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CHAIR'S COLUMN

Honoring a Memory and Looking to the Future

by Thomas Snyder

The many contributions made to the practice of family law by the Honorable Conrad W. Krafte have insprired many of us over the years and have particularly impacted me as I begin my year as chair of the Family Law Section of the New Jersey State Bar Association. Judge Krafte passed away on April 28th of this year. Over his 25 distinguished years on the bench, he authored 54 published opinions. Judge Krafte's commitment to improving the quality of family law in the state of New Jersey is reflected through his legendary opinions.

No other superior court judge in the New Jersey so dramatically affected the lexicon of family law as did Judge Krafte.... What was insightful and thoughtful legal commentary by Judge Krafte nearly 20 years ago has withstood the test of time.

No other superior court judge in New Jersey so dramatically affected the lexicon of family law as did Judge Krafte. Legal terminology such as anti-*Lepis* clause, *Harrington* hearing, passive immune assets and imputation of income are family part nomenclature that have their origin in his court decisions. What was insightful and thoughtful legal commentary by Judge Krafte nearly 20 years ago has withstood the test of time.

One of Judge Krafte's most significant opinions is *Scavone v. Scavone*.[1] In *Scavone*, Judge Krafte delineates the intricacies of passive and active assets in relation to equitable distribution. There is no better road map than *Scavone* for lawyers or judges to navigate the meaning, valuation, and distribution of passive and active assets; or to properly advise clients and correctly render verdicts in contested matters.

Judge Krafte was the first judge to articulate the requirement that, in order to succeed on a claim for rehabilitative alimony, a litigant must provide the

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IMMEDIATE PAST CHAIR'S COLUMN

The Year Concludes, but the Journey Continues

by Charles F. Vuotto Jr.

As my year as chair comes to an end, I wish to take this time to thank everyone who helped make this year a success, and consider what has been accomplished to further the mission of the section. As detailed in our recently updated bylaws, our mission is to serve as the statewide leader in the field of family law, protect the family (with special emphasis on the impact of divorce on children) and serve our constituents. We

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Chair's Column

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court with a specific plan of rehabilitation. Judge Krafte's insight regarding the necessity of a rehabilitative alimony plan is reflected in his decision in *Finelli v. Finelli*.[2] He was prescient:The requirement of a rehabilitative plan was consequently codified in N.J.S.A. 2A:34-23d.

Judge Krafte's cutting-edge decisions also include the case of *Finckin v. Finckin*,[3] one of the first published court decisions in the state of New Jersey to utilize the phrase "anti-*Lepis*." This term and principle is now commonplace in the practice of family law. Judge Krafte's conclusion in *Finckin*—that anti-*Lepis* provisions within a property settlement agreement were not violative of public policy—was ultimately adopted by the Appellate Division in *Morris v. Morris*.[4]

Another example of Judge Krafte's intuitiveness in addressing family law cases is his decision in *Davidson v. Davidson*.[5] In *Davidson*, Judge Krafte addressed (by way of first impression) the enforceability of oral agreements arising out of matrimonial litigation. His decision in *Davidson* led the way for the principles reflected in *Harrington v. Harrington*.[6]

In *Arribi v. Arribi*,[7] Judge Krafte tackled the implications of modification of support as a result of unemployment. He articulated the principles of imputation of income, and specifically that:

> A payor spouse may not decide to accept employment only in his preferred field after becoming unemployed and thereby remain unable to pay child support.[8]

Today, as family lawyers are challenged with the implications of the economic downturn and resulting applications for modification of support, the principles set forth in *Arribi* provide us all with insight and guidance in resolving these difficult issues.

Judge Krafte's commitment to the quality of the practice of family law by qualitative and quantitative analysis has provided both the bench and the bar a legacy.The case law he developed over his 25-year tenure guides us in addressing the pressing family law issues of today and in the future.

As Judge Krafte has, so too has the Family Law Section of the New Jersey State Bar Association committed itself to contributing to the development of case law that is substantively sound and rationally persuasive. Our state bar association

has shown its commitment to participating in the resolution of cutting-edge legal issues through the submission of *amicus curiae* briefs in a variety of legal cases.

In the arena of family law, the Family Law Section has prepared *amicus curiae* briefs that have been submitted by the state bar association to the Supreme Court in family law cases including but not limited to, *Fawzy*, *Gac*, *Mani*, *Weishaus*, and *Lewis v. Harris*.

In *Fawzy v. Fawzy*,[9] the *amicus* brief submitted by the state bar, and prepared by the Family Law Section, addressed the circumstances under which child custody cases could properly be arbitrated.

In *Gac v. Gac*,[10] the Family Law Section was responsible for drafting the *amicus curiae* brief the state bar submitted to the Supreme Court addressing the constitutionality of a parent's obligation to contribute to a dependent child's college education expenses.

In *Mani v. Mani*,[11] the state bar's *amicus* brief prepared by the Family Law Section addressed the implications of marital fault in the context of spousal support.

In *Weishaus v. Weishaus*,[12] the Family Law Section prepared the brief submitted, *amicus curie*, by the state bar, where the terms and conditions for memorializing marital standard of living for post-judgment applications was at issue.

The Family Law Section has also contributed, as a participant with other sections of the state bar association, in addressing issues that go beyond the customary scope of family part cases.

In *Lewis v. Harris*,[13] the Family Law Section contributed to the drafting of the *amicus curiae* brief submitted by the state bar addressing issues of disparity in treatment between same-sex couples in domestic partnership relationships and opposite-sex couples who are afforded the status of married.

In *Fischer v. Fischer*,[14] the section contributed, along with other sections of the state bar, to the brief submitted to the Appellate Division addressing the extent to which a court can exercise control over earned attorney fees during the course of litigation.

I urge all members of the Family Law Section and the bar at large to keep in mind the exceptional efforts we have made in submitting *amicus curiae* briefs in addressing emerging legal issues and in refining existing case law. We hope that all members of the bar association bring to our attention any significant and unique legal issues that could impact the practice of law and/or have major public policy implications. By so doing, you, as members of the state bar, are providing the association the means by which we can continue to participate in the creation of a legacy, such as that created by Judge Krafte, namely, the establishment and perpetuation of legal principles which rationally and fairly serve the citizens of the state of New Jersey. ■

ENDNOTES

1. 230 N.J. Super. 482 (Ch. Div. 1988).
2. 263 N.J. Super. 403 (Ch. Div. 1992).
3. 240 N.J. Super. 204 (Ch. Div. 1990).
4. 263 N.J. Super. 237 (App. Div. 1993).
5. 194 N.J. Super. 547 (Ch. Div. 1984).
6. 281 N.J. Super. 39 (App. Div.) *cert. denied*, 142 N.J. 455 (1995).
7. 186 N.J. Super. 116 (Ch. Div. 1982).
8. *Id*, at 118.
9. 199 N.J. 456 (2009).
10. 186 N.J. 535 (2006).
11. 183 N.J. 70 (2005).
12. 180 N.J. 131 (2004).
13. 188 N.J. 415 (2006).
14. 375 N.J. Super. 278 (App. Div. 2005).

Past Chair's Column

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must be sensitive to the needs of children and protect children from the negative impact of divorce or other involvement in the judicial system. For this reason, I created the Children's Rights Committee, which will continue its work in years to come.

We must continue to promote and protect the concept of 'family' in all of its various forms. We must remember to provide an open forum to all members of the bar for the discussion and resolution of family law issues. The section should serve as the pre-eminent resource to judicial, civic, governmental and public organizations in matters affecting family law. Our duty is to serve, educate and enhance the skills of our members in various ways, including the publication of the *New Jersey Family Lawyer* and involvement in continuing legal education programs. As the new editor-in-chief of the *New Jersey Family Lawyer*, I am dedicated to furthering these particular goals now that my year as chair has concluded.

The section's obligations also include the review of legislative and administrative proposals, rules and statutory changes, and, where appropriate, initiation of legislation and legal reforms in the areas of family law.

We must not forget to do all that we can to improve public and professional understanding of family law issues. As our society changes, it is incumbent upon all attorneys, but most importantly the family bench and bar, to increase the diversity and participation of our membership and to cultivate camaraderie among family lawyers. It furthers

everyone's best interest to improve professionalism of all participants in the administration of family law.

I have always believed that the adversarial process is very often ill-equipped to deal with the sensitive issues involved in family law. As such, we must always remember to promote and develop appropriate alternative dispute resolution approaches to family law issues. This is one reason I created the Arbitration Committee.

We cannot forget our relationship with the bench. Part of our charge is to encourage the NJSBA to engage in dialogue with the Judiciary and/or the Administrative Office of the Courts with regard to family law issues.

I am pleased to report that in my year as chair the section has accomplished much to further the goals of our mission statement. Certainly, these accomplishments were not achieved without the assistance of many members of the executive committee, and some who were not members of the committee.

We have new bylaws, which incorporate a mission statement I drafted for the section. The new bylaws were adopted by the New Jersey State Bar Association's Board of Trustees on Sept. 18, 2009. They were circulated to the entire Family Law Section and unanimously approved. Although many were involved in this process, I would like to make special note of Jane Altman, who was dedicated to making sure the process concluded as the section intended.

This year I created the Arbitration Statute Committee, co-chaired by Larry Cutler and Noel Tonneman. The committee worked hard to issue a report containing a comprehensive Family Law Arbitration Statute, which was approved by the executive committee and was submitted to the NJSBA Board of Trustees for approval. Our Arbitration Statute Committee is now working with the Alternate Dispute Resolution Section to address their comments and develop a unified position to be adopted by the New Jersey State Bar Association. I thank Noel, Larry and the rest of the committee for their hard work.

The Palimony Statute Committee worked tirelessly to develop a free-standing palimony statute to combat the proposed amendment to the Statute of Frauds, which effectively eliminated palimony in the state of New Jersey. The Palimony Statute Committee, and all members of the executive committee, should be commended for the hard work put into this project. A special thanks goes out to Cheryl Connors and Rebecka Whitmarsh, who were given the arduous task of doing the lion's share of the initial research and writing with regard to the report and proposed statute. The section's report and proposed statute were ultimately adopted by the executive committee and the trustees of the state bar. Although the amendment to the Statute of Frauds passed on Jan. 18, 2010, it was not without a significant battle on our behalf. I am sure that Tom Snyder, as our new chair, will continue the fight in the year to come.

I am pleased to report that in my year as chair the section has accomplished much to further the goals of our mission statement. Certainly, these accomplishments were not achieved without the assistance of many members of the executive committee, and some who were not members of the committee.

We continued our outreach efforts this year in order to increase the involvement of local bars, expand our diversity, seek the participation of others in our membership and cultivate camaraderie among family lawyers. Part of this process included the South Jersey Meet and Greet hosted by Kat Laughlin on June 25, 2009, and the Central Jersey Meet and Greet hosted by Brian Schwartz on July 15, 2009. Organizing these events is time consuming, and Kat and Brian should be commended for their work on these gatherings.

Andrea White O'Brien did a phenomenal job in hosting the "Hot Tips in Family Law" on Oct. 3, 2009. Andrea organized 42 speakers on as many topics, who presented to 106 registrants. The 2009 "Hot Tips in Family Law" continued a long tradition of successful Institute for Continuing Legal Education-sponsored programming for lawyers.

The Family Law Section made an incredible showing at the state bar's Mid-Year Meeting in San Francisco, which occurred in November of last year at the St. Regis Hotel. Our immediate past president, Allen Etish, should be commended for an entertaining, informative and overall enjoyable Mid-Year Meeting.

The holiday party at the PNC Art Center, organized by Lizanne Ceconi, was a huge success. I again congratulate the Honorable Melvin S. Whitken, JSC (Ret.) for his receipt of the Sepentelli Award at our holiday party. It was and is much deserved. I wish to thank Kimber Gallo and Megan Murray, co-chairs of the section's Young Lawyers Subcommittee, and its members, for their excellent work on the silent auction, which raised $12,665 for court-appointed special advocates.

We had record-breaking attendance at the 2010 Family Law Symposium, hosted by Frank Louis on Jan. 29–30, 2010. At total of 150 attended the Friday night program and 685 attended the Saturday program. The 2010 Saturday program was the largest ICLE-sponsored seminar in the history of the state

of New Jersey!

