

Who Should Profit from an Academic Degree Upon Marital Breakdown? Comparing Manitoba Common Law and the German Civil Code

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Divorce is the one human tragedy that reduces everything to cash.

—Rita Mae Brown

I. INTRODUCTION

UNFORTUNATELY, DIVORCE LAW and all divisible things, tangible and intangible, have become more and more significant in western cultures, with their highest divorce rates in history.¹ In fact, among cohorts currently married only 40–50 percent will still be married to each other after they have reached the age of fifty.² Family law has become one of the most important fields of study because “no area of law matters more to people than family law. Not many people do corporate takeovers, most do not commit crimes but absolutely everyone had a family.”³ Apart from custody of their children, the distribution

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¹ W.J. Goode, “World Changes in Divorce Patterns” in L. Weitzman & M. MacLean, eds., *Economic Consequences of Divorce: The International Perspective* (Oxford: Clarendon Press, 1992) at 11.

² *Ibid.* at 16.

³ R.S. Abella, “The Law of the Family in the Year of the Family” (1994) 26 *Ottawa L. Rev.* 533.

of marital assets⁴ usually is the most disputed issue, even if in most cases there is less at stake than in the case of the Saudi Arabian magnate, Adnan Kashoggi, whose ex-wife sued for \$2.5 billion!⁵

This article provides a comparative analysis of the laws in Manitoba and Germany regarding compensation for investments in the human capital of one spouse upon divorce. In both jurisdictions there is a so-called deferred community property regime. Its main feature is that there is no property which belongs to the community.⁶ The spouses remain owners of their separate properties, which each can freely dispose of and control, with few exceptions. At the end of the marriage there is only a monetary⁷ compensation.⁸ The amount of money that must be paid will depend both on the assets included in the calculation and on their fate during the marriage. The purpose of an equalisation payment upon marriage breakdown is to share the economic achievements of the marriage⁹ and, by doing so, to implement the idea of marriage as an economic partnership. The individual contributions of each spouse are not decisive.¹⁰

⁴ There is no exact definition of "career assets." Some authors include all tangible and intangible assets of either spouse that are acquired as part of his or her career or career potential, for example pensions and retirement benefits, licences to practise a profession or trade, as well as academic degrees and even the goodwill of a business. See L. Weitzman, *The Divorce Revolution: The Unexpected Economic and Social and Economic Consequences for Women and Children in America* (New York: Free Press, 1985) at 110. I discuss "career assets" only in a narrower sense, i.e., academic degrees and licences to practise.

⁵ E. Wachtel, "The 50 Percent Solution" (1980) 93 *McLean's* 46.

⁶ The name "deferred community regime" can be misleading. There is property belonging to the community only in community property regimes such as in California and Texas. For a more detailed comparison between the current community of property, separation of property, and deferred community regimes, see F. M. Steel, "The Ideal Property Regime: What Would It Be?" in E. Sloss, ed., *Family Law In Canada: New Directions*, (Ottawa: Canadian Advisory Council on the Status of Women, 1985) at 127.

⁷ There are exceptions to this rule, for example, § 1383 German *Civil Code* (Bürgerliches Gesetzbuch, short BGB), and *The Marital Property Act*, R.S.M. 1987, c. M45, s. 17(b) and s. 17(c) in the province of Manitoba.

⁸ Even at the end of the marriage neither spouse acquires any of the other spouse's property as an immediate consequence of marriage breakdown. Apart from Germany and Manitoba, this system is also used in other Canadian common law provinces, e.g., Nova Scotia, Newfoundland, and Saskatchewan. See, B. Welling, "Conflict of Laws Issues Arising from Matrimonial Property Statutes in Canada" (1993) 9 C.F.L.Q. 225 at 269.

⁹ D. Reinecke, "Zum neuen ehelichen Güterrecht" (1957) *Neue Juristische Wochenschrift* at 889.

¹⁰ W. Voegeli & B. Willenbacher, "Property Division and Pension Splitting in the FRG" in Weitzman & MacLean, *supra* note 1 at 164.

After consideration of career assets as marital property, I will juxtapose possible alternative solutions in both jurisdictions, followed by an overview of valuation approaches.

A study conducted in the mid-1980s in the United States determined that the average divorcing couple earned within one year more than the total value of their assets.¹¹ A current earning capacity therefore seems to be much more valuable than any other tangible asset such as a house, a car, or a cottage. If so, it should be shareable upon marriage breakdown, specifically if it was “acquired” or even improved during the marriage. If the most valuable asset is excluded from sharing, the purpose of the deferred community property regime, *viz.*, the equal sharing of all assets acquired during the marriage, has not been achieved. One can attain a better earning capacity through a better education, or a licence to practise a profession, for example law or medicine.¹² Therefore, many young couples invest in the education and the related improved earning capacity of one spouse in expectation of a better standard of living after this spouse has completed his or her studies. This situation often occurs in cases where the wife worked and enabled her husband to attend law school¹³ or dental college.¹⁴ If the marriage breaks down shortly after the husband reaches his goal, how should the wife be adequately compensated for her contributions to her husband’s degree or licence to practise? By helping their husbands improve career chances, wives usually suffer losses in four respects:

- (i) the loss of the husband’s foregone earnings during the period of investment;
- (ii) the money she provided to enable her husband to forego these earnings;
- (iii) the lack of her own career development during this period; and
- (iv) the loss of a return on her investments for a better lifestyle fails when the marriage breaks down.¹⁵

¹¹ *Supra* note 10 at 60.

¹² Of course, there is a difference between a law degree and the licence to practice law, given that the former is usually a pre-requisite for the latter, and that both usually lead to a higher earning capacity. I use these terms interchangeably. The distinction between them is in this context less important. However, for a discussion about it, see: M.F. McGovern, “Licences v. Degrees: Is there a Difference?” (1986) 2 *Fam. Advocate* 14.

¹³ *Corless v. Corless* (1987), 5 R.F.L. (3d) 256 (Ont. U.F.C.).

¹⁴ *Caratun v. Caratun* (1993), 10 O.R. (3d) 385 (Ont. C.A.), appeal from trial decision *infra* note 19.

¹⁵ J.M. Krauskopf, “Recompense for Financing Spouse’s Education: Legal Protection for the Marital Investor in Human Capital” (1979–80) 28 *U. Kan. L. Rev.* 379 at 380.

The lack of consideration of this common situation under both Manitoba's *The Marital Property Act* and the *German Civil Code* has been criticised.¹⁶ How can one deal properly with this problem without any statutory starting point?

II. DEGREES AND LICENCES TO PRACTISE AS MARITAL PROPERTY

AT FIRST GLANCE the most just and simple solution seems to be to take degrees and licences to practice into account when valuing each spouse's assets under both legal regimes, just like any other asset. This has rarely occurred in Canada¹⁷ and never in Germany.¹⁸ In an Ontario case¹⁹ the judge stated that the right to practise dentistry is proprietary and thus shareable under that province's *Family Law Act*.²⁰ However, this view was not shared by the Ontario Court of Appeal.²¹ In another trial decision,²² the law degree of the husband and his licence to practise were considered properties shareable under Ontario's *Family Law Act*.

In Manitoba the question arises whether a degree or a licence to practise contains a "right" under s. 9(1) of *The Marital Property Act* or an asset pursuant to s. 3 of the Act and consequently shareable. The Act defines "assets" in s. 1 as any real or personal property or interest therein. However, because it explicitly mentions "rights" under s. 9, it seems that "asset" under s. 3, as defined in s. 1, means only tangible assets. On the other hand it is not clear whether rights under s. 9 of the Act can include a degree or a licence to practise. The only right conferred on the holder of a licence to practise is the right to work in a particu-

¹⁶ For Manitoba and other Canadian common law provinces, see M.J. Trebilcock & R. Keshvani, "The Role of Private Ordering in Family Law: A Law and Economics Perspective" (1991) 41 U.T.L.J. 533 at 552. For German Law, see I. Schwenzer, "Medical Student Syndrome—Ausgleich von Karrierechancen nach Ehescheidung" (1988) *Zeitschrift für das gesamte Familienrecht* at 1114.

¹⁷ The recognition of an academic degree as property started in the United States when some courts stated that a degree or licence to practise is proprietary. For example in *O'Brien v. O'Brien*, 452 N. Y. Supp. (2d) 801 (N.Y. Ct. App. 1985), the New York State Court of Appeal held that the husband's licence to practise medicine was shareable under state law. The value was considered to be \$188 800, of which the wife was awarded 40 percent. In *Woodworth v. Woodworth*, 337 N. R. (2d) 332 (Mich. Ct. App. 1983), the husband's law degree was considered property. See also *Inman v. Inman*, 648 S. R. (2d) 847 (Ky. S.C. 1982).

¹⁸ For example, *BGH Zeitschrift für das gesamte Familienrecht* (1987), 909 at 910.

¹⁹ *Caratun v. Caratun* (1987), 9 R.F.L. (3d) 337 (Ont. H.C.).

²⁰ *The Family Law Act*, S.O. 1986.

²¹ *Supra* note 14.

