Addressing Post Judgment College Expense Issues

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ADDRESSING POST JUDGMENT COLLEGE EXPENSE ISSUES

INTRODUCTION

Post judgment college expense issues are among the most difficult and time-consuming applications presented to the Court. Statistically, over 12,700 dissolution and non-dissolution (FM and FD) matters were presented to the Burlington County Superior Court in the 2005 to 2006 year cycle. Of this total, 9,202 were reopened matters. Although statistics categorizing motion applications by topic are not maintained by the AOC or the Burlington County Vicinage, anyone familiar with the system would agree that many of these matters involve college expense issues.

In addition to the inherent complexity and large volume of applications filed, New Jersey does not apply a rigid guideline-like formula to the college expense analysis. Accordingly, each case is decided on unique facts, which requires exacting disclosure of critical information from the applicant. Unfortunately, applicants often fail to submit necessary information to the Court, leaving the Judges to struggle with an incomplete record. The purpose of the present article and related seminar is to clarify the appropriate criteria for analyzing college expense issues and refresh members of the bar with regard to necessary submissions.

History of College Expense Issues in New Jersey Family Law Practice

According to the American Bar Association, New Jersey is one of seventeen jurisdictions in America with some form of legal authority (statutory or decisional) empowering trial courts to impose a duty on litigants to pay for college expenses or to

otherwise support children while attending college. Although every United States jurisdiction has considered the issue, New Jersey subscribes to the minority rule. Other jurisdictions, including Pennsylvania, have concluded that courts lack the requisite authority to impose such obligations and uniformly declare children emancipated upon graduation from high school or reaching the age of eighteen, whichever occurs later.

Emancipation

The issue of contribution to college expenses is closely related to the concept of emancipation. In New Jersey, emancipation occurs upon the happening of the following events:

1. Upon the child reaching majority, *Newburgh v. Arrigo*, 88 N.J. 529 (1982); *Monmouth Cty. Div. Soc. Srvs. v. C.R.*, 316 *N.J. Super.* 600 (Ch. Div. 1998); as to which there is a rebuttable presumption, *N.J.S.A.* 9:178-3; *Gac v. Gac*, 351 *N.J. Super.* 54,61-62 (App. Div. 2002);

2. Upon the child graduating from secondary education, *Sakovits v. Sakovits*, *178 N.J. Super.* 623 (Ch. Div. 1981);

3. Upon the child entering into the Armed Services, *Step v. Step*, 43 *N.J. Super.* 538, 543 (Ch. Div. 1957); *Newburgh v. Arrigo*, *Supra* 88 *N.J.* at *543; Bishop v. Bishop*, 287 *N.J. Super, 593 (Ch. Div. 1995)*; *White v. White*, *313 N.J. Super.* 637 (Ch. Div. 1998);

4. Upon the child's marriage, *Leith v. Horgan*, 24 *N.J. Super.* 516,518 (App. Div. 1953); *Bishop v. Bishop*, *Supra* 187 *N.J. Super.* at 598; *Gac v. Gac*, *supra* 351 *N.J. Super.* at 61-62;

5. Upon the child's graduation from secondary education, or even graduate school, *Sakovits v. Sakovits*, *supra; cf.1*, *Monmouth Cty. Div. Soc. Srvs. v. C.R.*, *supra* 316 *N.J. Super.* at 616; and

6. At any other event by which the court determines that a child is or is expected to be self-supporting, *Div. of Youth & Family Servo v. V.*, 154 *N.J. Super.* 531, 536-537 (1. & D.R. Ct. 1977); *Bishop v. Bishop*, *supra* 287 *N.J. Super.* at 598; *Gac v. Gac*, *supra* 351 *N.J. Super.* at 61-62 .

CASE AUTHORITY

The explosion of important decisional authority related to the issue of college expenses closely parallels the introduction of no-fault divorce in the state of New Jersey in 1971, as well as larger societal changes involving greater numbers of young adults, including women, attending college in the late 1960's and early 1970s. A brief review of some prior decisions is informative, as they laid the groundwork for the criteria that would later appear in Newburgh.