The 2010 Annual Family Law Section Retreat in Aruba was a blast. Approximately 190 people attended. It says something about our section that so many would travel so far to enjoy each other's company in this unsteady economy. I wish to thank John Paone for MCing the karaoke at the welcome reception. We all enjoyed the sunset dinner at La Tratorria near the California Lighthouse. I wish to applaud all of the players who participated in the 3rd annual Ceconi Volley Ball Tournament hosted by Ceconi & Cheifetz (congratulations to Team Monmouth). Friday was capped with a great beach party and fireworks.

There are many people to thank, and we don't have space in this publication for me to thank everyone, but I would be remiss if I were not to expressly mention Kimber and Megan for their great work with the seminars and the Aruba Bowl; Sheryl Seiden for organizing the give-aways, Jerry D'Aniello for the excursions; Jeralyn Lawrence for the program booklet and, *last* but not least, Lizanne Ceconi for her almost daily efforts in all aspects of the trip. Thank you all!

This year represents one of the heaviest years for legislation in recent memory. Without the extreme dedication and hard work of our legislative co-chairs, Amanda S. Trigg and Jeralyn L. Lawrence, the executive committee would not have been able to handle the high volume of proposed new laws. Their work and organized approach has set the benchmark for future legislative co-chairs.

The Young Lawyers Subcommittee of the Family Law Section is our future. I applaud all of the working members of the subcommittee, with special attention to Kimber and Megan. I have rarely seen two attorneys work so hard and so well. If my year is viewed as a success, I can safely say that a large amount of the credit goes to Kimber and Megan.

We honored Mike Stanton as this year's Saul Tischler Award recipient. The Saul Tischler Award is an annual honor conferred upon an individual who has made an outstanding contribution to family law in the state of New Jersey. It is the highest honor the Family Law Section gives to a matrimonial attorney. The recipient of the award should be a role model for all matrimonial practitioners. Mike is that role model. First, he satisfies all of the criteria in spades. He has advanced the development of family law in this state by publishing articles, participating in seminars and serving the community. He has promoted the goals of our profession by contributing his time to the Family Law Section as a member and as its chair. He continues to serve the New Jersey State Bar Association as a trustee. He has participated on committees and volunteered his time as an early settlement panelist. He is actively involved in various family law activities at the local and state bar levels.

I will never forget this year, and the people I have come to know in the bar community. I wish to thank all of the members of the section, the executive committee and my fellow officers, who have supported and assisted me throughout this year.

In my opinion, however, Mike goes beyond the standards of the Tischler Award. There is more to being an exemplary family law attorney than simply writing, speaking and bar participation. Mike is a genuinely good person. You know this if you have any dealings with him, either as an adversary or in the course of his many bar activities. He truly cares. Further, he is able to advocate strenuously for his clients while maintaining a cordial, collegial and professional demeanor. These qualities raise Mike to a level that should be emulated by all matrimonial attorneys. Congratulations Mike!

It was an honor to attend the NJSBA Annual Meeting in May of this year and participate in the swearing in of our new chair, Thomas J. Snyder, of Einhorn, Harris, Ascher, Barbarito, & Frost, PC. Tom has already demonstrated his leadership qualities in the face of difficult decisions. I have no doubt he will continue to lead the section in accordance with its bylaws and most particularly, our new mission statement.

I will never forget this year, and the people I have come to know in the bar community. I wish to thank all of the members of the section, the executive committee and my fellow officers, who have supported and assisted me throughout this year. I also must thank my assistant, Monica Pfeiffer. Without her, I could not have gotten through this year. When I missed something (and I did from time to time) she would catch it. She kept me organized and on track. Thank you, Monica. I wish to especially thank the immediate past-chairs, Ed O'Donnell and Lizanne Ceconi. Without their sage and almost daily advice, this year would have been much more difficult and less productive (including their calming me down on more than one occasion). Last, but surely not least, I must thank my wife, Rosemary. She was there for me at every stage with support, advice and every kind of assistance. Thanks, Cookie.

It has been an honor and privilege to serve as chair of the Family Law Section of the New Jersey State Bar Association. I thank the entire membership for the privilege to serve in this capacity, and hope to continue such service in my role as editor-in-chief of this incredible publication. ■

Meet the Officers

Thomas J. Snyder (Chair) is a partner with the law firm of Einhorn, Harris, Ascher, Barbarito, Frost & Ironson, and devotes his practice exclusively to family law matters.

As a member of the New Jersey State Bar Association (NJSBA), he has contributed to the NJSBA's *amicus curie* brief submitted in the matter of *Lewis v. Harris,* 185 N.J. 415. As a former legislative chair for the Family Law Section, he has testified on behalf of the NJSBA before state legislative subcommittees involving open adoption. For his lobbying efforts, he received the state bar's annual Distinguished Legislation Award for 2006. He has litigated the following reported cases: *Anyanwu v. Anyanwu,* 339 N.J. Super. 278 (App. Div. 2001) and *Steneken v. Steneken,* 367 N.J. Super. 427 (App. Div. 2004) trial level, unreported.

Mr. Snyder has lectured on family law matters on behalf of the NJSBA, the New Jersey State Bar Foundation and the New Jersey Institute for Continuing Legal Education (ICLE). He is a member of the Association of Trial Lawyers of America and a graduate of the National Institute of Trial Advocacy. Mr. Snyder graduated from Seton Hall School of Law and served as judicial law clerk for the Honorable Peter B. Cooper, Superior Court of New Jersey, Essex County.

Andrea White O'Brien (Chair Elect) is a partner in the family law department of Lomurro, Davison, Eastman & Munoz, located in Freehold. Ms. O'Brien has been certified by the Supreme Court of New Jersey as a matrimonial law attorney. She was one of the 2006 recipients of the Women of Achievement Award from the Women Lawyers in Monmouth, is an associate managing editor for the *New Jersey Family Lawyer,* and is qualified pursuant to Rule 1:40 to mediate family law cases.

Ms. O'Brien is an officer in the New Jersey State Bar Association's Family Law Section and served three terms as the co-chair of the Monmouth Bar Family Law Committee. In addition, she is the immediate past chair of the New Jersey State Bar Association's Certified Attorneys Section. Ms. O'Brien is also a member of the Association of Trial Lawyers of America—New Jersey Chapter, the Monmouth Bar Association, the Ocean County Bar Association, the Women Lawyers of Monmouth County, and the Jersey Shore Collaborative Law Group. In addition, she serves as a panelist in the Monmouth County Early Settlement Program and lectures on family law issues.

Ms. O'Brien earned her B.A. from Villanova University and her J.D.from Brooklyn Law School. She served as a judicial law clerk for the Honorable Clarkson S. Fisher Jr.

Patrick Judge Jr. (First Vice Chair) is a shareholder in the family law department of Archer & Greiner, P.C., located in Haddonfield. Mr. Judge is a senior editor for the *New Jersey Family Lawyer.* He is a former member of the New Jersey Supreme Court Committee on the Unauthorized Practice of Law and the District IV Ethics Committee for Camden and Gloucester counties. In addition, Mr. Judge serves as an early settlement panelist in Burlington, Camden and Gloucester counties and lectures on family law issues. He also serves regularly as a blue ribbon panelist and is the author of several articles that have been published in the *New Jersey Family Lawyer.*

Mr. Judge earned his B.A. from Allentown College of St. Francis de Sales, where he graduated *cum laude,* and his J.D. from Widener University School of Law, where he also graduated *cum laude.* He served as judicial law clerk for the Hon. Donald P. Gaydos, in Burlington County, family part.

Brian M. Schwartz (Second Vice Chair) is a partner in Ceconi & Cheifetz, LLC, in Summit. Mr. Schwartz is the executive editor of the *New Jersey Family Lawyer,* and has authored various articles for the Institute for Continuing Legal Education (ICLE), the *New Jersey Family Lawyer,* the New Jersey Association for Justice (NJAJ), New Jersey Society of Certified Public Accountants (NJSCPA) and *Sidebar*. He has also been selected six times by ICLE to lead the skills and methods course in family law for first-year attorneys. He is a frequent moderator and lecturer for ICLE, NJAJ, the New Jersey State Bar Association, NJSCPA and local bar associations. He is a barrister of the Northern New Jersey Inn of Court–Family Law.

Mr. Schwartz received his B.A. from The George Washington University and his J.D. from the University of Pittsburgh School of Law.

Jeralyn L. Lawrence (Secretary) is a partner in the firm of Norris, McLaughlin & Marcus, P.A. She devotes her practice to matrimonial, divorce and family law, and is a trained collaborative lawyer and divorce mediator. Ms. Lawrence is a fellow of the American Academy of Matrimonial Lawyers, and has been certified by the Supreme Court of New Jersey as a matrimonial law attorney. She is an associate managing editor of the *New Jersey Family Lawyer,* and has been admitted to the rosters of mediators for economic aspects of family law cases and of custody and parenting time cases for Somerset County. She is an attorney volunteer at the Somerset County Resource Center for Women and Their Families and with the New Jersey State Bar Military Legal Assistance Program, providing *pro bono* legal assistance to New Jersey residents who have served overseas or active duty of the armed forces after Sept. 11, 2001.

Ms. Lawrence received the 2009 Kean University Distinguished Alumna award, was honored in 2008 as an outstanding woman by the Somerset County Commission on the Status of Women and in 2007 received the NJSBA's Young Lawyers Division's Professional Achievement Award and the Annual Legislative Recognition Award. She is also a graduate of the National Institute of Trial Advocacy and a member of the Central New Jersey Inns of Court.

Charles F. Vuotto Jr. (Immediate Past Chair) is a partner with the Matawan-based law firm of Tonneman, Vuotto & Enis, LLC. Mr. Vuotto is certified by the New Jersey Supreme Court as a matrimonial attorney. He is currently a member of the New Jersey Supreme Court's Family Part Practice Committee, the editor-in-chief of *New Jersey Family Lawyer,* and a co-chair of the Matrimonial Section of the New Jersey Association for Justice. Mr. Vuotto is a member of the American, New Jersey State, Union County, Monmouth County and Middlesex County bar associations. He is also a member of the Family Law Section/Committee of the American, State, Union County and Middlesex County bar associations. and a delegate to the NJSBA General Council on behalf of the Family Law Section. Mr. Vuotto is also a fellow in Litigation Counsel of America.

Mr. Vuotto has lectured to family part judges at Judicial College, and on behalf of the Institute for Continuing Legal Education, the New Jersey State Bar Foundation, the American Institute of Certified Public Accountants, and the New Jersey Society of CPAs. He has also authored the brief in support of the NJSBA's motion for leave to appear as *amicus curiae* in the case of *Brown v. Brown*, 348 N.J. Super. 466 (App. Div. 2002). ■

I Hate You, Dad! Now, Where's My Tuition Check?

by Allison C. Williams

New Jersey is one of the few states in the country to allow courts to impose an obligation upon divorced parents to contribute toward their children's college expenses. This minority view is often attributed to the seminal case of *Newburgh v. Arrigo*[1]; however, long before *Newburgh*, our courts had adopted the view that parents may be required to contribute financially to the cost of a college education for a child who had reached majority.[2] Pre-*Newburgh*, trial courts had even expanded the duty to contribute toward post-majority education to include a duty, in certain circumstances, to contribute toward graduate school expenses.[3]

Ross established a threshold inquiry for trial courts to consider before imposition of an obligation: Had there not been a divorce, would the parties, while living together, have contributed to the education expense?[4] However, this inquiry is no longer a 'threshold,' but rather is one of many factors to be considered by the trial court.[5]

Beyond the basic knowledge that trial courts had the authority to order a party to contribute to the cost of college, little guidance existed in case law regarding when, and under what circumstances, trial courts could make such an order. *Newburgh* provided this guidance, establishing the numerous factors the court *must* consider when establishing parents' obligations to contribute toward the cost of their children's college education. Those factors include:

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.

Not having a relationship with the child seeking contribution may have little success of defeating the request for college contribution; however, when coupled with the child's or custodial parent's failure to communicate with the estranged parent, trial courts have relieved noncustodial parents of the duty to contribute.