²² *Supra* note 13. See also *Berghofer v. Berghofer* (1988), 15 R.F.L. (3d) 199 (Alta. Q.B.).

lar profession.²³ This is not a right in its classical sense, such as the right of a shareholder to receive dividends. The legislature did not seem to intend to include a degree or licence to practise under s. 9, because this provision states that a right should not be included in the accounting if it is reasonably possible that this right will be realised.²⁴ A degree or a licence to practise cannot be realised. Obviously, the legislature wanted only to include so-called traditional rights under s. 9 of the Act. Therefore, it is questionable whether a career asset can be an "asset" under s. 3 of *The Marital Property Act*.²⁵ The same question arises in other jurisdictions where marital property legislation deals not with assets of the spouses but rather with "property," which is shareable upon marriage breakdown.²⁶

²³ *Supra* note 14 at 390.

²⁴ *The Marital Property Act*, s. 9.

²⁵ No case in Manitoba appears to deal directly with this issue. However, in *Neffgen v. Neffgen* (1983), 35 R.F.L. (2d) 393 (Man. Q.B.) the wife worked in low-paid jobs to enable her husband to go to university and complete a B.A., a M.Sc., and a M.D. By the time of the trial she earned a base salary of \$20 000 while her husband had an annual income of \$61 000. The Manitoba Court of Queen's Bench did not discuss whether the degrees of the husband were "property." Instead, the court awarded the wife substantial spousal support for her contributions and lost expectations of a better lifestyle. In *Monks v. Monks* (1993), 4 R.F.L. (3d) 459 (Man. Q.B.) the parties moved from Victoria to Vancouver to enable the husband to complete a Ph.D. degree at the University of British Columbia; next they moved to Winnipeg, where the husband was offered a job at the University of Manitoba. The wife suffered economic disadvantage because she lost career chances. She was working for an airline and the move from Vancouver to Winnipeg did not allow her to advance her career, because there were more opportunities available for her in Vancouver. Here again the court did not discuss whether the husband's degree was a shareable asset under the *Marital Property Act*, because the wife in this case did not suffer economic loss due to direct financial contributions to the acquisition of her husband's degree, but due to lost chances to advance her own career. The court awarded a lump sum of \$8 000 in spousal support to compensate her for this economic disadvantage. This decision was affirmed by the Manitoba Court of Appeal: *Monks v. Monks* (1993), 88 Man. R. (2d) 149 (C.A.); see also *King v. King* (1986), 40 Man. R. (2d) 43 (Q.B.). Most reported cases occurred in Ontario, British Columbia, and the United States. For Ontario decisions, see *supra* note 13 and *Keast v. Keast* (1986), 1 R.F.L. (3d) 401 (Ont. Dist. Ct.); and *Linton v. Linton* (1988), 11 R.F.L. (3d) 444 (Ont. H.C.). For British Columbia, see *Jirik v. Jirik* (1983), 37 R.F.L. (2d) 385 (B.C.S.C.); and *Whitehead (Burrell) v. Burrell* (1983), 35 R.F.L. (2d) 440 (B.C. S.C.). For an overview of U.S. decisions, see S.E. Willoughby, "Professional Licences as Marital Property: Responses to Some of O'Brien's Unanswered Questions" (1987-88) 73 Cornell L. Rev. 133 and L.S. Mullenix, "The Valuation of an Educational Degree at Divorce" (1983) 16 Loy. L.A. L. Rev. 227.

²⁶ See, for example, *The Family Law Act*, S.O. 1986, c. 4, s. 4(1).

Arguably, career assets should not be considered "assets" under s. 3 of *The Marital Property Act* because of the extreme difficulty in valuing them,²⁷ as they only represent an opportunity to earn money in the future and are not freely marketable.²⁸ Moreover, a degree cannot be earned solely by financial contributions to the studying spouse. Rather, it is the result of intellectual ability and hard work, and is personal to its holder.²⁹ One cannot inherit a degree, and it ceases to exist upon the death of its holder.³⁰ There exists a danger in broadening the definitions of "property" or "assets" too much. Everything, even airline frequent flyer points,³¹ becomes shareable under marital property legislation.³² This argument holds that career assets should not be taken into account when valuing either spouse's assets and should not be shareable.

This solution does not consider the alternative arguments. First, the fact that something is difficult to value is no reason to omit it as an asset. Other areas of law allow valuation of personal injuries which are speculative too; however, no one would suggest abolishing personal injury awards because of quantification difficulties. In wrongful death cases courts indirectly consider what the deceased might have earned in the future.³³ Second, if a career asset is an asset under s. 3 of *The Marital Property Act*, the other spouse would be adequately compensated, especially in cases where other forms of compensation, such as support, are too feeble.³⁴ Third, a narrow definition of asset under s. 3, i.e., that only tangible assets can be assets under *The Marital Property Act*, seems out of date. More and more intangible assets, such as pensions and the goodwill of a business, have been taken into account when valuing a spouse's assets. There is no reason why career assets should not constitute a further step in this development.³⁵

²⁷ A. Bissett-Johnson & S. Newell, "Professional Degrees in Marital Property: Canadian Developments" (1988) 15 C.P.J. 63 at 64.

²⁸ For details about the valuation of career assets, see Part IV, *infra*.

²⁹ *In Re Marriage of Graham*, 574 P. (2d) 75 (Col. S.C. 1978) at 77.

³⁰ *Ibid.*

³¹ See *Berghofer v. Berghofer*, *supra* note 22.

³² B. Ziff, "Recent Developments in Canadian Family Law: Marriage and Divorce" (1990) 22 Ottawa L. Rev. 139 at 228.

³³ M.M. Moore, "Should a Professional Degree be Considered a Marital Asset upon Divorce?" (1981-82) 15 Akron L. Rev. 543 at 547.

³⁴ D.J. Dochylo, "Perspectives on Increased Earning Potential: Should It Be Considered 'Property' Upon Divorce?" (1991) 3 W.R.L.S.I. 125 at 131.

³⁵ C. Welsh, "Apportioning Degrees Earned during Marriage: An Equitable Justification" (1987) 45 U.T. Fac. L. Rev. 272 at 276.

The argument that these assets are not heritable and cease to exist upon their holder's death is suspect because survivability has not been an earmark of property in the past.³⁶ Moreover, the Supreme Court of Canada has rejected transferability as a criterion for deciding whether something can be property for the purpose of division.³⁷ The reasons given by the Manitoba courts as to why a career asset cannot be an asset under *The Marital Property Act* are inconsistent. In *Caratun v. Caratun*, McKinlay J. stated that the difference between a licence to practise and any other right to work is in its exclusivity.³⁸ Yet this exclusivity is the main feature of all property. The essence of property is to exclude others from access. For instance, the statement "this is my pen" is meaningless if there is no one else in the world. "This is my pen" does not describe my relationship to the pen but rather to other people who might want to have that pen.³⁹ The same principle must apply to degrees or licences to practise because they enable their holders to have access to an otherwise closed profession. If only tangible assets, and very few intangible assets such as pensions and business goodwill, were considered under *The Marital Property Act*, this would not take into account our complex world, where wealth has many forms, including education.⁴⁰ It does not make sense to include goodwill as part of the business assets of either spouse and exclude each one's career assets; it makes no difference whether both spouses are working together, building up a practice with goodwill or acquiring an academic degree through combined efforts.⁴¹ The argument that the spouse who obtained the degree would be unfairly restricted in his or her personal freedom by being forced to continue in a certain profession in order to compensate the other spouse for contributions to that career asset⁴² is not valid; even if the degree is not an asset under s. 3 of *The Marital Property Act*, no dispute exists that there must be some kind of compensation.⁴³ Whether one prefers support rather than an inclusion of the degree as an asset, the personal freedom of this spouse will always be somewhat restricted because he or she will be forced to make some financial compensation to the former spouse. In this

³⁶ T.D. Schaefer, "Wife Works so Husband Can Go to Law School: Should She be Taken in as a 'Partner' when 'Esp.' is Followed by Divorce?" (1975) 2 C.P.J. 85 at 90.

³⁷ *Clarke v. Clarke* (1990), 28 R.F.L. (3d)113 (S.C.C.).

³⁸ *Supra* note 14 at 390.

³⁹ M.E. McCallum, "*Caratun v. Caratun*: It Seems that We are Not All Realists Yet" (1994) 7 C.J.L.W. 197 at 205.

⁴⁰ *Supra* note 33 at 546.

⁴¹ Mullenix, *supra* note 25 at 257.

⁴² *DeWitt v. DeWitt*, 296 N.W. (2d) 761 (Wisc. Ct. App. 1980) at 768.

⁴³ Ziff, *supra* note 32 at 229.

respect the *kind* of compensation is merely of secondary importance. The arguments which support the theory that a career asset cannot be a marital asset, shareable under marital property legislation, cannot withstand close scrutiny. If the career asset was acquired during the marriage through the combined efforts of both spouses, it should be valued and included in the accounting under Manitoba's *The Marital Property Act*.⁴⁴

In Germany, dealing with career assets is not as complex and controversial as in Manitoba, because German courts have not yet fully grasped the problem. Time and again, courts emphasise that future income from a job is not an asset which can be included in the valuation of either spouse's final assets.⁴⁵ It remains unclear how a spouse should be adequately compensated for his or her investments in the human capital of the other spouse. While some appellate courts did not allow the maintenance settlement procedure in these cases,⁴⁶ the Supreme Court of Germany has preferred to deal with this under support issues.⁴⁷ Not one case in Germany has considered career assets as "property" under provisions of the *Civil Code*⁴⁸ and shareable upon marriage breakdown.

