjustments, as may be just and proper for the parties to
17 contribute toward the nurture and education of their children, and the
18 court may order the parties to arrange with their employers for an
19 automatic payroll deduction each month or each pay period, if the
20 period is other than monthly, of the amount of the installment; if the
21 employer agrees, the installment shall be forwarded by the employer to
22 the clerk of the superior court that [WHICH] entered the judgment or
23 to the court trustee, and the amount of the installment is exempt from
24 execution;

25 (2) for the recovery by one party from the other of an
26 amount of money for maintenance, for a limited or indefinite period of
27 time, in gross or in installments, as may be just and necessary with-
28 out regard to which of the parties is in fault; an award of mainte-
29 nance must fairly allocate the economic effect of divorce by being
[take into consideration career assets.]

1 based on a consideration of the following factors:

2 (A) the length of the marriage and station in life of
3 the parties during the marriage;

4 (B) the age and health of the parties;

5 (C) the earning capacity of the parties, including
6 their educational backgrounds, training, employment skills, work
7 experiences, length of absence from the job market, and custodial
8 responsibilities for children during the marriage;

9 (D) the financial condition of the parties, including
10 the availability and cost of health insurance;

11 (E) ^{the conduct of the parties, including the unreasonable} the depletion of marital assets by the parties
12 during the marriage;

13 (F) the division of property under (4) of this sub-
14 section; and

15 (G) other factors the court determines to be relevant
16 in each individual case:

17 (3) for the delivery to either party of that party's per-
18 sonal property in the possession or control of the other party at the
19 time of giving the judgment;

20 (4) for the division between the parties of their property,
21 including retirement benefits, whether joint or separate, acquired
22 only during marriage [COVERTURE], in a just [THE] manner [AS MAY BE
23 JUST,] and without regard to which of the parties is in fault; howev-
24 er, the court, in making the division, may invade the property, in-
25 cluding retirement benefits, of either spouse acquired before marriage
26 when the balancing of the equities between the parties requires it;
27 and to accomplish this end the judgment may require that one or both
28 of the parties assign, deliver, or convey any of their real or person-
29 al property, including retirement benefits, to the other party; the

[take into consideration career assets.]

division of property must fairly allocate the economic effect of divorce by being based on consideration of the following factors:

(A) the length of the marriage and station in life of the parties during the marriage;

(B) the age and health of the parties;

(C) the earning capacity of the parties, including their educational backgrounds, training, employment skills, work experiences, length of absence from the job market, and custodial responsibilities for children during the marriage;

(D) the financial condition of the parties, including the availability and cost of health insurance;

(E) the depletion of marital assets by the parties during the marriage;

(F) the desirability of awarding the family home, or the right to live in it for a reasonable period of time, to the party who has primary physical custody of children;

(G) the circumstances and necessities of each party;

(H) the time and manner of acquisition of the property in question; and

(I) the income-producing capacity of the property and the value of the property at the time of division

[(5) TO CHANGE THE NAME OF ONE OF THE PARTIES].

* Sec. 6. AS 25.24 is amended by adding a new section to read:

Sec. 25.24.165. CHANGE OF NAME IN DIVORCE OR ANNULMENT. (a) In a judgment in an action for divorce or action declaring a marriage void, the court may change the name of either of the parties.

(b) If a party seeks a change of name to a name other than a prior name, the court shall set a date for hearing not less than 40 days after filing of the action. Notice of the application for a

1 change of name to a name other than a prior name and the date of the
2 hearing shall be published once each week for four consecutive calen-
3 dar weeks before the hearing in a newspaper of general circulation in
4 the judicial district. The court may also require posting of the
5 notice at locations it considers appropriate. The court shall by
6 judgment authorize the party to assume the new name not less than 30
7 days after issuance of the judgment, if the court is satisfied that no
8 reasonable objection exists to assumption of the new name. Within 10
9 days after issuance of the judgment the party shall publish notice of
10 the approval of the name change in a newspaper of general circulation
11 in the judicial district. The court may also require the posting of a
12 copy of the judgment.

13 * Sec. 7. AS 25.24.200 is amended to read:

14 Sec. 25.24.200. DISSOLUTION OF MARRIAGE. (a) A husband and
15 wife together may petition the superior court for the dissolution of
16 their marriage under AS 25.24.200 - 25.24.260 if the following con-
17 ditions exist at the time of filing the petition:

18 (1) incompatibility of temperament has caused the irremedi-
19 able breakdown of the marriage;

20 (2) if there are minor children of the marriage or the wife
21 is pregnant, and the spouses have agreed on which spouse or third
22 party is to [SHALL] be awarded custody of each minor child of the
23 marriage and the extent of visitation, including visitation by grand-
24 parents and other persons, ^{child} if in the child's best interests, and
25 support to be provided on the children's behalf, whether the payments
26 are to be made through the child support enforcement agency and the
27 tax consequences of that agreement;

28 (3) the spouses have agreed as to the distribution of all
29 jointly owned real and personal property, including retirement