The trend in requiring noncustodial parents to contribute to the college education of their children has been judicially recognized.[6] *Newburgh* factors four and six (*i.e.*, the ability of the parent to pay and the financial resources of both parents) tend to inundate the analysis employed by many courts, in large part because many parents have already agreed in their matrimonial settlement agreements to provide a college education for their children, leaving only the question of how the expenses should be allocated between them. Even where an agreement has been made to contribute, however, the trial court is not bound to enforce the agreement if "circumstances have changed in

such a way that requiring [a parent] to pay for college would no longer be equitable and fair."[7]

Thus, the court's duty to perform a full *Newburgh* analysis is not obviated by the existence of a matrimonial settlement agreement. Further, in performing the *Newburgh* analysis, consideration of certain factors to the exclusion of others is impermissible under our case law.[8]

One factor that has had little success in defeating an application for college contribution has been the absence of relationship between the noncustodial parent and the child. Not having a relationship with the child seeking contribution may have little success of defeating the request for college contribution; however, when coupled with the child's or custodial parent's failure to communicate with the estranged parent, trial courts have relieved noncustodial parents of the duty to contribute.

The first significant published decision to address this *Newburgh* factor was *Moss v. Nedas*, *supra*.[9] In *Moss*, the trial court conducted a plenary hearing and ordered the noncustodial father to contribute toward his daughter Leigh's college expenses.[10] The father never objected to paying his fair share of the college expenses, but opposed contributing to the cost of Sara Lawrence College, which he had advised his daughter was too expensive.[11] At the time of the plenary hearing, the trial court noted that: "Leigh's relationship to her father [appeared to be] one of affection, care, shared goals as to her education, although it is not a close and intense relationship."[12]

After the plenary hearing, Leigh and her mother made numerous decisions about her education, including Leigh's transfer to a different college, without consulting or involving the father.[13] This ultimately resulted in additional litigation, leading the trial court to enter a very specific order compelling communication between the mother or child and the father regarding college issues.[14] Given the first failure to communicate, the trial court reduced the father's obligation.[15] The practice of not involving the father continued, causing further litigation and eventually leading the trial court to terminate the father's obligation to contribute.[16]

In upholding the trial court's ruling, the Appellate Division noted the trial court's finding that the noncustodial father was "viewed solely as a 'wallet' in regard to his obligation for college contribution."[17] It was not only the absence of relationship between Leigh and her father, but her refusal to communicate with him and involve him in the process that ultimately led the trial court to eliminate the obligation. The interplay between the absence of relationship between the noncustodial parent and child and the lack of communication are routinely addressed in tandem, with the former often causing the latter. This interplay was addressed by the New Jersey Supreme Court in *Gac*, *supra*.[18]

Unlike the noncustodial father in *Moss*, the noncustodial father in *Gac* had absolutely no relationship and no parenting time with his daughter, Alyssa, from the time he and Alyssa's mother divorced. Alyssa remained angry with her father following the divorce due to his acts of domestic violence during the marriage, and she rebuffed all efforts he made to remediate the relationship.[19] The father was never consulted regarding Alyssa's choice of college, and only inadvertently learned that she was even attending college.[20] Upon Alyssa's graduation, the father filed a motion to emancipate her, which prompted Alyssa's mother for the first time to seek retroactive college contribution.[21] The trial court ordered the father to contribute, and the Appellate Division affirmed.

The Supreme Court reversed the Appellate Division and vacated the father's duty to contribute. In so doing, the Court reiterated the Appellate Division's interpretation of the *Moss* decision:

> We do not read *Moss* as holding that a child's rejection of a parent's attempt to establish a mutually affectionate relationship invariably eradicates the parent's obligation to contribute to the child's college education. In this case, for example, a judge could reasonably find from the evidence that defendant's abusive conduct during the marriage so traumatized the children as to render nugatory any real possibility of a rapprochement. In that event, it would not be reasonable to penalize Alyssa for the defendant's misconduct. Nor would it be reasonable to reward defendant by removing his financial obligation to contribute to his daughter's college costs.[22]

The *Gac* Court was principally concerned that the father was not contacted for contribution until after the college expenses had been incurred, thereby depriving him of any possibility to plan his finances. While acknowledging that "[t]here are indeed circumstances where a child's conduct may make the enforcement of the right to contribution inequitable," this was not the basis for alleviating *this father's* obligation since it was "claimed that it was [the father] himself who was the architect of his own misfortune." The absence of communication, rather than the estranged relationship, ultimately led the Court to extinguish the obligation:

> As soon as practical, the parent or child should communicate with the other parent concerning the many issues inherent in selecting a college. At a minimum, a parent or child seeking contribution should initiate the application to the court before the expenses are incurred. The failure to do so will weigh heavily against the grant of a future application.[23]

A series of unreported decisions have addressed the extent to which an estranged relationship bears upon the duty to contribute toward college expenses, following the principles delineated in *Gac*. In

Bullwinkel v. Bullwinkel,[24] a noncustodial father, following a series of unsuccessful supervised visits with his son, terminated his efforts to exercise parenting time. In opposing the custodial mother's eventual request for college contribution, the father cited *Moss* and *Gac* for the proposition that his non-existent relationship with his son obviated his duty to contribute toward his college expenses.

The Appellate Division disagreed, citing *Gac* for the opposite view:

> [c]ontrary to [the father's] position, a relationship between a non-custodial parent and his child is not a prerequisite for the custodial parent to see the non-custodial parent's financial assistance to defray college expenses.[25]

In *Winans v. Winans*,[26] the noncustodial father's relationship with his son became strained once the father remarried. By the time college contribution was sought, the relationship was hostile and acrimonious. In affirming the trial court's imposition of an obligation upon the father, the Appellate Division noted that the *Gac* decision was not based *solely* upon the relationship between parent and child, but upon the specific actions of the child and the custodial parent in ignoring the father in the choice and cost of college and attempting to simply bill him after the fact. The appellate panel further explained that the outcome reached in *Moss* relied heavily upon the child and the custodial parent's repeated violations of court orders explicitly requiring communication with the noncustodial parent. Again, the duty to communicate with the noncustodial parent regarding college carried more significance than the status of the parent-child relationship.

In *Anderson v. Anderson*,[27] although the trial court strongly criticized the noncustodial father for "aggressive litigation," which it found to have caused the rift between father and daughter, the Appellate Division reversed and remanded where the record below was inadequate for the trial court to make the findings it made regarding the noncustodial father's relationship with his daughter. Without a plenary hearing, the trial court found that "any existing strain on the relationship between [father] and [daughter] resulted from the [father's] engagement in aggressive litigation and resistance in supporting [his daughter's] education."[28]

Seeming somewhat impervious to the policy considerations implicated by the trial court's apparent punishment of a litigant for pursuing arguments allowed by existing case law (namely, the estranged relationship), the Appellate Division required that a plenary hearing be conducted to address the scope and cause of the estrangement and its impact upon any obligation of the father to contribute.[29]

This decision is harmonious with the recurring theme throughout cases addressing the impact of alienated relationships upon the parent's duty to contribute. Plainly stated, a parent found to have caused the rift in the parent-child relationship, as in *Gac*, is not likely to prevail on an argument that the resulting estrangement nullifies the duty to contribute. The strong public policy of ensuring support for academically inclined children seeking higher education permeates our jurisprudence and is difficult to overcome. However, although an estranged parent-child relationship often results in the failure to communicate so fervently denounced by *Gac*, custodial parents and children seeking contributions to college costs must be mindful that the estranged relationship is not an excuse not to communicate with the other parent. Failure to do so can negatively impact the claim.

The family law practitioner should be mindful of these principles when presenting applications to the court seeking or opposing college contribution. ■

ENDNOTES

1. 88 N.J. 529, 443 A.2d 1031 (1982).
2. *See*, *Jonitz v. Jonitz*, 25 N.J. Super. 544, 96 A.2d 782 (App. Div. 1953).
3. *See*, *Ross v. Ross*, 167 N.J. Super. 441, 400 A.2d 1233 (Ch. Div. 1979).
4. *Id*. at 445.
5. *See*, *Gac. v. Gac*, 186 N.J. 535, 897 A.2d 1018 (2006).
6. *Sakovits v. Sakovits*, 178 N.J. Super. 623, 429 A.2d 1091 (Ch. Div. 1981); *Gac*, *supra*, 186 N.J. 535 (2006).
7. *Moss v. Nedas*, 289 N.J. Super. 352, 674 A.2d 174 (App. Div. 1996), *citing Lepis v. Lepis*, 83 N.J. 139, 161 (1980).
8. *See*, *Raynor v. Raynor*, 319 N.J. Super. 591, 726 A.2d 280 (1999); *Gac, supra*, at 545.
9. 289 N.J. Super. 352 (1996).
10. *Id*. at 354.
11. *Id*.
12. *Id*. at 355.
13. *Id*.
14. *Id*.
15. *Id*. at 356.
16. *Id*. at 358.
17. *Id*. at 356.
18. 186 N.J. 535 (2006).
19. *Id*. at 538.
20. *Id*. at 539.
21. *Id*.
22. *Id*. at 544.
23. *Id*. at 546-547.
24. 2006 WL 3511432 (App. Div.).
25. *Id.* at 2.
26. 2007 WL 4270351 (App. Div.).
27. 2008 WL 4703221 (App. Div.).
28. *Id*. at 2.
29. *Id*. at 5.

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College Contribution

A Contrarian View

by Carolyn Daly

N.J.S.A. 2A:34-23, the statue governing the support of children, provides in pertinent part as follows:

> Pending any matrimonial action or action for dissolution of a civil union brought in this State or elsewhere, or after judgment of divorce or dissolution or maintenance, whether obtained in this State or elsewhere, the court *may* make such order … as to the care, custody, education and maintenance of the children, or any of them, as the circumstances of the parties and the nature of the case shall render fit, reasonable and just … (Emphasis added)

The presumed resolution in most cases is simply to have the parties share the responsibility for the child's college education in proportion to their respective incomes, often without regard for the cost and actual ability of the parties to pay. This presumption must be challenged.

Nothing in this statute mandates that a parent contribute to the college education of a child. However, having said that, you have undoubtedly encountered this misconception. Much of the case law that has developed on this issue is not particularly helpful in arguing against, at a minimum, some contribution. Yet, the fact remains that neither the current statutes, nor case law, *automatically* require a parent to contribute to, let alone pay the full costs of, a college education. When one considers that the cost of a college education can easily exceed $20,000 per year at a public four-year college and $50,000 per year at a private four-year college in New Jersey[1] many parents, particularly those who have gone through a divorce, are not in a financial position to afford this substantial expense. The presumed resolution in most cases is simply to have the parties share the responsibility for the child's college education in proportion to their respective incomes, often without regard for the cost and actual ability of the parties to pay. This presumption must be challenged.

RELEVANT LEGAL HISTORY

The earliest case law on the subject of a parent's obligation to contribute to a college education for a child held that a parent was under no duty to pay for a child's college education, regardless of their financial ability. In *Streitwolf v. Streitwolf*,[2] the wife sought an increased alimony award in order to pay for their son's law school tuition and books.[3] The trial court found in favor of this request over the father's objection that his son was not suited to law.[4] The Appellate Division reversed, holding that "[i]t is not well for the courts to assume unnecessary responsibility in the critical matter of choosing a profession (education) as to which even the persons most deeply interested and best qualified to judge are not free from liability to error, or to stand *in loco parentis* before the locus parentis has been vacated or forfeited by the death, disability, or misconduct of the rightful incumbent."[5] In other words, the parents, the individuals who are most concerned with their child's education, are the best ones to make decisions in this regard unless that right to parent has been taken away. This sentiment is echoed in *Ziesel v. Ziesel*,[6] which recognized the right of a fit parent to make a determination regarding the proper education of his child.[7] This is acknowledged again in *Straver v. Straver*,[8] *Rosenthal v. Rosenthal*,[9] and *Limpert v. Limpert*.[10]

In 1948, what is now N.J.S.A. 2A:34-23 was amended to permit a court "to make an order governing the care, custody, education or maintenance of a child." In 1949, the case of *Cohen v. Cohen*[11] was decided. Despite the specific change in the statute to permit a court to make an order regarding the education of a child, the courts were reluctant to do so. In *Cohen*, the court simply acknowledged that, "where a college education would seem normal, and where the child shows scholastic aptitude and one or other of the parents is *well able financially* to pay the expense of such an education, we have no doubt the Court *could* order the

payment."[12] Here again, the court only provided that it *could* order the payment, not that it must order the payment of college expenses by a parent.