⁴⁴ For the same opinion see *supra* note 27 at 69.

⁴⁵ *Supra* note 18 and BGH Zeitschrift für das gesamte Familienrecht (1983), 881 at 882 and BGH Zeitschrift für das gesamte Familienrecht (1981), 239 at 240.

⁴⁶ OLG Celle Zeitschrift für das gesamte Familienrecht (1979), 595 and OLG Hamm Zeitschrift für das gesamte Familienrecht (1986), 72.

⁴⁷ BGH Zeitschrift für das gesamte Familienrecht (1985), 782. For a detailed discussion about it see Part III(C) *infra*.

⁴⁸ The relevant provisions of the German *Civil Code* are §§ 1373–1378. The code does not clearly define "initial" and "final" assets and consequently career assets are not considered "property" under these rules.

§ 1373. *The concept of accrued gains*

Accrued gains is the amount by which the final assets of a spouse exceed his initial assets.

§ 1374. *Initial assets*

- (1) Initial assets are the assets belonging to a spouse, after deduction of his obligations, at the beginning of the matrimonial regime; obligations may be deducted only to the extent of the property.
- (2) Assets which are acquired by a spouse after the beginning of the matrimonial regime, as a result of death or consideration of a prospective right to inheritance, through gift or as furnishings, shall be included in the initial assets, after deduction of obligations, insofar as the circumstances do not warrant their inclusion in the income.

§ 1375. *Final assets*

- (1) Final assets are the assets belonging to a spouse, after deduction of obligations, at the time of termination of the matrimonial regime. Obligations can be deducted if under the provisions of § 1390 there are claims against third parties, even to the extent that these exceed the amount of the assets.
- (2) The final assets of a spouse include amounts by which such assets were diminished due to the fact that after the beginning of the matrimonial regime a spouse:
 - (a) made gratuitous dispositions by which he did not comply with a moral obligation or one which arose from principle of common decency;
 - (b) wasted assets; or
 - (c) implemented transactions with intent to cause detriment to the other spouse.
- (3) The amount of property diminution shall not be included in the final assets if it occurred at least ten years before the termination of the matrimonial regime or if the other spouse had consented to such gratuitous disposition or wasting of property.

§ 1376. *Valuation of initial and final assets*

- (1) The value for the commutation of initial assets shall be, at the beginning of the matrimonial property regime, the value of the assets existing at that time, and for assets to be included in the initial assets, the value at the time of acquisition.
- (2) The value for the computation of final assets shall be, at the termination of the matrimonial regime, the value of the assets existing at that time, and for diminution in assets to be included in the computation of the final assets, the value at the time of such diminution.
- (3) The foregoing provisions apply *mutatis mutandis* to the appraisal of obligations.
- (4) Any agricultural or forestry asset which is to be taken into consideration for the computation of initial or of final assets shall be appraised at the value of its produce; the provision of § 2049(2) shall apply.

§ 1377. *Inventory of initial assets*

- (1) If the spouses jointly established, in an inventory, the content and the value of the initial assets of one of the spouses and the items to be added to such assets, it will be presumed in the relationship of the spouses to each other that the inventory is accurate.
- (2) Each spouse may demand the co-operation of the spouse in the drawing up of the inventory. For the drawing up of the inventory the provisions of § 1035 concerning usefruct are applicable. Each spouse may employ at his expense an expert for establishing the value of the items of assets and of obligation.
- (3) Insofar as no inventory was drawn up, it shall be presumed that the final assets of a spouse represent his accrued gains.

Therefore, the investing spouse usually has no right whatsoever to claim any kind of compensation under the rules dealing with division of property upon divorce.⁴⁹ It is illogical that German courts include compensation for lost future income in cases of personal injury awards,⁵⁰ but do not consider future income from a job as an asset. While personal injury awards, such as compensation for personal harm, have nothing to do with the marriage, but are included in the accounting,⁵¹ career assets acquired through the combined efforts of both spouses are not taken into consideration! The recourse of the Supreme Court to the support provisions has not been reasonable either.⁵² Apart from few exceptions,⁵³ academics have ignored this dilemma.

§ 1378. *Equalisation claim*

- (1) If the accrued gains of one spouse exceed the accrued gains of the other, the other is entitled to half of the surplus as an equalisation claim.
- (2) The amount of equalisation claim shall be limited to the value of the assets existing at the termination of the matrimonial regime, after deduction of the obligations.
- (3) The equalisation claim arises upon the termination of the matrimonial regime and from this time on it is subject to inheritance and is transferable. An agreement made by the spouses during proceedings for the dissolution of their marriage is dissolved requires notarization; § 127 shall apply also to an agreement which is entered in the record of proceedings before a trial court in a matrimonial action, otherwise neither spouse may oblige himself to dispose of his equalisation claim prior to the termination of the matrimonial regime.
- (4) The equalisation claim prescribes in three years; the period begins to run from the time when it becomes known to the spouse that the matrimonial regime is terminated. However, the claim prescribes at the latest thirty years after the termination of the matrimonial regime. If the matrimonial regime is terminated by death of a spouse, in other respects the same provisions shall be applicable which are valid for the prescription of a claim of compulsory portion.

⁴⁹ *Supra* note 2 at 169.

⁵⁰ BGH Neue Juristische Wochenschrift (1982), 279.

⁵¹ BGH Neue Juristische Wochenschrift (1982), 1836.

⁵² For a detailed discussion, see Part III(C) *infra*.

⁵³ I. Schwenzer, *supra* note 16.

III. ALTERNATIVE SOLUTIONS

A. Constructive Trust

If career assets are considered property the question arises as to whether they should be shareable under *The Marital Property Act* or subject to a constructive trust. The latter was declared at trial in *Caratun v. Caratun*,⁵⁴ however, the Ontario Court of Appeal rejected this solution,⁵⁵ explicitly stating that, if it had considered a licence to practise to be property, the career asset could be subject to a constructive trust.⁵⁶ The court did not discuss whether in this context the doctrine of constructive trust survived the enactment of *The Family Law Act*.⁵⁷ Some authors have drawn a parallel between *Caratun v. Caratun*⁵⁸ and *Pettkus v. Becker*,⁵⁹ to allow application of the doctrine of constructive trust in cases where investment in the human capital of one spouse has to be compensated.⁶⁰ Others choose not to side step the application of the Act.⁶¹

Although the doctrine of constructive trust provides some advantages in comparison to provisions of *The Marital Property Act*, particularly by providing more flexibility,⁶² it should not be applied in cases like *Caratun v. Caratun*.⁶³ The situation in this case was different from *Pettkus v. Becker*,⁶⁴ where the doctrine of constructive trust applied to prevent unjust enrichment where marital property legislation was not applicable. The same problem arose in cases where the value of assets of either spouse increased between valuation date and trial.⁶⁵

⁵⁴ *Supra* note 19.

⁵⁵ *Supra* note 14.

⁵⁶ *Per* McKinlay J.A.: "I agree that if the licence to practise constituted 'property' then there is no reason why, in a proper case, that property could not be subject to a constructive trust. However, if the licence does not constitute property, then there is nothing to which the constructive trust could attach." *Ibid.* at 394.

⁵⁷ *The Family Law Act* S.O. 1986.

⁵⁸ *Supra* note 14.

⁵⁹ (1981), 19 R.F.L. (2d) 165 (S.C.C.).

⁶⁰ Welsh, *supra* note 35 at 285.

⁶¹ Ziff, *supra* note 32 at 230.

⁶² J.E. Hatch, "The Division of Professional Degrees and Licences upon Marriage Breakdown: A Commentary on *Caratun v. Caratun*" (1993) 2 Dal. J. Leg. Stud. 245 at 248.

⁶³ *Supra* note 19.

⁶⁴ *Supra* note 59.

⁶⁵ *Rawluk v. Rawluk* (1990), 23 R.F.L. (3d) 337 (S.C.C.).

There again, the doctrine of constructive trust was applied because under the marital property legislation no adequate remedy was available. Cases dealing with career assets, however, are different. If a degree or licence to practise is an asset shareable under *The Marital Property Act*, there exists no reason for recourse to the doctrine of constructive trust, because *The Marital Property Act* provides for an adequate remedy with its equalisation payment. Therefore, cases involving career assets must be distinguished from cases like *Pettkus v. Becker*⁶⁶ and *Rawluk v. Rawluk*,⁶⁷ where the application of the doctrine of constructive trust was adequate.

Codified German law has nothing equivalent to the common law doctrine of constructive trust. Consequently, it cannot be applied to compensate one spouse for his or her investments in the career of the other.

B. Quantum Meruit

One way to compensate one spouse for investments in the human capital of the other is to allow a *quantum meruit* claim, which would provide the supporting spouse with reimbursement for his or her contributions to the acquisition of the degree or licence.⁶⁸ However, the court in *Caratun v. Caratun*⁶⁹ rejected this as unworkable. First, it might produce unjust results because *quantum meruit* only reimburses direct financial costs and fails to reflect non-financial contributions.⁷⁰ Second, it might easily over or under compensate the supporting spouse.⁷¹ And third, it does not provide any compensation for lost career chances of the investing spouse.⁷² For these reasons *quantum meruit* claims have usually been rejected.⁷³

In Germany, one could consider the provisions dealing with unjust enrichment⁷⁴ or the rules relating to the "fundamental change of circumstances un-

⁶⁶ *Supra* note 59.