The major pre-*Newburgh* decision was authored by Justice Proctor in *Kahlif v. Kahlif*, 58 N.J. 63 (1971). The case involved a petition for separate maintenance and child support. One of the children of the marriage was a student at George Washington University on the date the petition was filed. The father, a practicing dentist, had encouraged his son to attend college prior to the date of separation. The father had also paid all college expenses for the first semester, but later objected to continued contributions.

> The concept of what is a necessary education has changed considerably in recent years. While a "common public school and high school education may have been sufficient in an earlier time, see Ziesel v. Ziesel, 93 N. J. Eq. 153 (E.&A. 1921), the trend has been towards greater education. Our courts have recognized this trend by including the expenses of a college education as part of child support where the child shows scholastic aptitude and the parents are well able to afford it. Malkin v. Malkin, 12 N. J. Super.496 (App. Div. 1951); Cohen V. Cohen, 6 N. J. Super. 26, 30 (App. Div. 1949); Nebel v. Nebel, 99 N.J. Super. 526 (Ch. Div. 1968) See also Jonitz v. Jonitz, 25 N. J. Super. 544, 556 (App. Div. 1953); Hoover v. Voigtman, 103 N. J. Super. 535 (Cty. Ct. 1968); see generally Annotation, "Divorce - Support of Child - Education, 56 A. L. R. 2d 1207, 1220. We agree with the cases which include these expenses in child support where appropriate, and in the present case we see no difficulty in ordering the defendant to provide $3,200 a year board and tuition as support for his son James. Defendant must also repay the $1,600 plus interest which the plaintiff was forced to borrow for James' second semester board and tuition. If James does not choose

> to complete his college education or if he has already done so, the order may of course be modified.

Justice Proctor relied upon the aptitude of the child and the ability of the parents to pay as the basis of the majority decision to require the father to pay college expenses, then a novel extension of the support concept by the Supreme Court.

The next decision of importance was rendered by the Appellate Division in *Limpert v. Limpert*, 119 N.J. Super 438 (App. Div. 1972), and although it was at that time cited for the general proposition that courts can require payment of child support when a child attends college, the decision is somewhat aberrational in failing to logically extend the *Khalif* analysis (in the pre-child support guidelines era) of requiring direct contribution to tuition, room and board.

> In the present case there is support in the record below for the trial judge's findings that Gregory's high school record demonstrated dubious scholastic ability and lackadaisical determination, and that neither the income of plaintiff nor defendant, nor both incomes combined, warranted the expense of a junior college in Boston in light of the availability of superior schools in this area at a far more reasonable cost.
>
> It is noted that Gregory made some scholastic improvement after his first year at the junior college in Boston and, at the conclusion of his second year, was accepted for admission at the William Paterson College of New Jersey, in Wayne, New Jersey.
>
> The trial judge, who had found that Gregory was emancipated upon graduation from high school, also found that he was capable of earning sufficient funds to pay his own way through school; that he had several excuses for not working continually in Boston; and that he had purchased a couple of hundred dollars worth of tools to work as an automobile mechanic during one summer, and should take cognizance of the opportunity of automobile mechanics. On this basis, together with testimony as to the poor relationship between Gregory and his father, the trial judge eliminated support payments for Gregory as of January 16, 1970.

> Our reading of the record leads us to conclude that . . . the trial judge's finding of emancipation can hardly be sustained since the mother has custody of the boy and there is nothing in the record to suggest emancipation as far as the mother is concerned. It was her responsibility to raise the boy and determine what education was suitable for him under the circumstances.

The Appellate Division ruled that the residential parent is vested with discretion to determine whether a child should attend college, but inexplicably differed with the *Khalif* opinion by not requiring the father to contribute directly to college expenses. Rather, the court modestly increased child support as the appropriate mechanism for contribution to college expenses.

This decision was rendered a year and three months after *Kahlif,* and one possible explanation for the divergence of opinion may relate to the court's finding that the child maintained a dubious scholastic aptitude. Certainly, the opinion is important in that the aptitude of the child once again became a determining factor in the college expense calculus.