The court, in *Cohen*, simply reaffirmed what the court held in *Caruso v. Caruso*.[13] In *Caruso*, which involved the illegitimate child of the famous Italian tenor, Enrico Caruso, the court stated: "The last duty of parents to their children is that of giving them an education *suitable to their station in life*, a duty pointed out by reason and of far the greatest importance of any."[14]

In determining the amount to be set aside for Mr. Caruso's daughter, the court, relying heavily on the fact that this was an "extraordinary" case with a wealthy parent, set aside an amount that included a portion of the child's education, noting that the necessities of a child of such a parent "extends to articles which would ordinarily be necessary and suitable in view of the rank, position, fortune, earning capacity, and mode of life of the husband."[15] However, this was the exception, at the time, based upon the child having an extremely wealthy parent.[16]

In 1952, again, despite the amendment to the statute, the Appellate Division reaffirmed the principal that, "[o]f course, the father is not required to provide his son with schooling in a private preparatory school nor with college or professional training, nor with any education beyond that which the boy might receive in the public schools of this State."[17] In *Rosenthal v. Rosenthal*, the father sought to modify the custody provisions in the decree *nisi* to permit his son to attend preparatory school over the objection of his mother.[18] The father was willing to pay for both the preparatory school and college.[19] In ordering a modification of the decree *nisi* and permitting the son to attend the preparatory school, the court held that the decree "should be modified to the extent necessary to permit the son of the parties to take advantage *of the generosity of his father*, … and afterwards to secure a college education, both of which the plaintiff father has expressed his willingness and financial ability to provide and pay for."[20]

It is against this backdrop that the first cases expanding a parent's obligation to contribute to the college education of their child commenced. In 1951, the Appellate Division, in *Malkin v. Malkin*,[21] required a parent to pay not only support for their children, but to provide "their clothing and furnish[] a college education."[22] In *Jonitz v. Jonitz*,[23] the wife appealed the dismissal of her action for separate maintenance.[24] In reviewing the case, the Appellate Division noted the trial court's failure to make any provision for support, maintenance or education of the parties' eldest son, who had turned 18.[25] The court, in considering whether to include the college expenses for the older son as part of support, determined that there was no case law or statute that prohibited a court from making an allowance for the education of a child after reviewing the circumstances of the parties and facts of the case.[26]

Ultimately, however, the court determined that the facts and circumstances of the case did not warrant a "compulsory allowance" from the father to the son for college.[27] Therefore, despite the fact the statute had been amended in 1948 to permit a court to make an order providing for the education of a child, and, after noting there was nothing prohibiting such an order, the court declined to do so.

In *Nebel v. Nebel*,[28] the chancery court was faced with a request by the mother for payment of college expenses by the father. In *Nebel*, the father was a "dentist with an established practice," "economic potential and credit standing [that] were great enough for him to obtain a purchase money mortgage," "has a…stockholder interest in a realty corporation" and was "*well able*"[29] to contribute toward higher education expenses.

The court noted that:

> …Higher education is no longer a luxury for the affluent few. It is almost an economic necessity. Opportunities for earning an adequate livelihood without college, professional or technical training are already very scarce and they are becoming scarcer.[30]

The court went on the say:

> …that 'it is not part of a father's duty to send his children to college, Irrespective (sic) of circumstances,' and that while it would be 'helpful and desirable to give children the best education procurable to equip them for the tasks and demands of life, Whether (sic) this can extend to the range of collegiate courses must necessarily depend on the income and financial capabilities of the parent.' This seems to me to be a recognition, by implication, of a father's duty to provide his children with a college education *if he can afford it*.[31]

Despite noting the necessity of a college education, the court acknowledged again that payment of a college education was limited to those "well able" to afford it, and determining the father well able to afford it, ordered the father to contribute.

Interestingly, the father requested that if there was to be a contribution to college, it be limited to that of an education at Rutgers, and not Lafayette College, as requested by the mother.[32] In evaluating this request, the court seemingly changed its position on the defendant's financial ability, finding "[h]is income and assets, though adequate, are modest by today's standards," as opposed to him being well able to contribute, and limited his contribution to the cost at Rutgers since "a high quality education is available at Rutgers."[333] In doing so, the court did not require the father to send his son to the college of the son's choosing simply because the son had the aptitude and the father had the financial ability to pay, but instead limited the father's contribution to the costs at

a comparable state college because the son could obtain a high-quality education at a lesser cost there.

In the same year as the *Nebel* decision, another court recognized that a parent may only be liable for a child's college education under "appropriate circumstances." In *Hoover v.Voigtman*,[34] the court was asked to increase child support for four children, including support for an 18-year-old college freshman.[35] The mother was not seeking a contribution for college expenses and, thus, the court made no provision for it. However, the court did note the trend that a necessary education may not be limited to just a public school or high school education.[36] Based upon the totality of the circumstances, the court held that child support could include support for a child in college.[37]

Despite this trend, however, courts have required a child to help contribute to the costs of that education.[38] In *Khalaf*, the father was a doctor who had approved of his son's college choice and encouraged his attendance at the particular school.[39] The Court held that, but for the parties' separation, the doctor would have, "without dispute as would be expected of someone of his means," paid for his son's college education.[40] However, the Court still required the son to work "during his vacation periods" to help with the costs.[41]

The courts have also denied a request for a contribution to college expenses when the child's aptitude, coupled with the incomes of the parties, prohibits it.[42] In *Limpert*, the court acknowledged the trend "towards providing greater education for children by including the expense of a college education as part of child support where the child shows scholastic aptitude and the parents are well able to afford it."[43] However, the court found that the child for which the contribution was sought, "demonstrated dubious scholastic ability and lackadaisical determination, and that neither the income of plaintiff nor defendant, nor both incomes combined, warranted the expense…in light of the availability of superior schools in this area at a far more reasonable cost."[44]

However, none of this diminishes the fact that parental obligation to pay for a child's college education disproportionately falls on divorced parents rather than married parents. This was recognized by the court in *Sakovits v. Sakovits*.[45] In attempting to address this issue, the court in *Sakovits* adopted the factors enumerated in *Ross v. Ross*,[46] and added several more to be considered when evaluating a request for a college contribution.[47] These factors were, in large part, adopted by the court in *Newburgh v.Arrigo*.[48]

In *Sakovits*, the child seeking a contribution to college had been previously declared emancipated.[49] The court had no problem determining that a child, previously emancipated, could request a contribution to college expenses from their parents, but declined to so order.[50] The court's decision was based, in large part, on the four-year hiatus between high school and the request for a college contribution by the son, coupled with the fact that the father had, in the interim, "structured his financial future" relying on what had occurred.[51] The court noted, in *dicta*, that payment for the college expenses would have included grants, loans and parental contributions, not simply payment in full by the parents.[52] Here again, the court recognized that parents do not have to pay the entirety of their child's college education, that the child has some obligation to contribute and that the parents actually have the right, at some point in time, to plan for their own financial futures.[53]

In 1982, *Newburgh*, *supra,* considered the seminal case on college contribution, was decided. The *Newburgh* Court set forth 12 factors for a court to consider when evaluating a request for a college contribution. They are as follows:

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.[54]

The Court, in *Newburgh*, *started* with the proposition that generally parents are *not* under a duty to support a child beyond majority, and then went on to recite the cases that considered the issue of payment of a college education as an element of support as a "necessary."[55] But, in recognizing the court's ability to consider a contribution to college, the Court also recognized that there was:

> …a wide variety of educational institutions that provide post-secondary education for practically everyone. *State, county and community colleges, as well as some private colleges and vocational schools provide educational opportunities at reasonable costs.* Some parents cannot pay, some can pay in part, and still others can pay the entire cost of higher education for their children. In general, financially capable parents should contribute to the higher education of children who are qualified students.[56]

The court, in *Newburgh*, clearly recognized that not every child will receive a four-year college education at a private institution, or that parents will be required to pay all costs associated with a four-year college education at a private institution. Courts have recognized that a parent does not have a duty to provide support greater than they have the ability to afford.[57]

The argument has been made that the codification of the *Newburgh* factors under N.J.S.A. 2A:34-23(a), six years after the decision, provides "an explicit statutory basis for a support order directing a parent to contribute to the education of a child;" that this codification effectively requires parents to pay for their children's college educations.[58] This is a fallacy.

The statutory support providing for a child's education (not limited to a college education) was first accomplished in the 1948 amendment of the statute, as referenced above. Therefore, as early as 1948 the courts could have ordered parents to pay the costs of a child's college education, but they often did not. It took over 30 years for the factors enumerated in *Newburgh* to be fully articulated, and for the issue of contribution to college expenses to become one that is discussed in every case involving unemancipated children. In all that time, and even to the present, a parent's financial contribution to a child's college education has never been mandated, let alone payment in full, without contribution by the child. Despite this, practitioners are routinely confronted with judges or adversaries who believe there must be a parental contribution to a child's college education, and, in fact, payment in full by the parents, often without contribution by the child. That is not supported by statutory or case law in New Jersey.

CONSTITUTIONAL LAW CONSIDERATIONS

Then there is the following issue: How is the interference by a court with a parent's decision to determine the scope of parental involvement in the payment of a college education, reconciled with the 14th Amendment of the United States Constitution, which has long recognized the sanctity of a parent's fundamental right to make decisions regarding the care, custody and control of their child?[59]

The prohibition against overruling fit parents' fundamental right to make decisions regarding their children has long been recognized by the United States Supreme Court as being protected by the due process clause of the 14th Amendment.[60]

Those who argue that there is no constitutional infringement on a parent's fundamental right to make decisions regarding the care, custody and control of their children when a court renders a decision regarding a parent's obligation to contribute to the costs of a college education for their child, argue that the courts have broad discretion to intervene and make decisions for a child under their equitable power and *parens patriae* authority.[61] In fact, in *Hoefers v. Jones*, the court stated that the protection afforded parents under the United States Constitution must yield when weighed against the court's *parens patriae* power.[62]

However, the United States Supreme Court, in *Troxel v. Granville*, emphasized that, "the liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court."[63] And, in *Watkins v. Nelson*, the court held that "exceptional circumstances" permitting a court to exercise its *parens patriae* authority in overcoming a parent's liberty interest in the care, custody and control of a child "mean more than a child's best interests."[64] These cases support the proposition that the exercise of *parens patriae* should only occur to prevent harm to a child, or when that exercise is in the child's best interests, and does not unconstitutionally infringe upon a parent's constitutional rights.

Despite this, there has been no ruling by our state courts, or the Supreme Court, regarding the constitutionality of requiring a parent, divorced or otherwise, to contribute to the expenses of a college education for their children. In fact, the New Jersey Supreme Court specifically declined to address the issue in *Gac v. Gac*.[65] Therefore, the issue of whether it is constitutional for a court to make decisions regarding a parent's obligation to contribute to the costs of a child's college education remains undecided.[66] In light of the Court's refusal to address the issue in *Gac*, it is clear that a decision on this issue will not occur unless it is the only issue before the Court within this context. Until then, attorneys should continue to raise this issue, as it is one that calls out for a reasoned decision.

CONCLUSION

It is the responsibility of the attorney to advocate strenuously against the presumption that both parents *must* contribute to all or part of their child's college or other post-secondary education expenses, and require the court to render a decision based upon the facts and the law. Critically, we must cautiously craft the language and provisions recited in settlement agreements

relating to the issue of the contribution toward college expenses.

Some issues may require varying treatments. For example, is the child a teenager, or four or five years old when the divorce occurs? Should the parents be committed to college expenses for children who are four or five years old? If the parents are committed, what safeguards should be in place in the event of a change in circumstances (*i.e.*, loss of a job, disability, retirement, remarriage, additional children etc.)? What do the parties really intend? What assumptions, if any, are they making in reaching their decision? Do they intend to pay for all of their child's college education? If, yes, is this regardless of a change in circumstances? Should money be set aside now? Do they intend for the child to have some responsibility to contribute toward their college expenses? If so, what should the child's responsibility be? These are some of the issues that must be carefully considered and reflected in the parties' settlement agreement. Once the clients have signed a settlement agreement, and committed themselves to a course of action (*i.e.*, agreeing to make a contribution at all), it is very difficult, if not almost impossible, to modify or retract that commitment later.