⁶⁷ *Supra* note 65.

⁶⁸ C. Davies, "Degrees and Licences to Practise: Problems of Characterization, Compensation and Valuation" (1990) 6 C.F.L.Q. 1 at 12.

⁶⁹ *Supra* note 19 at 353.

⁷⁰ N. Bala, "Recognizing Spousal Contributions to the Acquisition of Degrees, Licences and other Career Assets: Towards Compensatory Support" (1989) 8 Can. J. Fam. L. 23 at 42.

⁷¹ *Ibid.* at 43.

⁷² *Ibid.*

⁷³ *Supra* note 19 at 353.

⁷⁴ Para. 812–822 BGB.

derlying a contract."⁷⁵ Both solutions are theoretically useful but unlikely to be applied in practice.

Recourse to provisions dealing with unjust enrichment would fail because of the German Supreme Court's opinion that the provisions dealing with property division after divorce are *lex specialis*, thus displacing any general rules. The court rejected an application of the unjust enrichment provisions in cases of interspousal gifts exceeding the amount payable as an equalisation payment, had the divorce occurred when the gift was made and in cases of increased value of either spouse's assets between valuation date and trial.⁷⁶ Consequently, German courts would likely reject any recourse to general unjust enrichment provisions in cases where one spouse invested in the human capital of the other.⁷⁷

Some authors have suggested applying the rules relating to the fundamental change in circumstances underlying a contract.⁷⁸ However, this solution must also fail because of legal hurdles erected by the German Supreme Court.⁷⁹ Applying these rules generates two problems. First, can these general rules be ap-

⁷⁵ These rules are, for the German understanding of the law, quite strange because they are not codified. They are based on para. 242 BGB—the principle of good faith—and were introduced after World War I when inflation made the adjustment of many contracts necessary (see H. Brox, *Allgemeines Schuldrecht* (München: C.H. Beck, 1992) at 56. The idea of rules relating to the fundamental change in the circumstances underlying a contract is that the parties had certain expectations and assumptions when entering the contract. These were of fundamental importance for the contract but so obvious that they were not mentioned. The rules relating to the fundamental change in circumstances underlying a contract become applicable if one or both parties erred in those expectations and assumptions, because of an unpredictable change in external circumstances: see D. Schwab, *Einführung in das Zivilrecht* (Heidelberg: C.F. Müller Verlag, 1991) at 276. The classical example is the so-called "Brandy Case," where A buys brandy from B. Meanwhile the tax for brandy increases dramatically. A would not be able to pay even the tax from the price agreed. In such a case the price has to be adjusted to the new unexpected rise in taxes for brandy (see H. Brox, *supra*). However, only extraordinary circumstances allow a recourse to the rules relating to the fundamental change in circumstances underlying a contract. It is not possible to adjust a contract due to changes in circumstances which lay entirely in the sphere of risk to one party (BGH Neue Juristische Wochenschrift (1978), 2390 and BGH Betriebsberater (1981), 1119). When applying these rules the primary remedy is the adjustment of the contract. Only in a very few cases of extreme circumstances is an annulment of the contract taken into consideration: W. Fiktenscher, *Schuldrecht* (Berlin, New York: Walter de Gruyter, 1992) at 148.

⁷⁶ BGH Neue Juristische Wochenschrift (1976), 328.

⁷⁷ It seems that German courts have never dealt explicitly with this problem, as they either have tried to solve it by not allowing the maintenance settlement procedure (see *supra* note 46) or by dealing with it under support issues (see Part III(D), *infra*).

⁷⁸ Schwenzer, *supra* note 16 at 1120.

⁷⁹ BGH Zeitschrift für das gesamte Familienrecht (1972), 201.

plied when the *Civil Code* already provides for a remedy, namely, the equalisation payment?⁸⁰ Second, for what kind of contributions to the acquisition of the degree or licence should the other spouse be compensated?

The German Supreme Court has applied the rules relating to the “fundamental change in circumstances underlying a contract” in only a few family law cases, mainly where one spouse has purchased the marital home in his or her name while the other spouse paid for it.⁸¹ Whether this approach can easily be adopted for degrees and licences remains doubtful. The argument that it makes no difference whether one spouse pays for a house registered in the name of the other or pays for the other spouse’s education,⁸² is reasonable; but it seems unlikely that the German Supreme Court would be willing to adopt this approach in cases where one spouse pays for the education of the other. In the vast majority of cases the court has rejected any recourse to general rules; and *only* in the mentioned cases, where the marital home was purchased by one spouse and registered in the name of the other, has the court allowed an application of general rules to avoid unfair results.⁸³

Even if one adopted this approach the second problem remains: what contributions of the investing spouse should be considered? Schwenger suggests that only direct financial costs should be compensated because, if the investing spouse participated in the professional success of his or her ex-spouse over years, this would be contrary to modern divorce law.⁸⁴ This solution does not consider that the economic loss of the investing spouse is not limited to the direct financial contributions he or she made,⁸⁵ such as lost advancement of his or her own career, which can be of much greater economic importance than direct costs. In Germany, the application of the rules relating to the “fundamental change in circumstances underlying a contract” leads to unfair results and useless solutions, comparable to the allowance of a *quantum meruit* claim in Manitoba, and should therefore not be considered an adequate kind of compensation for the investment in the other spouse’s career.

⁸⁰ The same problem arises as in Manitoba regarding the application of the doctrine of constructive trust in relation with *The Marital Property Act*.

⁸¹ See, for example, BGH Zeitschrift für das gesamte Familienrecht (1988), 482 and BGH Zeitschrift für das gesamte Familienrecht (1982), 910.

⁸² I. Schwenger, *supra* note 16 at 1120.

⁸³ *Supra* note 76.

⁸⁴ *Supra* note 16 at 1121.

⁸⁵ *Supra* note 15.

C. Unequal Division of Other Assets

Another approach is to divide other assets in a way which would advantage the investing spouse and compensate him or her by giving this spouse more assets, when dividing all other spousal property under both *The Marital Property Act* and the German *Civil Code*. However, as in the *quantum meruit* claim, this solution is useless and has usually been rejected by both sets of courts.⁸⁶ In order to get an unequal division in Manitoba the investing spouse must show that an equal division would be “grossly unfair” or “unconscionable”⁸⁷ or, regarding business assets, “clearly inequitable.”⁸⁸ In Germany, the equal division of other assets has to be “grossly inequitable.”⁸⁹ Considering the reluctance of the courts in both jurisdictions to allow an unequal division, it seems unlikely that the spouse who invested in the career of the other could convince the courts that an equal division of assets is “grossly unfair” or “grossly inequitable,” since this situation is not at all extraordinary. Moreover, an unequal division of other assets would usually not help the investing spouse because in many cases the divorce occurs shortly after the degree or licence was acquired and the couple lacks other assets. For this reason an unequal division of other assets was explicitly rejected by the Ontario Court of Appeal in *Caratun v. Caratun*.⁹⁰ One author succinctly summed up this difficulty as, “Even 100 [percent] of nothing is still nothing.”⁹¹ Therefore, an unequal division of other assets is usually not an appropriate method for compensating one spouse for investments in the other spouse’s career.

D. Support

In both jurisdictions authorities who do not consider degrees or licences to practise to be shareable assets try to compensate the investing spouse by apply-

⁸⁶ *Caratun v. Caratun*, *supra* note 14 at 394 and *Magee v. Magee* (1987), 6 R.F.L. (3d) 453 (Ont. U.F.C.) at 461. But see *Jirik v. Jirik*, *supra* note 25 at 388–389. In Germany it was not even considered as an approach to avoid unfair results for the investing spouse; see Schwenzler *supra* note 16 at 1118.

⁸⁷ *The Marital Property Act*, s. 14(1).

⁸⁸ *Ibid.* s. 14(2).

⁸⁹ Para. 1381 BGB.

⁹⁰ *Supra* note 14 at 394.

⁹¹ L.H. Wolfson, B.S. Corbin & D.S. Melamed, “Victor, Victoria (Apologies to Robert Preston & Julie Andrews)” (1992) 7 *Money & Fam. L.* 89 at 91.

ing support provisions.⁹² While this might lead to fair results in Manitoba, this approach has been completely unsuccessful under German law.

The current German support provisions were introduced by the *First Marriage Amendment Act*⁹³ and have been subject to increasing criticism ever since.⁹⁴ In order to be entitled to support in Germany three requirements must be fulfilled. First, there must be a ground for support;⁹⁵ second, the spouse claiming support must be needy;⁹⁶ and third, the other spouse must have sufficient means to pay support.⁹⁷ The grounds for support are frequently criticised as too broad⁹⁸ because they undermine the principle of self-sufficiency.⁹⁹ They were considered out of date by the time they were introduced.¹⁰⁰ However, upon closer examination none of the statutory grounds for support is appropriate to compensate one spouse for investments in the human capital of the other. The following example demonstrates this.

Mr. and Mrs. Schmidt from Berlin married when they were both 25 years of age. At the time of the marriage Mrs. Schmidt worked as a travel agent. Mr. Schmidt had already completed undergraduate business studies and worked for a bank. As he did not enjoy his job he decided to complete a doctoral degree,

⁹² For Manitoba see E.S. McKenna Kay, "Career Assets: Spousal Interest in Professional Degrees" (1987) 6 C.F.L.Q. 154 at 161. For Germany, see BGH Zeitschrift für das gesamte Familienrecht (1988), 148.