The next significant decision was rendered by Judge Conn in the Chancery Division case of Ross v. Ross, 167 N.J. Super 441 (Ch. Div 1979). It was the first reported decision concerning the obligation of parent to support a child through graduate school, and in this case, law school.

The parties child, Jane, was a first year law student at Seton Hall University and commuted to the campus from the mothers home. Judge Conn asked, for the first time in a reported New Jersey decision, a critical question that has now become a routine inquiry in the college expense analysis.

> Before listing and analyzing the various factors that must be considered, the court believes that there is the following threshold question: Had there not been a separation and divorce, would the parties, while living together, have sent their daughter to law school and financed that schooling? It would seem clear from the facts, particularly the respective incomes of the parties; the fact of only having one child, and the early indicators in this case of Jane's interest in law school, that the parties, in all probability, would have financed Jane's law school education.

In concluding that the father was obligated to contribute to the support of the child, the Court annunciated a number of factual inquiries that would later become the core of the Newburgh analysis.

As most family law practitioners expected, Judge Conrad Krafte came to the rescue in the decision of *Sakovits v. Sakovits,* 178 N.J. Super, 623 (Ch. Div. 1981).

> The following factors should . . . be considered:
>
> 1. The amount of support (or school cost) sought:
> 2. The ability of the noncustodial parent to pay the cost, and its relation to the type of schooling sought;
> 3. The financial position of the custodial parent;
> 4. The commitment and aptitude of the child to the schooling in question;
> 5. The child's relationship to the noncustodial, paying parent, and
> 6. The relationship of the schooling in question to any prior training and generally, the relationship to the over-all long range goals of the child. To this list this court believes it is important to add some further considerations especially applicable to the college education situation:
>
> 1. The reasonableness of time between graduation from high school and the time the child desires to attend college, and
> 2. Based on the parents' educational and social backgrounds, the expectation on behalf of the parents that the child would attend college.
>
> A common situation we must confront today is where, after high school graduation, the child takes a year or more hiatus from school to travel or work before attending college. The intentions of the child of returning to college in such instance is usually made known to the parents and they, therefore, would still reasonably expect that child would go to college.

> An agreement or general understanding between the parents and child that there would be such hiatus may also be important.

As is always the situation with any leading case, *Newburgh v Arrigo* pulled all the threads together, mentioning many of the above cited cases, offering historical context for the imposition of the duty to pay for college and largely adopting the eight factors identified by Judge Krafte, with certain additions .

> In evaluating the claim for contribution toward the cost of higher education, courts should consider all relevant factors, including (1) whether the parent, if still living with the child, would have contributed toward the costs of the requested higher education; (2) the effect of the background, values and goals of the parent on the reasonableness of the expectation of the child for higher education; (3) the amount of the contribution sought by the child for the cost of higher education; (4) the ability of the parent to pay that cost; (5)the relationship of the requested contribution to the kind of school or course of study sought by the child; (6) the financial resources of both parents; (7) the commitment to and aptitude of the child for the requested education; (8) the financial resources of the child, including assets owned individually or held in custodianship or trust; (9) the ability of the child to earn income during the school year or on vacation; (10) the availability of financial aid in the form of college grants and loans; (11) the child's relationship to the paying parent, including mutual affection and shared goals as well as responsiveness to parental advice and guidance; and (12) the relationship of the education requested to any prior training and to the overall long-range goals of the child.

Although there have been several important decisions related to college expenses since 1982, *Newburgh* remains the cornerstone of any college expense analysis.

Filing the Motion

Cases with language related to college expenses

In many cases, final judgments, property settlement agreements or previous orders

contain some language relating to college expenses. As a matter of contractual obligations, this language should be binding upon the parties unless it violates public policy, i.e., states that the parties are not responsible to support a child through college. Testimony in the form of certification and exhibits should then be tailored to the language relating to college expenses as contained within the judgment, property settlement agreement, or order along with a duly updated case information statement, as well as other exhibits described below.

Cases with no language related to college expenses

The following discussion applies generally to cases where there is no language in a final judgment, property settlement agreement or previous order concerning college expenses, or where the language so contained is of little assistance to the court due to its brevity or inartful construction. This discussion applies to FM or FD matters.