The recent unreported decision of *Miccinilli v. Collins*,[67] underscores the need for careful discussions with clients and drafting. In *Miccinilli*, the court, in upholding the trial court's decision not to consider the *Newburgh* factors when evaluating the parties' contribution to college expenses, stated:

> We reject defendant's view that the judge erred by not considering the twelve-factor test set forth in *Newburgh*. While *Newburgh* may factor into a determination of whether a parent should contribute to college, they do not appear to be in dispute here, and as to the quantum of such contribution, those issues have been resolved by the parties in the PSA. In determining the issues here, we hearken back to the bedrock principle that "[t]he basic contractual nature of matrimonial agreements has long been recognized[,]" *Pacifico v. Pacifico*, 190 N.J. 258, 265 (2007)(*citing Harrington v. Harrington*, 281 N.J. Super. 39, 46 (App. Div. 1995)), and "courts should enforce contracts as the parties intended." *Id.* at 266. *We find no error in the judge's not specifically addressing the Newburgh factors.*[68]

Thus, if the parties have already agreed to contribute to their children's college expenses in their settlement agreement, the court may not have to consider the *Newburgh* factors in making a determination regarding whether they contribute at all, or the amount to be contributed, unless the parties' settlement agreement sets forth how those determinations are to be made. In other words, parties would do well to guide the court in how a determination on contribution to college expenses is to be made, if unresolved at the time of the divorce, by providing in their settlement agreement, for example, that any determination on college contribution is to be made in accordance with the *Newburgh*[69] factors. Otherwise, they risk exposing themselves to unintended, potentially expensive, consequences regarding their contribution to a child's college expenses in the future. ■

ENDNOTES

1. Based upon 2010 tuition, room, board and fees at Rutgers University, The College of New Jersey, Princeton University and Drew University. *See also,* National Institute for Educational Statistics, 2007-2008 school year, Table 333.
2. 58 N.J. Eq. 570 (E.&A.1899).
3. *Id*. at 571.
4. *Id*. at 572.
5. *Id*. at 576.
6. 93 N.J. Eq. 153 (N.J. E.&A. 1921).
7. *Id*. at 157. ("A father, unless his parental authority has been taken away by the courts, is the one to decide the extent of the education of his child, beyond what is required and provided by the school system of the state, and is under no legal duty to send his son to a boarding school, no matter what his financial circumstances may be.").
8. 26 N.J. Misc. 218 (N.J. Ch. 1948).
9. 19 N.J. Super. 521 (Ch. Div. 1952).
10. 119 N.J. Super. 438, 441 (App. Div. 1972).
11. 6 N.J. Super. 26 (App. Div. 1950).
12. *Cohen* at 50. (Emphasis added.)
13. 102 N.J.Eq. 393 (N.J. Ch. 1928).
14. *Caruso* at 398-399 (Emphasis added).
15. *Caruso* at 399. *See also, Kiken v. Kiken*, 149 N.J. 441 (1997) and *Black v. Walker*, 295 N.J. Super. 244 (App. Div. 1996).
16. In a state where the median household income is $67,142, few parents can be considered extremely wealthy. 2007 United States Census Bureau (New Jersey); www.quickfacts.census.gov/qfd/states/34000.html.
17. 19 N.J. Super. 521, 526 (Ch. Div. 1952).
18. *Id*. at 524-525.
19. *Id*. at 525.
20. *Id*. at 527. (Emphasis added.)
21. 12 N.J. Super. 496 (App. Div. 1951).
22. *Id.* at 499.
23. 25 N.J. Super. 544 (App. Div. 1953).
24. *Jonitz* at 548.
25. *Id.* at 553.
26. *Jonitz* at 554.
27. *Id.* at 556.
28. 99 N.J. Super. 256 (Ch. Div. 1968).
29. *Id.* at 263-264. (Emphasis added.)
30. *Id*. at 263.
31. *Nebel* at 261-262 *citing Rufner v. Rufner*, 131 N.J. Eq. 193, 196 (E. & A. 1941). (Emphasis added.)
32. *Id.* at 264.
33. *Id*.
34. 103 N.J. Super. 535, 539 (J.&D.R.

Ct. 1968).
35. *Id*. at 536.
36. *Id*. at 539.
37. Interestingly, at the trial level, "[t]estimony was taken concerning the background, education and financial status of both parents as well as Edward's scholastic ability." *Id*. at 536.
38. *See, Khalaf v. Khalaf* , 58 N.J. 63, 71 (1971).
39. *Id*. at 67.
40. *Id*. at 71.
41. *Id.*
42. *Limpert* at 441; *See also, Baldino v. Baldino*, 241 N.J. Super. 414, 418 (Ch. Div. 1990) (Voluntarily drug addicted child not entitled to college contribution and emancipated.).
43. *Id.*
44. *Id*.
45. 178 N.J. Super. 623, 629-630 (Ch. Div. 1981).
46. 167 N.J. Super. 441 (Ch. Div. 1979).
47. *Ross*, which discussed a parent's obligation to contribute to a child's post-graduate education, set forth six factors to be considered by the court: 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. *Ross* at 445.The court in *Sakovits* added two more: 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. *Sakovits* at 630.
48. 88 N.J. 529 (1982).
49. *Sakovits* at 625-626.
50. *Id.* at 631-632.
51. *Id*. at 632.
52. *Id.*
53. Many judges take the position that a parent should take out the loans to pay for a child's college expenses, but that is not what usually occurs in the general population. Almost 50 percent of dependant undergraduate students and 63.8 percent of independent (over 24 or married with dependants) undergraduate students take out student loans themselves. Parent loans account for 9.6 percent of financial aid for dependant undergraduate students. U.S. Department of Education, National Center for Education Statistics. (2009). *2007–08 National Postsecondary Student Aid Study (NPSAS:08) Student Financial Aid Estimates for 2007–08*; www.nces.ed.gov/pubs2009/2009166.pdf.
54. *Newburgh* at 545.
55. *Id.* at 544.
56. *Id.* (Emphasis added.)
57. *See, Monmouth County Div. of Social Services for D.M. v. G.D.M.* 308 N.J. Super. 83, 89 (Ch. Div. 1997) ("None of this is to say that a parents owes a duty greater than he she can feasibly provide."); *Foust v. Glaser*, 340 N.J. Super. 312, 318 (App. Div. 2001) ("…an adult child desirous of pursuing higher education is not necessarily immunized from the ill fortune of a parent whose lifestyle involuntarily has come to preclude an ability meaningfully to contribute financial support.") and *Schumm v. Schumm*, 122 N.J. Super. 146, 150 (Ch. Div. 1973) (The child had the aptitude for college, but neither parent had the financial ability to contribute and so the court only ordered a continuation of child support to assist the child.)
58. *Kiken* at 560.
59. Interestingly, there was a Parental Rights Amendment to the United States Constitution introduced in the 111th Congress as House Joint Resolution 42 on March 31, 2009, that may impact this issue in the future.
60. *See, Pierce v. Society of Sisters,* 268 U.S. 510 (1925) (Compulsory requirement that parents send their children to public schools held unconstitutional as unreasonably interfering with a parents' right to direct the upbringing and education of their children.); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); Wisconsin v. Yoder, 406 U.S. 205 (1972) (Requirement that Amish parents send their children to high school as unconstitutional since it unreasonably interferes with the right of the parents to direct the upbringing and education of their children.); *Quilloin v. Walcott,* 434 U.S. 246, 255 (1978) ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected"); *Parham v.J.R.,* 442 U.S. 584, 602 (1979) ("Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course"); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972)("It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements'")(citation omitted.); *Troxel v. Granville*, 530 U.S. 57 (2000) (A fit parent's right to make decisions regard-

ing the care, custody and control of their children will not be overcome absent a showing of harm.) and the New Jersey Supreme Court, *see*, *V.C. v. M.J.B.*, 163 N.J. 200, 218-219 *cert. denied*, 531 U.S. 926, (2000)(A court cannot interfere with the decision of biological parent of a child born to same sex partners to deny visitation absent a showing of unfitness or "exceptional circumstances."); *Watkins v. Nelson*, 163 N.J. 235, 248 (2000)(presumption of custody in favor of biological parent over grandparents absent showing of unfitness or "exceptional circumstances"); *Wilde v. Wilde,* 341 N.J. Super. 381, (App.Div.2001); *Moriarty v. Brandt*, 177 N.J. 84 (2003); *Mizrahi v. Cannon*, 375 N.J. Super. 211 (App. Div. 2005); and most recently in *Fawzy v. Fawzy*, 199 N.J. 456, 473-475 (2009) ("Deference to parental autonomy means that the State does not second-guess parental decision making….[n]or does it impose its own notion of a child's best interests on a family….Indeed the state has an obligation, under the *parens patriae* doctrine, to intervene where it is necessary to prevent harm to a child.").

61. *See, Lepis v. Lepis*, 83 N.J. 139, 149 (1980) ("Parties cannot bargain away the court's equitable power."); *Hoefers v. Jones*, 288 N.J. Super. 590, 606-607 (Ch. Div. 1994) ("A child's education, like other childhood needs—shelter, food, clothing, health, recreation, social, cultural, to name but a few—is an obligation for which parents have been historically held accountable by statute, by Chancery Courts asserting *parens patriae* powers on behalf of the state.")
62. *Hoefers* at 608. ("In disputes such as this one, *parens patriae*, when weighed, when balanced, when tested against competing, constitutional principles must prevail. For in a court of equity, a child's best interests and general welfare must always come first."). *Cf.*, *Holder v. Polanski*, 111 N.J. 344, 544 A.2d 852 (1988), *Zwernemann v. Kenny*, 236 N.J. Super. 1, 563 A.2d 1139 (App. Div. 1989), *Murnane v. Murnane*, 229 N.J. Super. 520, 552 A.2d 194 (App. Div. 1989) (child's best interest right, preservation of child's relationship with non-custodial parent, state's strong *parens patriae* concern in promoting child's welfare-predominates over parent's constitutional right of freedom of movement to travel); *State v. Perricone,* (where evidence presents compelling necessity to protect child's welfare-here blood transfusion to save child's life-state's exercise of *parens patriae* jurisdiction to allow blood transfusion over parental religious objection not violative of freedom of religion sections of state and federal constitutions or due process section of the U.S. Constitution); *Raleigh Fitkin-Paul Morgan Memorial Hosp. v. Anderson*, 42 N.J. 421, 201 A.2d 537 (1964), (same blood transfusion protection extended to unborn child); *Kelly v. Kelly*, 217 N.J. Super. 147, 524 A.2d 1330 (Ch. Div.1986), (best interests of children to visit non-custodial parent outweighs, does not unconstitutionally infringe upon custodial parent's First Amendment freedom of religion rights;"… any constitutional right a parent has with regard to his or her children, is always subject to the best interests of those children," *Id.*, 157, 524 A.2d 1330); *Wagner v. Wagner*, 165 N.J. Super. 553, 557, 398 A.2d 918 (1979), (where scheduling conflict exists between child's religious training and visitation, conflict should be resolved to achieve benefit of children's visitation even if religious instruction is less than ideal).
63. *Troxel* at 65.
64. *Watkins* at 248.
65. 186 N.J. 535, 547 (N.J.2006) ("It is not necessary for the disposition of this appeal that we decide the constitutional issue, and we therefore decline to do so.")
66. However, attorneys should be cautioned that if their clients agree to contribute to a child's college expenses, they are waiving their right to raise the constitutional argument later. *See, Orero v. Orero*, 2010 Westlaw 596690 , page 5 (N.J. Super. A.D.) ("…unlike the circumstances presented in Gac, in this case, the defendant voluntarily executed a PSA that obligated him to contribute to his daughter's college expenses… Defendant willingly accepted such responsibility. As such, we fail to see any validity to defendant's constitutional argument.")
67. 2010 WL 771496 (N.J. Super. A.D.).
68. *Miccinilli* at 7. (Emphasis added.)
69. *Newburgh* at 545.

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College Contribution

Theory, Law, and Practice

by Charles M. Rand and Amy Sara Cores

With limited exceptions, most of family law is a grey area. Very few controversies result in a clear winner or loser. This is especially true of college contribution. Derived primarily from common law, generally each college case only addresses but one issue to be analyzed by the court in determining the parties' respective obligations to contribute to college expenses. Other than *Newburgh*, the case law provides limited guidance with respect to the proofs needed to make a successful application to the court. New Jersey is among only 24[1] other states in which the courts can compel parents to contribute to college expenses for children of divorced families.