⁹³ 1. *Eherechtsänderungsgesetz* (1. EheRG) vom 14. Juni 1974, in force since 1 July 1977.

⁹⁴ U. Diederichsen, "Ehegattenunterhalt im Anschluß an die Ehescheidung nach dem 1. EheRG," BGH Neue Juristische Wochenschrift (1977) 353 and G. Christl, "Quotenunterhalt und Bedarfskontrolle," BGH Neue Juristische Wochenschrift (1982) 961.

⁹⁵ There are six grounds on which support can be granted: support for caring for a child (para. 1570 BGB), support for an aged spouse (para. 1571 BGB), support for sickness and infirmity (para. 1572 BGB), support until appropriate employment is found (para. 1573 BGB), support for education, further education or retraining (para. 1575 BGB), and support on the ground of equity (para. 1376 BGB).

⁹⁶ Para. 1569 BGB.

⁹⁷ Para. 1581 BGB.

⁹⁸ U. Diederichsen, *supra* note 94 at 353.

⁹⁹ The principle of self-sufficiency is the leading aspect under German support law; see para. 1569 BGB. Only in cases explicitly mentioned in the Civil Code can one spouse claim support from the other: W. Köhler, *Handbuch des Unterhaltsrechts* (München: C.H. Beck, 1987) at 114. In Manitoba, by contrast, self-sufficiency is only one aspect—and not the paramount one—when granting support. For support orders under *The Divorce Act*, see *The Divorce Act*, R.S.C., 1985 c. 3, s. 15(7). For support orders under *The Family Maintenance Act*, see *The Family Maintenance Act*, R.S.M. 1987, c. F20, s. 7.

¹⁰⁰ U. Diederichsen, "Geschiedenenunterhalt—Überforderung nahehehlicher Solidarität?" BGH Neue Juristische Wochenschrift (1993) 2265 at 2275.

which took him two years and improved his chances for finding a better job. While studying full-time, Mrs. Schmidt provided for the living expenses of the family. Shortly after he completed his degree the couple moved to a small Bavarian village near München where Mr. Schmidt was offered a well-paid job with a computer company. Mrs. Schmidt could not find employment as a travel agent in München and began working for a local newspaper in the village, which meant less income for her than from her travel agent's job in Berlin. Three months after their move Mr. Schmidt petitioned for divorce. Here the question was whether, according to German support provisions, Mrs. Schmidt could claim compensation for the direct financial contributions to Mr. Schmidt's Ph.D. degree and the economic disadvantages to her own career, caused by the move from Berlin to Bavaria.

Three grounds for support may apply in such a case. First, support until appropriate employment is found,¹⁰¹ if one argues that the job at the local newspaper is not appropriate; second, support for education;¹⁰² and third, support on the ground of equity.¹⁰³

Whether employment is appropriate for a spouse primarily depends on his or her education and abilities,¹⁰⁴ as well as on the career plans of both spouses made during the marriage.¹⁰⁵ A job change from a travel agent to a local newspaper would probably not be considered inappropriate because it is at a comparable level regarding required skills and remuneration. Thus, Mrs. Schmidt would not fulfil this ground for support.

Support on the ground of education¹⁰⁶ also could not be granted because Mrs. Schmidt did not interrupt or refuse to continue *her* education in contemplation of the marriage,¹⁰⁷ but had helped Mr. Schmidt to advance *his* career. The requirements for support for education are usually not fulfilled by spouses who help their husbands or wives update their skills, because the investing

¹⁰¹ Para. 1573 BGB.

¹⁰² Para. 1575 BGB.

¹⁰³ Para. 1576 BGB.

¹⁰⁴ Para. 1574 BGB and D. Schwab, *Handbuch des Scheidungsrechts* (München: Verlag Vahlen, 1989) at 602.

¹⁰⁵ O. Jauernig, P. Schlechtriem, R. Stürner, A. Teichmann & A. Vollkommer, *Bürgerliches Gesetzbuch* (München: C.H. Beck, 1994) at 1467.

¹⁰⁶ Para. 1575 BGB.

¹⁰⁷ This provision is as unclear as the rule regarding the acquisition of assets "in contemplation of the marriage" under Manitoba law. See *The Marital Property Act*, R.S.M., 1987, c. M45, s. 4(1)(b). It can be extremely difficult to prove that a formal education was interrupted "in contemplation of the marriage." For further criticism see U. Diederichsen, *supra* note 91 at 356.

spouse often has already finished his or her professional training or first degree. Moreover, this provision is quite useless because it might produce harsh results by punishing the investing spouse, forcing him or her to finance the ex-spouse's education even after divorce!¹⁰⁸ In this case, the recourse to support provisions demonstrates the absurdity of this approach, because the spouse who should be compensated ends up even more disadvantaged.

Finally, even support on the ground of equity would not be applicable in Mrs. Schmidt's case. This ground for support is considered to be a narrow exception which should not include all cases where granting support would seem fair.¹⁰⁹ Only in a few cases, with extreme circumstances where one spouse makes extraordinary sacrifices for the other, will this provision for awarding support be applied.¹¹⁰ Moreover, the non-allowance of support has to be "grossly inequitable"¹¹¹; and in order to get support on the ground of equity the claiming spouse has to be needy,¹¹² which the investing spouse mostly is not. In the example Mrs. Schmidt would be able to support herself; she is self-sufficient. It goes

¹⁰⁸ See BGH Neue Juristische Wochenschrift (1980), 393. In this case, the wife was forced to finance the husband's studies in psychology which he started before marriage. During the marriage he interrupted his studies due to serious illness. After divorce, however, he continued studying psychology. The wife had to pay until he finished because he convinced the court that he would do so within a reasonable period of time.

In another case, (BGH Neue Juristische Wochenschrift (1985), 1695) the parties married while the husband was a student of medicine and the wife was a nurse. It was a mutual plan that the wife would also study medicine after the husband had established himself as a doctor. Meanwhile, the parties separated and the wife applied for an interim support order on the ground of completing her further education, i.e., to study medicine. The court rejected this because as a nurse she worked in an established profession and had not interrupted her own career while married (on the contrary, the court reproached her for having updated her skills during the marriage!) and added that it was too uncertain that she would be able to successfully complete her studies. This case might demonstrate that the German Supreme Court is not willing to agree that investment in the human capital of the other spouse disadvantages the supporting spouse. Instead of compensating the wife for her contributions to her husband's medical degree, the court punished her for supporting her husband and updating her own skills during the marriage. Unfortunately, this is still the law in Germany.

¹⁰⁹ *Supra* note 105 at 1470.

¹¹⁰ This provision was, for example, applied in cases where one spouse cared for an adopted child; see BGH Neue Juristische Wochenschrift (1984), 1538. However, it was explicitly rejected when one spouse wanted to update his or her skills, because para. 1575 BGB is *lex specialis*, i.e., if this provision cannot be applied for whatsoever reason no recourse to the general rule of para. 1576 BGB is allowed; see OLG Düsseldorf Zeitschrift für das gesamte Familienrecht (1980), 585.

¹¹¹ *Supra* note 104 at 641.

¹¹² *Supra* note 105 at 1470.

without saying that the high test used by German courts to award spousal support on the ground of equity is rarely met.

In the example Mrs. Schmidt is not entitled to any kind of support whatsoever, neither because of her direct financial contributions to her husband's degree nor due to the economic disadvantage she suffered, because no provision dealing with grounds for support is applicable. The German support rules, which have a reputation for being too wide,¹¹³ completely fail in situations paralleling this example.¹¹⁴ German support law is not based on a principle of compensation; in cases where the investing spouse is not needy, no support whatsoever will be granted. Obviously, this concept of support disadvantages spouses who have helped ex-spouses advance their careers. The paramount principle of self-sufficiency is removed from reality and should be replaced by a more open approach, which considers, for example, the economic disadvantages suffered by the investing spouse. For these reasons, the application of support provisions to compensate the investing spouse remains completely inappropriate under German law.

In Manitoba the situation is different. There exists no list of grounds on which a support order can be made. On application of either spouse, the court

¹¹³ For a harsh criticism, see K.H. Johannson & D. Hennrich, *Eherecht, Trennung, Scheidung, Folgen* (München: C.H. Beck, 1992) para. 1575 Rdnr. 2:

With this as a completely new described provision the legislature carried things too far. The divorced spouse is partly put in a position as if he or she never married ... and is granted an education he or she had never completed had the marriage not broken down. The divorced spouse now has a ground for support after divorce he or she did not have during the marriage. This provision is contrary to the principle of self-sufficiency. Moreover the intention to encourage spouses to continue with their education for which no public funding is possible, is mistaken because the spouse most economically affected by the divorce is now "tapped" for even more money.

The author obviously did not want to recognise the economic disadvantage suffered by the home-making spouse or that this caused her absence from the work force, creating a bigger economic loss for her than for her spouse, even if the latter had to make a substantial equalisation payment.