The testimony proffered by your client in the certification in support of the motion should be based upon the twelve factors contained on page 545 of the *Newburgh* opinion as well as any additional factors probative in nature.

Discussion of Newburgh Factors

(1) Whether the parent, if still living with the child, would have contributed toward the costs of the requested higher education;

This factor was first articulated by Judge Conn in the Ross case. Judge Conn described this as a threshold question. Although it is not treated as a threshold question in subsequent authority, the decision of the Supreme Court in Newburgh to list this as the first factor suggests its importance in the minds of the Newburgh majority. Few subsequent cases discuss the factor at length and few ever describe it as a "threshold" issue, and in fact the Supreme Court appears to have retracted from the "threshold" label in the Gac decision.

Judge Conn specifically stated in his opinion that an answer one way or the other to this inquiry is not dispositive. It is useful to review the full opinion of Judge Conn in the Ross case to more clearly understand the intent behind this factor, as well as the factual details deemed important to the analysis of this issue by the Court.

(2) The effect of the background, values and goals of the parent on the reasonableness of the expectation of the child for higher education;

This second factor comes directly from Judge Krafte in Sakovits. Judge Krafte stated, "Based upon the parents educational and social backgrounds, the expectation on behalf of the parents that the child would attend college". The original language from Judge Krafte can better help us understand this factor. Is this a family where the parents went through college? Did other family members go through college? Are there any legacy issues where family members went to a specific college for several generations? Are the parents active in their college alumni associations or do they contribute regularly to their alumni funds? When raising the children, did the parents often discuss college goals and expectations among themselves, with the children, with other family members or other individuals? Where course decisions made in high school, athletic programs or extra-curricular activities selected with an eye towards college placement? Where college savings accounts established or other assets pledged to future college expenses? These and other similar facts are relevant to the inquiry.

(3) The amount of the contribution sought by the child for the cost of higher education

Is the child seeking $5,000.00 or $50,000.00 from the parents? This factor comes from Judge Conn who once again most artfully discussed his rationale behind the factor, to wit, will the amount sought create a "serious financial burden" on the parents? Additionally,

the expected family contribution determination reached through the financial aid formula should be made available to the Court, and will generally be dispositive as to the exact amount of contribution needed for attendance at college. It is also helpful to provide the tuition, room and board statement from the university as well as any other document memorializing additional college expenses such as lab fees, student registration fees or computer fees.

It is settled law in the state of New Jersey that the cost of a college education at a public university is not a standard or benchmark for purposes of establishing contribution to the expense. Finger v. Zenn, 335 N.J. Super 438 (App. Div. 2000).

(4) The ability of the parent to pay that cost;

Updated, accurate case information statements, tax returns, W-2 statements and other relevant data will assist the court in determining the ability to pay. A review of all assets, income and the reasonable budget for the remaining family members is pertinent to this discussion.

When determining the ability of a parent to contribute to college expenses, the Court takes into consideration the child support obligations of either of the parties for siblings not attending college. The duty to pay child support for younger siblings is just as important as the college expense obligation. Accordingly, it is critical to present testimony in the Certification describing the revised child support for the remaining siblings and the impact of the obligation on the ability to pay college expenses.

(5) The relationship of the requested contribution to the kind of school or course of study sought by the child

Once again, Judge Krafte said it best, his sixth factor from the Sakovits case, to wit,

"the relationship of the schooling in question to any prior training and generally, the relationship to the overall long range goals of the child." By way of example, perhaps the child demonstrated an aptitude for computer application throughout her youth. Perhaps she went to computer camp or enjoyed other specialized experiences related to the topic. Perhaps she attended AP courses in the field of computer sciences throughout high school. Perhaps her family owned a computer company, where she worked during the summer or a parent closely trained and assisted the child in garnering peculiar expertise concerning computer applications, etc. Additionally, is the school selected by the child known for the specific area of study? There are literally dozens of publications related to the college selection process, which include rankings determined by the New York Times and US News and World Report concerning the strength of specific academic programs at each University and College. It would be helpful for the Court to have this information as well.