This article provides an overview of both the historical jurisprudence and the current status of the law.[2] Particularly, the authors provide an overview of the current case law that enhances the factors set forth in *Newburgh v. Arrigo*[3] and illustrate the manner in which these types of applications should be presented.

There remains a question as to whether every post-judgment motion seeking college contribution requires a plenary hearing. The authors suggest that a plenary hearing may not be necessary in many cases.[4] Indeed, if the court is provided with sufficient detailed information a decision can be made without compelling the parties to incur the costs associated with post-judgment discovery and a hearing.

The authors note the following: Although throughout this article the authors generally refer to this obligation arising from a divorce or children of a marriage, the obligation is extended to parents under appropriate circumstances. However, we await the final say from the Supreme Court as to the constitutionality as to the extension (or lack thereof) of this obligation to parents in an intact family, a question the Court has not addressed up to this point. The authors further refer to college education and post-secondary education interchangeably, as the obligation to contribute to a trade school or even professional school may be imposed by the courts.

Our statutory scheme does not create a specific obligation on behalf of parents to contribute to the college expenses of their child(ren)….However, the courts in the past 40 years have expanded the definition of child support to include those items that are deemed necessary to permit a child to truly become emancipated.

THE HISTORY AND BACKGROUND OF COLLEGE CONTRIBUTION

Our statutory scheme does not create a specific obligation on behalf of parents to contribute to the college expenses of their child(ren). Indeed, this concept is relatively youthful in the jurisprudence of this state. However, the courts in the past 40 years have expanded the definition of child support to include those items that are deemed necessary to permit a child to truly become emancipated. "When a child moves beyond the sphere of influence and responsibility exercised by a parent and obtains an independent status on his or her own, generally he or she will be deemed emancipated."[5] When a child's aptitude, coupled with each parent's financial ability converge, post-secondary education will be deemed by the courts to be a prerequisite for the continuation of support by way of college contribution.

The concept of parents contributing to the post-secondary educational expenses of children has evolved over the past 110 years. Initially, the courts rejected these claims. However, by the mid-1900s the courts were more receptive. Indeed, as society in general evolved and post-secondary education became more commonplace, the courts responded accordingly. However, it was not until the 1980s that trial court judges and practitioners received clear guidance by

way of a list of factors to consider in such applications.

In *Straver*, the request made for the continuation of support payments for a child under the age of 21, did not include a request for post-secondary education. However, the court cited to the case of *Streitwolf* in noting that there was no requirement under the laws of this state to compel a parent to contribute to college. "It seems to be the established law of New Jersey that a father is under no duty to provide a college education for a son or daughter, and this regardless of his financial capacity."[6]

The matter of *Strietwolf* involves a series of four reported decisions from 1898 through 1900. A careful consideration of this case is essential to understanding the basis, as this case appears to be the genesis of the modern jurisprudence. The Strietwolfs' son was of a "wayward and uncontrollable disposition."[7] However, the young man seemed to thrive after taking a position as a clerk and his subsequent matriculation in law school. Upon application, the chancery court had ordered the husband to pay to the wife an additional sum of *pendente lite* support so that she could pay the son's tuition. At the time, it was an additional $75 per semester. However, Mr. Strietwolf was strongly opposed to his son's attendance at the law school and wanted him "to do something practical."[8]

The vice chancellor held,

> …it is a case where the court ought to order alimony to include the expense of the boy's education in the direction in which he seems to have taken a bent. And the only question is as to his age. Is there any time fixed by the authorities beyond which the court will not order money paid for education against a father? I recollect of no such rule at all. I have not had an opportunity to look into the cases on the subject, and I hoped that counsel would have assisted me in that respect, since the matter was stirred on Wednesday last, as requested, but neither counsel has been able to assist me with any case on that subject. And at present I cannot see where the line can be drawn short of legal majority. The boy is making his home with his mother. She is giving him food and raiment. He is studying faithfully, and submitting himself to the discipline of the law school. It is apparently the first real success that the boy has made in self-government; and I think that, under all the circumstances, this order ought to be made. I make it with great hesitation as to the power of the court. On the merits I think it ought to be made; and I will therefore make an order that the money be paid.[9]

However, the appeals court disagreed and held that Mr. Strietwolf ought not be compelled to contribute to the professional school costs of the parties' son. Specifically, the court felt that the chancellor had improperly extended the court's authority to enter a *pendente lite* order for the support of the wife including such an expense. In short, it was improper to increase the amount of *pendente lite* alimony to be paid to the wife in order to permit her to pay for the education of the son. The higher court noted that the father ought not be compelled to contribute to the grown-up son's ambitions.[10]

The issue lay fallow for over 50 years, until addressed in the *Cohen*[11] case, where the court noted:

> Ordinarily, the obligation of the parent to support ends when the child reaches full age, although it might continue indefinitely if the child were crippled or unable to support himself. In many cases, the obligation terminates when the child is around 18 years. *Amos v. Amos*, 4 N.J. Eq. 171 (Pennington, C., 1842); *Snover v. Snover*, 13 N.J. Eq. 261 (Green, C., 1861); 1 Blacks.Com. 449. It is probably safe to say that when the family situation is such that, had there been no divorce or separation, the child would have gone to work and become self-supporting before attaining age 21, the duty of the parents under the statute likewise terminates while the child is still a minor. On the other hand, in a family where a College education would seem normal, and where the child shows scholastic aptitude and one or other of the parents is well able financially to pay the expense of such an education, we have no doubt the Court could order the payment. *See*, however, *Streitwolf v. Streitwolf*, 58 N.J. Eq. 570, 43 A. 904, 45 L.R.A. 842 (E. & A. 1899); *Ziesel v. Ziesel*, 93 N.J. Eq. 153, 115 A. 435, 18 A.L.R. 896 (E. & A. 1921). The responsibility of father and mother is equal except as the circumstances of the particular case cast on one or the other the greater burden. Said Vice Chancellor Pitney, 'Upon general principles, I am unable to perceive any difference between the parents, as to their duty of support of their child. Each is equally responsible for the existence of the child, and easy by natural instinct, feels the duty, as well as the desire, to protect and nourish their common offspring.' *Alling v. Alling*, 52 N.J. Eq. 92, 97, 27 A. 655, 657 (1893). Our statutes at the present time cast no greater responsibility on one parent than on the other. This is true not only of the section of the divorce act, which is the basis of the present proceeding, R.S. 2:50-37, N.J.S.A., but also of the act concerning minors, R.S. 9:2-4, N.J.S.A., and the pertinent provisions of the Poor Law, the Disorderly Persons Act and Crimes Act. R.S. 44:1-140; 2:204-1, and 2:121-2, N.J.S.A. 'The circumstances of the parties and the nature of the case' determine what should be ordered.[12]

In part relying on the statutory imperative that courts have the authority to order maintenance for a child, as it is reasonably based on the circumstances of the case, the *Cohen* court ordered the father to continue to make support payments, as well as contribute to the child's expenses by way of bi-annual gifts.[13] Interestingly, the child was not yet of the age of majority and the precise issue of post-secondary

education was not directly raised in the *Cohen* case. Yet, this *dicta* would subsequently form the basis for the parental obligation to contribute to college.

In the next 30 years leading up to the court's decision in *Newburgh*, we find a rich jurisprudence addressing the issue of college contribution directly and indirectly. Moreover, we find evidence of private agreements by the parties to contribute to college expenses of children incident to divorce proceedings.[14] As well as the courts encouraging such agreements to be entered into when the circumstances of the case permit.[15]

The case of *Jonitz* provides not only the legal basis for future court-imposed obligations to provide for the payment of college expenses, but also the most colorful array of commentary on the state of the parties' union.[16] It is noted that the impressions of the court sometime pre-determine the outcome in a given matter. The court noted that when incensed Dr. Jonitz's eyes blaze with anger. Yet the marital discord sprinkled over a span of a dozen years was perhaps primarily prompted by the neither decorous nor platonic social companionships of Dr. Jonitz. Once these suspicions were confirmed by Mrs. Jonitz, the marriage "became progressively frosty with only a few periodical thaws from the warmth of the doctor's professed repentance and his wife's tentative forgiveness."[17] The primary focus of the court's analysis on appeal was to the cause of action.

The court, however, considered the issue of the continued support for the parties' eldest son. The parties' son, Robert, was over 18 years of age, but about to attend college. The trial court had denied the wife's request that the husband contribute financially to this expense. The appellate court opined,

> We are not aware of any decisional or statutory law now prevailing that absolutely inhibits the exercise of the power of the court to provide for the custody and maintenance of a minor child who has arrived at the age of 18. We have no doubt of the power of the court to make such provisions where the circumstances warrant until the unemancipated minor has at least reached the age of 21. The exercise of the judicial authority is governed by the circumstances of the parties and the nature of the individual case. Vide, R.S. 2:50-39, as amended L.1948, c. 320; N.J.S. 2A:34-24, N.J.S.A.

In the next 30 years leading up to the court's decision in *Newburgh*, we find a rich jurisprudence addressing the issue of college contribution directly and indirectly. Moreover, we find evidence of private agreements by the parties to contribute to college expenses of children incident to divorce proceedings.

> Likewise the propriety of an allowance for the education of a minor child is guided Inter alia by the circumstances of the parties and the nature of the individual case. Basically it is indubitable that a common school education has for centuries been regarded as a necessary to which a child is entitled at the expense of the parent. Indeed it is a parental obligation which Blackstone characterized as one of supreme importance to the family life and to society in general. Solon excused the children of Athens from supporting their parents if the latter had neglected to give them early training. We now have our compulsory education laws. R.S. 18:14-14, 39, 40, N.J.S.A.; *Knox v. O'Brien,* 7 N.J. Super. 608, 72 A.2d 389 (Cty.Ct.1950).[18]

Although the court did not adopt the contention that it was without power to compel a parent to provide a child with a college or vocational education, the court did not find that the facts presented justified same.[19] However, the court ordered that the father make child support payments for the eldest son. Therefore, the *Jonitz* case established the judicial precedent, subsequently followed by many courts, compelling a parent to provide support for a child who has reached the age of majority, but is attending an institute of higher education, without directly compelling the payor of support to contribute to the expenses of the education.

In 1968, *Nebel*,[20] a case of first impression, irrefutably established the court's authority to compel a parent to contribute to the college expenses of their children incident to a divorce proceeding. However, the court limited the father's contribution to the cost of attendance at a state school, specifically Rutgers.[21] In *Nebel*, the parties disputed the existence of an agreement at the time of the divorce that the father would contribute to college. The judgment was silent on the issue. Upon motion by the mother for contribution to college, the trial court ordered the father to pay one-half of the cost of college, subject to the submission of briefs by the parties. Specifically, the court sought to determine whether there was an absolute bar under the laws of New Jersey to compel a parent to pay for college.

The court reviewed the evolution of cases from *Streitwolf* to *Jonitz*. The court noted, "I am of the opinion that there can be no valid legal distinction between ordering defendant to pay college expenses directly and ordering him to do so indirectly under the guise of increased support."[22] The court found that the reasoning in *Streitwolf* no longer applied due to the "[t]remendous changes [that] have occurred in our educational needs and patterns since 1899."[23] The court further relied on the *dicta* in

Jonitz and *Cohen* in determining that the court indeed had the authority to order a parent to contribute to the costs of college. As noted, the court limited the contribution to the equivalent cost of the child's matriculation at Rutgers. However, the court ordered the father to pay the equivalent of the entire cost of Rutgers, or what amounted to half of the actual cost of college for the Nebels' child.[24]

A series of cases address whether the court continues to have the ability to order a parent to contribute financially to the support of a child who has attained the age of majority.

In *Hoover*,[25] the court recited the evolution of the public policy adopted by the courts of this state.