¹¹⁴ Even if one of the grounds for support is fulfilled, the investing spouse might be disadvantaged because the quantum of the support depends on the lifestyle the spouses enjoyed at the time of the divorce (not at the time of separation). See H.U. Graba, "Unterhalt nach den ehelichen Lebensverhältnissen" *BGH Neue Juristische Wochenschrift* (1989) at 2786 and *BGH Neue Juristische Wochenschrift* (1980), 2083. If the divorce occurred shortly after the acquisition of the degree or licence, the standard of living enjoyed by the spouses is usually quite modest. The standard of living often improves after divorce. According to the German Supreme Court this higher lifestyle can only be considered when awarding support, if it was at the time of divorce very likely that the spouses would have enjoyed it if the marriage had not broken down. See *BGH Zeitschrift für das gesamte Familienrecht* (1986), 793 and P. Friederici, *Aktuelles Unterhaltsrecht* (München: C.H. Beck, 1991) at 143.

can make an order under both *The Family Maintenance Act*¹¹⁵ and *The Divorce Act*.¹¹⁶ In order to do so the court has to consider many factors,¹¹⁷ of which the principle of self-sufficiency is only one.

The mid-1980s marked a trend in Canada toward the principle of self-sufficiency as the paramount aspect¹¹⁸ when awarding support under *The Divorce Act*.¹¹⁹ However, in *Moge v. Moge*¹²⁰ the Supreme Court of Canada rejected this approach, stating that the principle of self-sufficiency should be only one factor out of four which must be considered;¹²¹ awarding support can be an appropriate method to compensate one spouse for economic disadvantages suffered due to the marriage, for example because of investments in the other spouse's career.¹²² In this decision, the Supreme Court of Canada explicitly indicated that, because of the usual allocation of roles in today's families, the spouse who stays at home and cares for the children or who is only a secondary source

¹¹⁵ *The Family Maintenance Act*, R.S.M. 1987, c. F20, s. 4.

¹¹⁶ *The Divorce Act*, R.S.C. 1985 (2nd Supp.), c. 3, s. 15(2).

¹¹⁷ *The Family Maintenance Act*, s. 7 and *The Divorce Act*, s. 15(5)-(7).

¹¹⁸ See the trilogy of *Pelech v. Pelech* (1987), 7 R.F.L. (3d) 225, *Caron v. Caron* (1987), 7 R.F.L. (3d) 274, and *Richardson v. Richardson* (1987), 7 R.F.L. (3d) 304 where the Supreme Court of Canada primarily dealt with the impact of spousal agreements on support and emphasised the principle of self-sufficiency. Whether and to what extent the trilogy is also applicable in cases where no spousal agreement exists has been in dispute since this decision. See, for example, K.R. Halorson, "Causal Connection and Spousal Support" (1989) 5 C.F.L.Q. 195; R.E. Salhany, "Is There a New Test for Spousal Support?" (1989) 5 C.F.L.Q. 151; J. L'Heureux-Dube in *Moge v. Moge* (1992), 43 R.F.L. (3d) 345 at 362; and J.G. McLeod "Annotation to the Trilogy" (1987) 7 R.F.L. (3d) 225 at 232. However, in the context of compensation for investments in the human capital of the other spouse, this question need not be discussed here because the investing spouse is usually self-sufficient.

Other pre-*Moge* decisions also reflected the idea that self-sufficiency, and not just any kind of compensation, is the underlying principle for support orders granted under *The Divorce Act*. A wife who was self-sufficient could not be awarded any support, even if she made substantial contributions to her husband's career potential. See, for example, *Johnson v. Johnson* (1988), 16 R.F.L. (3d) 113 (B.C.C.A.) and *Baker v. Baker* (1989), 22 R.F.L. (3d) 346 (Ont. U.F.C.).

¹¹⁹ *The Divorce Act*, s. 15(7).

¹²⁰ (1992), 43 R.F.L. (3d) 345 [hereinafter *Moge*]. *Keast v. Keast*, *supra* note 25, is another case where the compensatory support model was adopted in order to compensate a wife who had made substantial contributions to her husband's degree as a doctor. The wife was awarded \$1 000 per month for ten years as pure compensation for her contributions, apart from "ordinary" support. See also *Kierans v. Kierans* (1984), 38 R.F.L. (2d) 445 (Ont. H.C.), where the wife was awarded \$20 000 lump sum support as compensation for her contributions to her husband's increased career potential and \$1 250 spousal support.

¹²¹ *Ibid.* at 376.

¹²² *Ibid.* at 390.

of income, suffers significant economic loss in comparison to the main breadwinner of the family who can advance his career by on-going training, promotions, seniority, etc. This economic reality has to be borne in mind when awarding spousal support.¹²³ Unfortunately, the German Supreme Court did not, or rather did not want to, recognise this social development in its full consequences.

The *Moge* decision received a positive reception among academics due to its wide consideration of economic consequences upon marriage breakdown,¹²⁴ in particular disadvantages suffered by wives. This new model of support was an "important step in the elimination of post-divorce gender inequality."¹²⁵ In fact, it is better than the former approach, where the principle of self-sufficiency was overvalued and weighted in favour of the breadwinner.¹²⁶ Consequently, the *Moge* approach was considered the best solution to compensate spouses who invested in the other spouse's career potential.¹²⁷

Although the Supreme Court of Canada is liberal by comparison with the German Supreme Court, a recourse to support provisions when dealing with compensation for investments in career assets is not without problems. It is true that support provisions are more flexible than the inclusion of career assets in the accounting under *The Marital Property Act*, which is "once and for all."¹²⁸ At the same time, this flexibility is the main disadvantage in a consideration of investments in the career potential under support provisions. If a fundamental change in circumstances regarding the support-paying spouse occurs, the court may vary the support order. This problem is closely connected with the above mentioned argument that, if a degree or licence was considered property, the degree-holder would be forced to remain in his or her profession.¹²⁹ For example, if one spouse contributed directly to acquisition of the degree, perhaps by paying the tuition fees, this spouse cannot be worse off than a third party, where the studying spouse borrowed the money from this third party, for example, from a bank. If a degree is not property, but has to be taken into consideration when making a support order, a court would likely vary support when the de-

¹²³ *Supra* note 120 at 388.

¹²⁴ C. Davies, "Compensatory Support: New Beginnings or a Return to the Past?" (1994) 11 C.F.L.Q. 129 at 141.

¹²⁵ S. Engel, "Compensatory Support in *Moge v. Moge* and the Individual Model of Responsibility: Are We Ahead in the Right Direction?" (1993) 57 Sask. L. Rev. 397 at 412.

¹²⁶ *Supra* note 118.

¹²⁷ E.S. McKennay Kay, *supra* note 92 at 161.

¹²⁸ J.G. McLeod & A.A. Mamo, eds., *Matrimonial Property Law in Canada*, Vol. I (Toronto: Carswell, 1993) at 113.

¹²⁹ *Supra* note 42.

gree-holder is no longer able to work in the high-income profession, for example, due to an accident. If the degree-holder had borrowed the money from a bank, he would have to repay it, regardless of which profession he or she qualified for. The degree-holder would be advantaged simply by choosing the spouse to finance his or her studies, rather than borrowing the money from a bank. Moreover, the court has to consider a wide range of circumstances when awarding support, for example, the economic advantages and disadvantages arising from the marriage and its breakdown,¹³⁰ as well as the duration of the marriage.¹³¹

Because cases involving education usually deal with short-term marriages, spousal support might not be granted, or only to a lesser extent. The court must also consider the outcome of the division of other property and then award a spouse who already has obtained significant assets less support.¹³² If, by contrast, a degree or licence is property, it is valued and shared equally, regardless of how many other assets the spouses own. When, as in *Caratun v. Caratun*,¹³³ the divorce occurred shortly after acquisition of the degree or licence, it may be unclear how much the degree-holder really can earn. Therefore, the support might be awarded on the present income of the degree-holder, which is considerably less than his or her earning potential.¹³⁴ This problem can be avoided by considering degrees and licences property, to be valued and shared equally. By doing so, the real increased earning potential is shared. Moreover, support is rarely requested because it is rarely granted.¹³⁵ Compensatory support is highly discretionary. According to the Supreme Court of Canada, compensatory support is inadequate as a substitute for sharing an asset (in this case a pension) accumulated during the marriage through the combined efforts of both spouses.¹³⁶ The nature of the asset should not determine whether compensatory support should be a substitute, sharing the asset under *The Marital Property Act*, because pen-

¹³⁰ *The Divorce Act*, s. 15(7)(a).

¹³¹ *Ibid.* s. 15(5)(a).

¹³² *Supra* note 124 at 142.

¹³³ *Supra* note 14.

¹³⁴ *Supra* note 36 at 88.

¹³⁵ For example, in 1989 women earned only 68 percent of men's earnings for equivalent jobs. A study done by the Department of Justice found that support was requested in only 16 percent of the studied court files and granted in only 6 percent. See *supra* note 34 at 130. These figures, of course, do not encourage women to claim support once they know their chances.

¹³⁶ *Per* Wilson J.: "Discretionary support payments are a wholly inadequate and unacceptable substitute for an entitlement to share in the assets accumulated during the marriage as a result of the combined efforts of the spouses." See *supra* note 37 at 131.

sions and degrees or licences are comparable in that all were acquired in the past, before the divorce, but continue to bear fruit in the future, after the divorce. The argument that a career asset cannot be an asset shareable under *The Marital Property Act* because the provisions dealing with property division are retrospective,¹³⁷ is not persuasive. Pensions, like career assets, are "future assets," but no one would suggest excluding them from sharing because of their nature.¹³⁸

For all of these reasons, career assets should be considered property and thus shareable under *The Marital Property Act*. In Manitoba, recourse to the support provisions¹³⁹ is more fair than the situation under German law; however, an inclusion of career assets in the pool of shareable assets, under both *The Marital Property Act* and the German *Civil Code*, would provide more certainty¹⁴⁰ and guarantee that the investing spouse is adequately compensated.