(6) The financial resources of both parents;

This is somewhat redundant of the fourth factor. In reviewing the decisions predating Newburgh, this is not listed as a separate factor. It is somewhat difficult to determine the intent of the Supreme Court in annunciating this item separately, other than differentiating between discretionary income and assets, and intending that this factor consider assets alone.

Use of IRA's - There is no 10% penalty for withdrawals from IRAs prior to age 59-1/2 for qualified higher education expenses (including those related to graduate level courses at a post-secondary educational institution) for the taxpayer, the taxpayer's spouse, child or grandchild of the taxpayer. Unfortunately, former spouses are not included in this category. Of course, such withdrawals will be subject to regular federal income tax. Qualified

expenses include tuition, fees, books, supplies, room and board and equipment required for enrollment or attendance at an eligible education institution.

It should be noted that there is no penalty-free provision for the pre-age 59-1/2 withdrawal from a qualified plan. Thus it may benefit the taxpayer to roll over part of that which is in a plan, if possible, into an IRA to take advantage of the education early withdrawal provision. I.R.C. Section 529 (e) (3).

This provision of the IRC empowers a Court to utilize monies in an IRA to fund qualified college expenses, assuming the circumstances warrant such an approach.

(7) The commitment to and aptitude of the child for the requested education;

These concepts are lifted directly from Kaliff and Ross. As to commitment, in the Ross decision, Judge Conn found particularly impressive the efforts of the child to work during the summer and weekends as a waitress for purposes of banking money to help support her education. She was also making a fairly long commute to the campus and was strongly committed to her studies.

The issue of aptitude has been raised in several of the above described leading cases. In this regard, a copy of the high school academic transcript, any letters of recommendation and the standardized college application form will prove useful to the Court.

(8) The financial resources of the child, including assets owned individually or held in custodianship or trust;

Are there any 529 accounts, savings bonds, college savings or trusts? Any statements of these accounts, copies of the trusts or other pertinent information should be supplied to the Court as part of the application. The asset disclosure sheet from the case information statement form can be completed separately for the child.

(9) The ability of the child to earn income during the school year or on vacation;

During the academic year, most colleges participate in the federally sponsored college work study program. Students normally work a limited number of hours during the week while the school is in session, on campus, which tends to insure that the job will not interfere with academic studies. Some off campus opportunities are available to work for non-profits. Average earnings are usually $1,500.00 per year. Assuming the child participates during the academic year, they then receive preference during the summer for full forty hour placements. Although there is a need factor, any student who demonstrates financial need after consideration of loans, scholarships etc., should be eligible for the program.

When performing financial aid calculations, work study is not factored into the analysis of the expected family contribution to all college expenses. Students typically use these monies to buy books, for laundry, food etc.

Absent a medical situation, disability or other unusual circumstance, most courts take very seriously this Newburgh factor and direct the children to contribute monies to their education. It is not unusual for a Court to impute $2,000.00 to $3,000.00 during the summer as the children's contribution to the expected family contribution. This figure is simply extrapolated from the minimum wage, assuming full time employment during the course of twelve weeks. Even the FAFSA analysis imputes to each student an annual contribution of a similar amount.

(10) The availability of financial aid in the form of college grants or loans;

Pell Grants are available through the Federal government and are designed to help low income students, with grants ranging from $400.00 to $4,050.00.

The Federal Perkins loan program offers students long term, low interest loans. The maximum amount is $4,000.00 per year for undergraduates and $6,000.00 per year for graduate students.

The Federal Stafford student loan program is also a long term, low interest loan, permitting students to borrow between $2,625.00 to $5,500.00 per year.

The most substantial form of subsidization available to any student are scholarships offered by the individual universities. In order to attract students, colleges and universities provide scholarship awards to students, representing outright "gifts" dollar for dollar, against college expenses.

There are literally dozens of other forms of subsidization available for students.

When considering this factor, the Court is typically concerned with why a student chooses one college over the other. In this regard, if college A and college B maintain a similar rank and reputation, yet college A offers a higher level of subsidization, how should the court react to a decision by a student to attend the school with lower subsidization and hence a greater expected family contribution?