> A substantial change has taken place in our concept of the specific stage of education which is regarded as a 'necessary,' to which a child is entitled at the expense of the parent. Certainly, the old rule limited the obligation to a 'common public school and high school education.' *Ziesel v. Ziesel*, 93 N.J. Eq. 153, 115 A. 435, 18 A.L.R. 896 (E. & A. 1921). However, restrictive common law concepts of support, a reflection of then existing judicial and social policies, have given way to enlargement by statute and modern judicial decision. *See Jonitz v. Jonitz*, *supra*, 25 N.J. Super., at p. 553, 96 A.2d 782; *Daly v. Daly*, *supra*, 21 N.J. at p. 610, 123 A.2d 3; *Bonanno v. Bonanno*, 4 N.J. 268, 72 A.2d 318 (1950). Consistent with such advances is the realization that age alone is not the determinative factor in evaluating an obligation to support. With specific reference to age 18, precedents suggest an unemancipated infant does not necessarily reach maturity at that point but rather 'becomes a *sui generis* person and therefore no longer a child' at age 21. *Johonson v. State*, 18 N.J. 433, 114 A.2d 1 (1955), *certiorari denied* 350 U.S. 942, 76 S. Ct. 318, 100 L. Ed. 822 (1956); *Leith v. Horgan*, 24 N.J. Super. 516, 517-518, 95 A.2d 15 (App. Div.1953), *reversed on other ground*, 13 N.J. 467, 100 A.2d 175, 38 A. L.R.2d 1440 (1953); *Cohen v. Cohen*, supra, 6 NLJ. Super., at p. 30, 69 A.2d 752. Beyond this perhaps equally formalistic approach, it is the totality of the facts and circumstances in each particular case which determines whether a child 18 or over is still properly the subject of a parental obligation to support…[26]

The child in *Hoover* was a straight-A high school student, who had been accepted into a private college. The mother sought the continuation of the father's child support obligation only and not additional contribution to college. The father objected to the continuation of support based on the fact that the child was attending a more expensive school than a state college. The court ordered the continuation of support, as well as an increase in support for all of the unemancipated children. The court noted the cost of school was irrelevant, since separate contribution for college was not sought.

Hoover was decided on the heels of *Nebel*. Indeed, the court notes that the parties argued different interpretations of the *Nebel* decision. The issue being jurisdictional in nature since the Juvenile and Domestic Relations Court heard the *Hoover* case and *Nebel* was decided in the Chancery Division of the superior court.

The Supreme Court intervened in the matter of *Kalaf*.[27] The parties separated after the oldest son commenced matriculation at a private college. The father had paid for the first semester of tuition, room, and board, but refused to pay for college expenses after the parties' separation. The trial court ordered the father to pay $25 per week in support and failed to provide for the payment of the college expenses. After the Appellate Division affirmed: the Supreme Court unanimously reversed. The Supreme Court ordered the father to pay 100 percent of college expenses going forward and to reimburse the wife for the loan and interest to cover the second semester of tuition. In doing so, the Court provided the following analysis:

> [The trial court] reasoned that James should work during the summers and that he could avail himself of student loans to complete his college education. While we agree that James should work during his vacation periods, we cannot agree that he should be compelled to take out loans if he wishes to complete college. He has demonstrated scholastic aptitude necessary for college admission and, we can assume, that had it not been for his parents' separation, tuition would have been provided by the defendant without dispute as would be expected of someone of his means. The $25 a week provided by the trial judge is unrealistic and falls woefully short of what is needed for a college education today.[28]

The Court further approved of those cases that provide for the inclusion of college expenses in a child support analysis.[29]

In *Schumm*, the court held that child support can and should continue for a child over the age of 18 who is attending college.[30] The parties were divorced in 1963. Their agreement provided that the husband would pay $25 per week in support for the two children. In 1972, the child at issue turned 18, graduated high school, and matriculated at a local college. The father ceased making support payments for the child. The mother applied to the court for the fixation of arrears and continuation of support, pending the child's graduation from college. The court focused on several factors in ordering the continued child support payments. The court noted that the father was not being asked to contribute to college. The child worked in the summer to assist with the cost of college, he continued to reside with his mother, and the child showed an aptitude for college. The court held that under these circumstances it was equitable to continue the support provision.[31]

Leading up to *Newburgh*, the aforesaid appears to be the trend adopted by the courts. If a child has reached the age of majority, but has shown the aptitude for a college education (and actually attends college), then child support will continue.

In 1982, the Supreme Court decided *Newburgh*. Interestingly, the case arose from a dispute about the distribution of the proceeds of a settlement of a claim for the wrongful death. Mr. Newburgh's widow and son of a prior marriage were the claimants. The son contended that the divorce between his father's widow and her first husband was invalid and thus she was not entitled to her distributive share of the estate, to wit, the proceeds of the wrongful death action. The Supreme Court held that the son had failed to overcome the presumptive validity of the widow's prior divorce and of her marriage to Mr. Newburgh. However, the case was remanded for reconsideration of the distributive shares of the estate, after agreeing with the appellate panel's conclusion that a factual issue existed as to whether the son had a right to financial support after attaining the age of 18.[32]

The Court reviewed the evolution of the law of the state and the current trend in post-secondary education. Not only did the Court find that financially capable parents should be compelled to contribute to the higher education of qualified students, but the Court further opined that "parental responsibility includes the duty to assure children of a college and even of a postgraduate education such as law school."[33]

The Court set forth the factors to be considered in analyzing such a request,

> 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.[34]

Thus, *Newburgh* established the precedent for compelling a parent to contribute to the costs of higher education. It also provided us with a comprehensive list of factors to be considered in these cases.

THE *NEWBURGH* FACTORS AND MAKING THE CASE

It is well-settled that the parties may agree by way of settlement agreement or consent order to a fixed arrangement for the payment of college expenses. Indeed, in the matrimonial arena settlements are to be particularly encouraged[35] A settlement agreement between spouses is enforceable if it is completely voluntary, fair and equitable.[36] It is, therefore, only subject to amendment by the court when changed circumstances make its enforcement inequitable.[37]

Therefore, if the parties' agreement sets forth with particularity the terms of parental contribution, then the court need look no further then the plain language of the agreement. For example, if the parties agree to equally share in the cost of college for the child, then there is little need for judicial intervention other than to enforce the agreement. However, if the agreement is silent, there is no agreement in effect at the time the issue is presented to the court, or if the agreement simply defers to the *Newburgh* case, then the court must conduct an independent analysis of the *Newburgh* factors. Alternatively, the parties' agreement may contain the infamous phrase "based on the parties' respective ability to pay."This seemingly innocuous phrase may ultimately catapult the parties into costly post-judgment discovery.

A settlement agreement between spouses is enforceable if it is completely voluntary, fair and equitable. It is, therefore, only subject to amendment by the court when changed circumstances make its enforcement inequitable.

Since *Newburgh*, the courts have provided guidance with respect to the timing and issues to be addressed in college contribution cases. The following analysis of the case law addresses both the jurisprudence, as well as the authors' suggestions as to the evidence that should be presented.

Timing and Standing

An application for contribution

to college expenses must be made prior to, or at the time the child starts college.[38] In *Gac*, the noncustodial parent was not consulted prior to the selection of a college or the expenses being incurred. Indeed, the custodial parent sought reimbursement after the child had graduated from college. The Supreme Court held that at a minimum, the noncustodial parent must have notice prior to the expenses being incurred.

The right to college contribution from parents is the right of the child, just as the right of child support is the right of the child. These rights cannot be waived by a parent.[39] "The custodial parent brings the action on behalf of the child and not in his or her own right. For this reason and because of the State's *parens patriae* interest in assuring a proper level of support for all children, the right to child support cannot be waived by the custodial parent."[40]

A child has standing to enforce the parental obligation to contribute to college.[41] In *Johnson v. Bradbury*, the court opined that the college contribution

> …is enforceable not only at the instance of a custodial parent against a non-custodial parent, but at the child's instance as well. Enforcement of the right by the child is not necessarily defeated by the fact that she has reached the age of majority. While it is true, as a general proposition, that parents are not under a duty to support children after majority, even then, "in appropriate circumstances, the privilege of parenthood carries with it the duty to assure a necessary education for children.[42]

In *White*,[43] the parties' son was deemed emancipated when he enlisted in the Navy. After completing his service, he sought to intervene in the post-judgment proceedings to be deemed unemancipated and have his parents contribute to his educational expenses. The trial court permitted the son to intervene in the action, finding that because he had been previously adjudicated emancipated there was no present party protecting his interest. The son was entitled to intervene and have the court fully analyze the case pursuant to the factors set forth in *Newburgh*.

Likewise, if a demand for payment by the custodial parent for college contribution has been made to the noncustodial parent, the court has jurisdiction to hear the issue as a matter of enforcement (if the parties' agreement provides for college contribution) or as a post-judgment application to compel contribution under *Newburgh*.

The authors are not aware of any case in New Jersey that permits the child of an intact family to apply to the court for contribution from his or her parents. The authors take no position on such an application.

An application should be made immediately once the college-bound student has received acceptance letters and a financial aid award. But practically, the application should be brought to the court no later than early April for the fall college year that the contribution is sought. Even if the college-bound student has not received all of his or her acceptance letters, the custodial parent should have the bulk of the information necessary to submit to the court. The courts may permit the submission of additional information as it becomes available and/or necessary. For example, a child may have been accepted to Rutgers as of January 15, but not received a complete financial aid award until much later. Once the financial aid package is available, that information can be presented by way of supplemental certification or exchanged during discovery. By waiting until July or August to submit the issue to the court, undue pressure is placed on all interested parties. Moreover, there is insufficient time for discovery to flesh out disputed issues.

Whether the Parent, If Still Living with the Child, Would Have Contributed Toward the Costs of the Requested Higher Education (Newburgh 1); The Effect of the Background, Values and Goals of the Parent on the Reasonableness of the Expectation of the Child for Higher Education (Newburgh 2)

There are many questions to be considered. While the parties were married did they impress upon the children the value of a post-secondary education? Are both of the parents college educated? Did the parents have assistance from their respective families to attend post-secondary school? Did the parents start college savings plans for the children during the marriage?

Interestingly, there is no case law directly on point. The authors submit that these factors as posited, are very fact sensitive, as well as likely to create the necessity for a plenary hearing.

However, in making the application to the court the practitioner can prepare a client certification setting forth sufficient information for the court to consider these factors. The certification should include the following:

1. A fully inclusive statement of the educational background of both parents, including all of and the highest degrees attained and whether the parent went to public or private school.
2. The impact on each parent's education, or lack of education, on each parent's ability to earn.
3. Any agreement (written or oral) between the parties with respect to college for the child(ren) born of the marriage.
4. Evidence of savings plans created by the parents for the college education of the children; evidence of savings plans from other family members; purchase of pre-paid college plans. Also note when these plans were created; how and when

and by whom they were funded. If the accounts were established during the marriage, the amount should come off the top, prior to calculating the parties' respective contributions. If the savings occurred after the divorce, then the monies may be used by the savor to meet his or her college contribution.

The Amount of Contribution Sought by the Child for the Cost of Higher Education (Newburgh 3); the Relationship of the Requested Contribution to the Kind of School or Course of Study Sought by the Child (Newburgh 5); the Commitment to and Aptitude of the Child for the Requested Education (Newburgh 7); the Relationship of the Education Requested to Any Prior Training and to the Overall Long-range Goals of the Child (Newburgh 12)

Virtually every reputable institution of higher learning has a website. On most (if not all) the cost of attendance, including tuition, room, board, fees, etc. is readily available. They may also provide information on miscellaneous or estimated expenses, such as books, travel, etc.

A parent seeking college contribution must obtain and submit to the court a detailed list of all expenses to be incurred during the academic year. Even if an expense (such as books) must be estimated, it must be submitted to the court along with documentation from the institution evidencing the anticipated cost. A mere statement from the client will not suffice.

If the child has selected a college based on a particular program offered by that institution, then the reasons must be set forth. For example, if a child wants to attend Florida State University because they have a musical theater program, then the application should also include a statement as to other schools in New Jersey (and the surrounding areas) that either have or do not have such a program. The application should analyze the benefits of the student's attendance at the selected institution over the schools not chosen. Additionally, the comparative cost of attendance at other 'local' schools should be included.

If the child participated in a special program, such as music, sports, or theater, evidence of the child's participation and aptitude should be presented to the court. Awards, certifications, special recognitions, statements from coaches, instructors, administrators, etc., must be provided if the child is seeking to attend a school with a specialized program or course of study in one of these special areas.

The cost of college is not limited to the cost of Rutgers University or another state institution.[44] In *Finger*, the court held that when parents are financially capable they may be compelled to contribute to the cost of a private or out-of-state school. However, if a parent seeks to send a child to an out-of-state institution or private school, the basis for same must be included in the application to the court. Why should the court compel a parent to pay out-of-state tuition for a student to obtain a general degree at an out-of-state school that can be obtained from an in-state school? On the other hand, if the child is a music prodigy, then the court may have a basis to compel a parent to contribute to the cost of a college specializing in music studies. While we may not generally see these extremes, the point is clear that there should be a sound basis upon which to seek contribution, based on the aptitude, skills, grades, or other special needs of a particular child.