IV. VALUATION OF CAREER ASSETS

A. General Valuation Problems

Regardless of whether a degree or licence is considered property or taken into account when awarding support, it must be valued.¹⁴¹ Some authors think this task impossible in monetary terms because it is too speculative¹⁴² and that no evidence can exist for the real value of a career asset.¹⁴³ Thus, they believe that the valuation of career assets must necessarily lead to unfair results. Others

¹³⁷ C. Rogerson, "Women, Money and Equity: The Background Issues" in K. Busby, L. Fainstein & R. Penner, eds., *Equality Issues in Family Law: Consideration for Test Case Litigation* (Winnipeg: Legal Research Institute of the University of Manitoba, 1990) 97 at 109.

¹³⁸ For a similar comparison when a spouse invests in the business of the other, instead of in the other's career, see Ziff, *supra* note 32 at 231.

¹³⁹ Moge makes clear that the application of support provisions to compensate the investing spouse is a way of doing justice which is currently accepted by the Supreme Court of Canada.

¹⁴⁰ Because of the difficulties in valuing a career asset, some authors think that the certainty offered by the consideration of career assets as property is "more illusory than real": *supra* note 70 at 59. However, it is unclear how judicial discretion can be more certain than valuing and sharing these assets!

¹⁴¹ *Supra* note 27 at 66.

¹⁴² Mullenix, *supra* note 25 at 260.

¹⁴³ T. Oldham, "Property Division in *O'Brien: Good Intentions Gone Astray*" (1986) 2 Fam. Advocate 11 at 12.

have adopted somewhat cleverly devised methods to put an accurate value on degrees and licences.¹⁴⁴

The simplest way to avoid valuation problems is to deny that career assets can have a present value¹⁴⁵ or any value at all.¹⁴⁶ Although degrees and licences are not saleable, this does not mean they cannot have any value. If a career asset had no value, it would be an uneconomic investment. In *Corless v. Corless*,¹⁴⁷ Steinberg J. stated that the husband's law degree and licence to practise did not have a value although they were considered to be property. However, in *Elliott v. Elliott*,¹⁴⁸ the same judge decided that a loss in career advancement had a negative value. This makes a career asset worthless if acquired, but negatively worthy if one lacks an updated education. This inconsistency is not plausible, and the majority of courts and academics have acknowledged that career assets must have a value, however defined.¹⁴⁹

Apart from valuation difficulties there is a second problem with career assets: how to divide them? If a degree or licence is considered property, just as any other asset, it would be shareable in equal portions under both *The Marital Property Act* and the *German Civil Code*. This seems just, if both spouses have contributed in a substantial way, for example, if the non-degree-holder spouse contributed financially and did most of the housework, enabling the other spouse to study. In cases where the non-studying spouse made no contributions whatsoever to the acquisition of the career asset, one could argue that an equal split of the value of the degree or licence would be unfair.¹⁵⁰ However, this argument is inconsistent with the policies behind both *The Marital Property Act* and the *German Civil Code*, because both jurisdictions enforce a presumption that all assets acquired during the marriage were accumulated through combined efforts. Individual contributions to the assets do not matter. This is particularly so in a long-term marriage, where it might be impossible to document who paid for what after years of acquisition and use of the asset in dispute. If,

¹⁴⁴ *Supra* note 1 at 131. See also the overview of valuation approaches in J.L. Hovarth, "Valuing Professional Degrees and Licences" (1988) 3 C.F.L.Q. 1 at 7-20, and *supra* note 35 at 288-292, as well as *supra* note 15 at 382-384, and *supra* note 36 at 93-97. See also S.E. Willoughby, *supra* note 25 at 138-139.

¹⁴⁵ Willoughby, *supra* note 25 at 139.

¹⁴⁶ J.G. McLeod & A.A. Mamo, *supra* note 128 at 114.

¹⁴⁷ *Corless v. Corless*, *supra* note 13 at 278.

¹⁴⁸ (1992), 42 R.F.L. (3d) 7 (Ont. U.F.C.).

¹⁴⁹ See, for example, C.S. Nelson, L.K. Ferrier & H. Elston, "The Professional Degree and Practice as Property: A Comment on *Corless v. Corless* and Other Recent Decisions" (1987) 2 C.F.L.Q. 269 at 275.

¹⁵⁰ *Supra* note 137 at 108.

for example, the husband acquired a car during the marriage, for which he alone paid, and the car was used for family purposes, it is shareable under *The Marital Property Act* and the *German Civil Code*. No one would suggest that the car not be shared because the husband paid for it. If the husband acquired a degree instead of a car, should one look at the particular contributions of the non-studying spouse to the acquisition of that degree? This would undermine the policy of equal sharing in the marital property legislation. If a degree or licence to practise is property, it must be treated as any other asset. Consequently, it does not matter which contributions the non-studying spouse really made to the acquisition because he or she was at least indirectly affected, for example, by not enjoying a better standard of living during the period of study, or by a delay in his or her own career.

Some authors think the valuation and division of a career asset cause problems if the spouse in question marries more than once. This might unfairly affect the degree-holder if the first spouse gets one half of the value of the career asset and subsequent spouses are entitled to an equitable distribution of that amount by which the degree or licence has increased in value during the succeeding marriage;¹⁵¹ but, for subsequent marriages, the degree is a pre-acquired asset; it has nothing to do with the subsequent marriage and is excluded from sharing.¹⁵² The degree does not increase, but rather decreases in value over the years, its influence gradually replaced by work experience; after about six years in the work force the degree lacks paramount importance.¹⁵³ Therefore, the valuation of career assets should not become more complicated if the degree-holder marries more than once.

B. Valuation Approaches

The valuation of career assets can be difficult where no generally accepted method takes all factors into consideration. How should it be valued?¹⁵⁴ According to which formula?¹⁵⁵ Which aspects should be taken into account when valuing?¹⁵⁶ There are four main valuation approaches which are sometimes

¹⁵¹ *Supra* note 68 at 7.

¹⁵² For German law see, para. 1373, 1374 Abs. 1, 1378 Abs. 1. For Manitoba law see, *The Marital Property Act*, s. 4(2).

¹⁵³ *Supra* note 12 at 20.

¹⁵⁴ For example, should the future income stream be valued, as a result of the degree or should the degree be valued?

¹⁵⁵ Should there be a "deduction" in the value of the degree because the influence of it is replaced by working experience after some years?

¹⁵⁶ Some factors which might be considered when valuing a degree are:

(i) direct costs, such as tuition fees, textbooks, and other academic charges;

modified, resulting in an immense variety of methods. This discussion deals only with the main approaches and possible modifications.

1. Direct Cost Approach or Reimbursement Method

Under this approach the investing spouse is compensated only for direct costs incurred in earning the degree or licence.¹⁵⁷ This method avoids any unfairness to the studying spouse caused by having to pay an award based on projected future income which may never occur.¹⁵⁸ As the direct financial contributions of the investing spouse are usually smaller than the future income stream of the studying spouse, payment of the awards will not be a problem. Therefore, a permanent debt relationship between people who are trying to dissolve their relationship, and get on with their lives, can be avoided.¹⁵⁹

This approach, however, lacks sophistication. It is unrealistic to believe that contributions of the investing spouse do not go beyond direct financial help.¹⁶⁰ For example, one major contribution of the supporting spouse is to free the other spouse of any housework obligations. This does not recognise that any economic loss for the investing spouse is the delay in his or her own career advancement, which can be much bigger than the direct financial contributions to the other spouse.¹⁶¹ Consequently, the Direct Cost Approach is too one-sided and unsatisfactory to compensate the investing spouse.

2. Opportunity Cost Approach

This offers a further development from the Direct Cost Approach, but it is still not a sophisticated valuation method. Sometimes referred to as the "Schaefer Approach,"¹⁶² it not only considers the direct costs of the education, but also

(ii) incremental travel, living and commuting costs which exceed normal expenses;

(iii) foregone salary of the student spouse; and

(iv) non-student spouse service contributions that are greater than student-spouse service contributions.

For a list of factors taken into account when valuing a career asset; see *supra* note 13 at 21.

¹⁵⁷ This approach was used, for example, by the Kentucky Court of Appeal in *Inman v. Inman*, *supra* note 17.

¹⁵⁸ Willoughby, *supra* note 25 at 138.

¹⁵⁹ K.K. Baker, "Contracting for Security: Paying Married Women What They've Really Earned" (1988) 55 U. Chi. L. Rev. 1193 at 1197.

¹⁶⁰ Mullenix, *supra* note 25 at 93.

¹⁶¹ Hovarth, *supra* note 144 at 10.