(11) The child's relationship to the paying parent, including mutual affection and shared goals as well as responsiveness to parental advise and guidance;

This factor is directly from the Ross opinion, and a review of Judge Conn's analysis is helpful.

"It is conceivable that, in a given situation, a child's arbitrary refusal to respond to the sincere visitation efforts of a noncustodial parent might significantly affect the outcome of the question of continued support".

An absence of relationship is one of the most frequently used defenses to college

contribution applications. This factor is widely misunderstood. A close review of the decisions discussing this issue involve extreme or severe situations, not often seen in the typical college expense motion. Accordingly, this "defense" should be used most judiciously.

The recent decision of Gac v. Gac also contains an extensive discussion of this particular factor as it relates to an application for retroactive contribution to college expenses.

(12) The relationship of the education requested to any prior training and to the overall long-range goals of the child.

See discussion above pursuant to the fifth factor.

Other Factors

Judge Krafte created an additional consideration in Sakovits, to wit, " The reasonableness of time between graduation from high school and the time the child desires to attend college". As a review of all of the above cited cases indicates, the Judges or Justices consistently comment that it is increasingly common for children to wait a year or even slightly longer to attend college after graduating from high school. This appears to be very common. In the majority of the above cited cases, where a child waited three or more years to attend college, the Courts almost universally refused to require the payment of support.

Naturally, if there is a disability or other unusual circumstance that delays matriculation, the Court will consider the impact on any delay.

In addition, the certification should include testimony as to the following matters;

1. Disclosure of all colleges considered, the nature and extent

of investigation into each college, a presentation in summary form of all pertinent information related to the college including curriculum, expenses and the availability of student aid and any legacy considerations, as to each college. See factor (10) above.

2. Discussion as to why a particular college was chosen over other educational institutions. See factor (10) above.

3. Attempts during High School to involve the noncustodial parent by the child and the custodial parent. See factor (11) above.

Exhibits

By way of exhibits, the following should be provided to the court;

1. Copy of final judgment and property settlement agreement:

2. Copies of any relevant post judgment orders:

3. An updated case information statement with all appropriate attachments:

4. Copies of the FAFSA form:

5. Copies of any applications made for student aid:

6. Financial aid award letter from college:

7. Copy of tuition bill or statement:

8. Letters of acceptance or rejection from each college:

9. Statement of any 529 plans, college savings, trusts (contingent or otherwise) established specifically for college expenses.

10. Standard college application forms with letter of recommendation:

11. High School academic transcript:

12. Proof of past, current and anticipated income and assets of the college bound child.

Child Support

In the event a child is living at home while attending college, recent revisions to the Rules permit the court to utilize the child support guidelines in light of the fact that no room and board expenses are included in relation to attendance at the college or university. Accordingly, counsel should also submit proposed child support guideline worksheets.

If the student will be living away at school, it is reasonable to anticipate the need to adjust the current child support order to accommodate this change. Volunteer the proposal which accounts for this reasonable adjustment, knowing certain expenses (e.g., clothing, toiletries, transportation) remain as needs of the child. Several well published peer-reviewed studies conclude a student needs approximately $200.00 to $250.00 per month for these expenses. Note also that the cost for auto insurance may be reduced if the insurance carrier is informed that the child is a full-time college student, using the automobile on a less frequent basis.

Miscellaneous Issues

Release instruments- It is entirely appropriate for the court to direct the child to execute a release instrument to permit the parents to communicate directly with the school concerning academic status, disciplinary status, college expenses, student aid and other information pertaining to college obligations.

Impact on Dependency Deductions - Gwodz v. Gwodz, 234 N.J. Super 56 (App. Div. 1989) permits trial Courts to allocate the dependency exemption. Under IRC Section 152, a custodial parent is entitled to the exemption, now worth $3,200.00, if (1) The child receives over half of his support during the calendar year from his parents and (2) resides at least one-half of the year with a parent asserting the claim.

Irrespective of any previous allocation in a final judgment, property settlement agreement or prior order, when reviewing the college expense issue, under Gwodz, the Court may reconsider the dependency exemption allocation. This can provide an important tax benefit to a parent required to make significant contributions to college expenses.