¹⁶² The name comes from T.D. Schaefer who was one of the first authors to suggest this approach. See, *supra* note 36 at 93.

the “lost opportunity costs,”—namely, the money the student-spouse would have earned during the education period by being employed at the most likely available position. Some writers also take the loss of education and employment opportunities for the investing spouse into consideration.¹⁶³ Consequently, the compensation for the supporting spouse would be greater than under the first approach.¹⁶⁴

However, even this method should be rejected because, although it avoids speculation about the future income of the educated spouse, it does not consider that the increased earning capacity of the studying spouse is much more valuable than the direct financial contributions of the supporting spouse.¹⁶⁵ This approach might compensate some wives adequately, for example, in cases where it is possible to figure out the exact damage for the loss of career advancement for the investing spouse. Yet a wife who was only a housewife cannot be compensated by this method, because the compensation for lost opportunity would be limited to the foregone earnings of the educated spouse.¹⁶⁶ In such a case, the compensation award would depend on the profession of the supporting spouse.

Some writers think that inclusion of the lost opportunity costs could overcompensate the non-studying spouse because he or she might have received economic benefits during the marriage, for example, by enjoying a higher standard of living.¹⁶⁷ However, in the majority of cases dealing with career assets, this is not relevant because the marriages are usually of short duration, with separation occurring soon after acquisition of the degree or licence. Therefore, the danger lies in under-compensating the investing spouse under this approach.

3. Labour Theory of Value

Under the labour theory of value, the value of a degree or licence is in the value of the labour necessary to secure that career asset. For example, it takes four years to complete law school, article, and pass the bar admission exams. The value of the law degree and licence to practise are equal to four years' labour, which the student-spouse owes to the investing spouse because, had the student-spouse not attended law school, he or she would have contributed to the

¹⁶³ Willoughby, *supra* note 25 at 139.

¹⁶⁴ Under the Direct Cost Approach the formula to value the degree or licence would be: Value of the Degree = Cost of Education = Direct Financial Costs. Under the Opportunity Cost Approach the value would be: Value of the Degree = Direct Financial Costs + Lost Opportunity Costs.

¹⁶⁵ *Supra* note 35 at 291.

¹⁶⁶ *Supra* note 16 at 555.

¹⁶⁷ M. Neave, “Resolving the Dilemma of Difference: A Critique of ‘The Role of Private Ordering in Family Law’” (1994) 44 U.T.L.J. 97 at 104.

family.¹⁶⁸ The investing spouse should therefore be entitled to 50 percent of the student spouse's income for the same period of time, which the student spouse needed in order to acquire the degree or licence.¹⁶⁹ This simple method of calculation avoids valuation problems,¹⁷⁰ but it does not lead to the fair results its creator promises.¹⁷¹ Avoiding valuation problems does not mean solving them.

As with the Direct Cost Approach, the Labour Theory looks primarily at the costs of the education, but not at the improved earning capacity of the degree-holder. There is no reason to equate a year's post-degree income with a year's cost of acquiring the degree.¹⁷² Over-simplifications of this kind tend to be unjust. For example, the degree-holder may earn surprisingly more or comparatively less during his or her early years in a professional career, depending on many factors such as changing competition in the labour market. In this case, the investing spouse would either be advantaged or under compensated. This approach also fails to recognise that only the degree or licence was acquired during the marriage, and not the entire education of the studying spouse. If the income of the degree-holder is divided after divorce, the pre-marriage earning capacity of the student-spouse is not taken into account at all.¹⁷³ Like the approaches discussed above, the Labour Theory of Value does not provide for adequate compensation for the investing spouse.

4. Increased Earning Approach

This is the method most often used to value a career asset is the increased earning approach. Moreover, it is probably most reliable in valuing a career asset. Under the Increased Earning Approach, the value of a career asset is the difference between the student's most likely future earnings, based on the increased earning capacity and the student-spouse's most likely earnings, based on the education and qualifications acquired before the marriage.¹⁷⁴ Although not perfect, it seems to avoid many of the shortcomings of the other approaches.

¹⁶⁸ Mullenix, *supra* note 25 at 278.

¹⁶⁹ *Ibid.* at 279.

¹⁷⁰ D.R. Mitchell, "Family Law: Professional Degrees in 1986—Family Sacrifices Equals Family Asset" (1985) 25 Washburn L. Rev. 276 at 289.

¹⁷¹ Mullenix, *supra* note 25 at 280.

¹⁷² *Supra* note 35 at 290.

¹⁷³ For example, if one spouse completes a B.A. in psychology before marriage and a Ph.D. in psychology during the marriage, this approach would give the investing spouse one half of the Ph.D.-holder's income. It does not recognise that someone with a B.A. in psychology has a certain earning capacity as well. Thus, the investing spouse might easily be over compensated.

¹⁷⁴ *Supra* note 15 at 382–384. See also Hovarth, *supra* note 144 at 11.

One main advantage is that it determines the actual value of the career asset to its holder and awards the supporting spouse a fair share, rather than merely returning the supporting spouse's investments in the educated spouse's degree or licence.¹⁷⁵ Moreover, it recognises that the earning capacity of the student-spouse is not built by the degree, but only increased by it.¹⁷⁶ However, even this more sophisticated approach¹⁷⁷ has its shortcomings. For example, the criticism that it is unlikely that the income stream will be constant¹⁷⁸ is legitimate. Yet, it remains the best method available today. The Increased Earning Approach has been developed further. By multiplying the original formula¹⁷⁹

¹⁷⁵ Willoughby, *supra* note 25 at 139.

¹⁷⁶ For an example, see *supra* note 173 and accompanying text.

¹⁷⁷ The formula for the valuation of the career asset would be:

$$\sum \frac{EAt - EBt}{(1+i)^t} \quad t=1,n$$

EAt: The student's spouse most likely earnings in the period "t," based on the increased earning capacity due to the degree or licence.

EBt: The student's spouse most likely earnings in the period "t," is based on the level of education and qualifications acquired before the marriage without considering the increased earning capacity due to the higher education.

t: The period of time.

n: The number of years between the valuation date and the student's spouse estimated last productive working time period, i.e. the retirement.

i: The period discount rate. This considers a number of factors, such as the field of employment, the level of risk associated with the student's spouse achieving the projected future earning levels, the degree of competition in the field of employment or practice, and prospective and existing economic conditions. For a full list of aspects taken into account under "i" see L.J. Horvath, *supra* note 144 at 14–15.

¹⁷⁸ A.M. Parkman, "The Recognition of Human Capital as Property in Divorce Settlements" (1986–87) 40 Ark. L. Rev. 439 at 451.

It seems odd that the author criticises this approach because it "misunderstands the concept of human capital." On the other hand, when compensating a housewife for her lost career advancement, Parkman uses just this "misunderstood concept" to compensate her: the compensation should be based on the difference between the income that she can now expect to earn in comparison with the income she could potentially be earning if she had not left the workforce. *Ibid.* at 456. The concept is exactly the same as under the Increased Earning Approach; the only difference is that Parkman emphasises the lost career advancement of the investing spouse instead of looking at the increased earning capacity of the student-spouse. However, it is the idea that, if a career asset is considered to be property and its value—primarily defined as the increased earning capacity of the student-spouse—is divided, it compensates the supporting spouse for the investments in the other spouse's education, as well as for the loss of advancement in his or her own career.

¹⁷⁹ *Supra* note 175.

with a so-called sliding fraction,¹⁸⁰ the fact that the degree or licence loses its impact over the years and is replaced by work experience is taken into consideration.¹⁸¹

V. CONCLUSIONS

A COMPARATIVE LEGAL STUDY such as this reveals both drawbacks and advantages within the law which usually remain unanticipated. Neither the German nor the Manitoban law regarding compensation of one spouse for investments in the human capital of the other upon divorce is perfect. Thus, it would be foolish to conclude that one law is superior, if only because of the ever-shifting standards by which one can apply law itself.

However, if we want to avoid financial disadvantages for a spouse who contributes to the higher earning capacity of his or her ex-spouse, both systems must consider career assets to be property and to be included in the accounting under both *The Marital Property Act* and the *German Civil Code*. Alternative solutions, especially support provisions, simply do not adequately work for all concerned parties to a divorce.

Once we allow for that, the Increased Earning Approach becomes suitable for valuing such career assets. In fact, it probably produces fairer results than some of the valuation methods used in valuing business assets. No one now suggests that business assets are not to be shared because it is difficult to value them. But because career assets remain intangible and do not fit neatly into the traditional picture of property, it is easy to exclude them from sharing by asserting that it is impossible to value them. Some arguments expressed against inclusion of career assets, in the accounting under marital property legislation, could also apply to a wide range of other areas of law. The difficulties often expressed when valuing and sharing career assets are old problems in a new light, made the more glaring by the dramatic increases in the number of divorces. For example, when awarding damages for the wrongful death of one spouse, the future income of this spouse is routinely considered, along with loss of anticipated increased earning capacity and other "future assets," such as larger pen-

¹⁸⁰ Thus, the formula for valuing the degree would be:

$$\sum \frac{Eat - Ebt}{(1+i)^t} \times \frac{a}{b+t} \quad t = 1, n$$

a: The number of years of professional education.

b: The number of years between the commencement of the professional education and the valuation date.

All other variables have the same meaning as in the original formula. See *supra* note 175.

¹⁸¹ Schaefer, *supra* note 36 at 97.

sions, that would have been earned. The problem is not our ability to value and share career assets. Rather, it is one of priorities and equity, created by the reluctance of some people to realise that the traditional concept of property must expand to include career assets. Divorce will never be painless, but it should at least be fair.