If the child has a strong desire to be a tattoo artist, then it is a more difficult case to make to compel a noncustodial parent to contribute to the cost of a four-year college education. However, if the student proposes a course of study at an art school, or even an apprenticeship at L.A. Ink, then it can be said that the relationship between the proposed course of study correlates to the long-range goals of the student.

On the other hand, if a child has studied music for several years and seeks to pursue a career in the music industry, then it may be more appropriate to investigate a school that has a well-developed program. Although many colleges may offer a degree in music, not all music degrees are equal. Thus if the student is accepted to a non-specialty college and a college that specializes in music and intends to pursue a career as a music teacher, then the non-specialty college would provide a sufficient education. If the student aspires to perform with the Boston Pops, then the specialty college may be more appropriate.

Yet the analysis must be grounded in the recognition of the realistic factual circumstances. If a student receives Cs and Ds throughout high school it may not be reasonable to suggest that a parent should contribute to the cost of a four-year college initially. Indeed, such a student may not necessarily be suited to pursue a traditional college education. In such a circumstance, trade or technical schools may be more appropriate.

In short, the purpose of this analysis is to ensure that the educational pursuits are properly tailored to suit the goals of the student, not merely to provide a student an additional four years of support from his or her parents to 'find' him or herself. It is part and parcel of the jurisprudence that the continuation of support (be it as child support and/or college contribution) is predicated on a student having the aptitude to excel in the program of study for which contribution is sought. A threshold question is whether the student is even entitled to parental contribution. It is only through this critical analysis under *Newburgh* 5, 7, and 12, that the court can properly determine whether the totality of the circumstances even warrant parental contribution to college.

The application should include a list of all of the colleges to which

the student applied. In addition, the following information should be indicated for each institution:

1. Name, location, and cost of the school (actual or anticipated) to include tuition, room, board, fees, books, travel to and from school, and any other information available;
2. Reasons for applying to that particular college;
3. The degree program that the child intends to pursue, noting the concerns set forth hereinabove;
4. Special programs available at each school that are suited to any special circumstances of the child;
5. SAT scores, ACT scores, or SAT II, AP exam scores, a high school transcript and/or grades, high school credentials;

The Financial Resources of the Child, Including Assets Owned Individually or Held in Custodianship or Trust; the Ability of the Child to Earn Income During the School Year or During Vacation; the Availability of Financial Aid in the Form of College Grants and Loans (Newburgh 8, 9, 10)

Are there any assets or savings by the child or held for the child's benefit? A copy of trust, bank account, and 529 plan statements should be provided. A statement of any savings bonds held in the name of the child, as well as the actual value (as opposed to face value) should be included. If there is a Uniform Gifts to Minors Act (UGMA) account, the movant must provide a recent statement.

In *Tretola v. Tretola*,[45] the court held that the noncustodial parent is entitled to information about any income earned by the child.The child was accepted to Rutgers University, but chose to attend community college with the intention of transferring to Rutgers later. After his first year in college, he began working 35 hours a week while attending college full-time, taking 12 credit hours per semester. However, the child continued to reside at his mother's residence and commute to school.

The implication of *Tretola* is that if the child earns an income, it may constitute a substantial change in circumstances warranting a modification of child support. The case further notes that once the *prima facie* showing is made the court must then analyze the statutory factors set forth in N.J.S.A. 2A:34-23 to determine the impact of the child's earnings on the amount of child support and or college contribution to be paid. In short, *Tretola* suggests that discovery and a plenary hearing may be necessary in such cases. Therefore, documentation of earnings, such as most recent pay stubs, W-2, and federal and state income tax returns (if any) should be provided.

The authors suggest that if the child has worked during the summer while in high school the evidence of the child's income should also be provided. This is the most recent indication of the amount of money that the child could earn during the summer break from school. The court need not necessarily deduct this amount directly from the amount of contribution to be made by the parents. The court can consider the child's ability to earn income while in, prior to and/or during school.

There is a difference between a child's ability to work during the first year, as opposed to later years. It is suggested that a first-year college student should not be compelled to work during the academic year, whereas an upperclassman may be more settled in the college environment and capable of managing a full-time course load and part-time employment. Also, one must consider the degree program of the student. A theater or music student, who has requirements above and beyond attending lectures and studying for exams, is less capable of part-time employment.

On the other hand if a child received a personal injury award settlement, these monies need not be disclosed or considered in determining the parent's obligation toward contributing to college expenses.[46] In *Moehring*, the court held that personal injury settlements are intended to compensate the child for pain and suffering and are not anticipated nor relied on when planning financially for the child's future. Therefore, the child should not be required to dissipate the funds when the parents are financially capable of contributing to college expenses.

However, financial aid packages, the availability of private loans and scholarships, and other forms of financial assistance are essential to the analysis. A student aid report (SAR) must be provided to the court upon receipt. The free application for student aid or FAFSA is less important to the analysis. The SAR lists the answers to the questions from the FAFSA and provides the expected family contribution (EFC). This is the important number for the purposes of educational institutions making financial aid awards. This number is essentially deducted from the anticipated cost of attendance and the financial aid award seeks to bridge the gap. Indeed, the EFC in conjunction with the financial aid award letter from the school provides the most guidance to the court in determining the total amount of contribution to be provided by the parents.

After the school receives the SAR, a financial aid package will generally be sent to the student. This will include the availability of loans, scholarships award, grants, and/or work study. The availability of parent loans, private grants and scholarships, and private loans will generally not appear on the financial aid award letter.

The Child's Relationship to the Paying Parent, Including Mutual Affection and Shared Goals, as Well as Responsiveness to Parental Advice and Guidance (Newburgh 11)

The case of *Moss v. Nedas*[47] specifically addresses the necessity

of parental involvement in the educational decision. Although the issue was presented in the *Gac* case, the Supreme Court elected not to deal with this specific issue, thus continuing this as a rather murky factor to be analyzed by the courts. Many questions can arise at this juncture.

What if a father abandoned the family and moved on to start a new family? Does that automatically result in the inference that he was the cause of the breakdown in a parent child relationship? Does that then naturally lead to absolution from an obligation to contribute to a college education for a child?

What if the custodial parent alienated a child from the noncustodial parent? What happens upon reaching the age of majority and being college-bound, the child reaches out to the noncustodial parent and subsequently seeks contribution for college?

What if the noncustodial parent worked his or her way through college without assistance from his or her family? Was it always the intention of the noncustodial parent that the children would do the same?

What if the noncustodial parent has indicated over the years that he or she would only pay for community college? The child then elects to attend a full four-year institution, such as Monmouth University. Should the parental contribution be capped at the equivalent cost of community college?

In short, this *Newburgh* factor presents 'what ifs.' There are simply few answers to these questions. Indeed, the *Moss* case specifically dealt with the question of a custodial parent failing to communicate with the noncustodial parent with regard to the transfer from one educational institution to another, after a plenary hearing had been held.[48] The court relieved Mr. Moss of any court-ordered obligation to contribute to college. The trial court noted that the father was being treated as a wallet, rather than being given the opportunity to participate in the decision-making process of school selection. The trial court had entered an order clearly compelling the mother to provide information to the father and discuss all aspects of college attendance with him. She not only failed to do so, but continued to make unilateral decisions for the parties' daughter. The appellate panel in affirming the decision of the trial court found, "Such obstructive conduct as is evidenced in this record militates strongly in favor of the Family Part's determination, and we find no basis for intervention."[49]

The practitioner representing the custodial parent should advise his or her clients to fully communicate with the noncustodial parent during the college selection process. In the event that there is a substantial breakdown in communication, the facts and circumstances of same must be presented to the court in the application seeking college contribution.

The Ability of the Parent to Pay the Cost (Newburgh 4) and the Financial Resources of Both Parents (Newburgh 6)

A common error in considering these two factors is to simply look at the income of the parties. The ability of the parties to contribute to college expenses is based on more than just the current stream of income. In order to determine 'ability to pay' we should not only consider income, but also liquid (or non) assets, savings for college, the ability to borrow, and each parents expenses relative to his or her income.

We obtain this information first and foremost from a fully completed case information statement including a full disclosure of assets and liabilities, the most recent W-2 or 1099 and current and complete federal and state income tax returns with all schedules. Quite possibly, a self-employed litigant should supply business returns, or evidence of an interest in a closely held corporation. In short, it is essential to provide the court with a full disclosure of all income sources and assets, as well as a full statement of all liabilities.

A parent's ability to contribute should include a thorough analysis of gross and net income, assets and ability to borrow. The parents may have disproportionate incomes, yet the lower income-earning parent may have a greater ability to pay. This result can occur when one of parents is remarried.

The case of *Hudson* provides that,

> A court may consider a current spouse's income to the extent that it provides a fiscal basis for meeting current living expenses or long-term financial obligations which, absent such income, would be borne by a parent individually.[50]

The remarried parent can submit this information to the court *in camera* for review.[51]

The basis for the *Hudson* decision is that the parent is receiving a benefit from the new spouse, in that his or her needs are decreased. This frees up additional income by the remarried parent to be applied toward college expenses. For litigants who are remarried, this is an important consideration and should always be brought to the attention of the court.

Ability to pay encompasses not just earnings, but a parent's ability to encumber assets, liquidate assets, and/or obtain traditional loans. For example, one parent may have substantial equity in his or her residence, but be unable to borrow against it due to his or her income. The other parent may have a higher income and the ability to obtain loans, through the various government programs. Combined, the parents can afford to make the monthly payments on such loans. There are remedies available that may require creative solutions to be fashioned by the court and counsel to achieve the goal of allowing a worthy student to attend the appro-

priate college with fair contribution by both parents.

OTHER CONSIDERATIONS

Child Support

It is axiomatic that child support must be adjusted when a child attends college and the payor of child support is compelled to contribute to college. The child support guidelines do not apply to children over the age of 18, although "the child support guidelines may be applied in the court's discretion to support for student over 18 years of age who commutes to college."[52] Moreover, Appendix IX-A paragraph 18 provides that, "Primary consideration shall be given to the continued support of minor children remaining in the primary residence by reapplying the child support guidelines for those children residing at home *before* determining parental obligations for the cost of post-secondary education..."

If the parties have children who are under the age of 18, child support must first be calculated for those children. The authors suggest that while the amount of child support paid is deducted from the noncustodial parent's available income, the entirety of same should not be included in the custodial parent's income for the purposes of analyzing ability to pay. The child support is designed to provide for the children remaining in the residence, while the student is attending college.

If the college-bound child will be residing at home, then some amount of support should be added above and beyond the child support calculation for the children under the age of 18. Again, we must look at those expenses, designated as fixed expenses. However, if the child is residing on campus, the amount of child support may be nominal or non-existent. Alternatively, if a child commutes to college the court could fix support for all the children according to the guidelines and then address the contribution to college separately. Appendix IX-A of the Rules Governing the Courts of New Jersey provides, "The child support guidelines may be applied in the court's discretion to support for students over 18 years of age who commute to college."

The court and practitioner should also balance the amount of child support with the amount of college contribution. For example, a child who receives 90 percent of the total college costs in grants, loans, and scholarships, has reduced the out-of-pocket costs to his or her parents. What is the impact on the amount of child support to be paid? Should the child support remain intact, or should the support be reduced? What if the child resides at home and receives 90 percent of the college costs in aid, as opposed to the child who resides on campus? These questions must be considered and hopefully addressed.

Multiple Children in College

What if the parties have four children, ages 18, 17, 16, and 15? During at least one year, all four children may hopefully be attending college. The amount of contribution to college in such cases should be planned well in advance of the event. The parties should be encouraged to arrive at a mutual agreement with regard to the total annual amount of contribution, the total cost to be incurred for the children, and whether child support be terminated in favor of college contribution. Although advance planning is preferable in any family where college contribution will be sought, it is especially important where there are multiple children attending college at the same time. In the event that such a case is brought before the court, it would indeed be a far more complex situation to consider and such an application may need to be brought slightly earlier than otherwise suggested herein.

Tax-Related Issues

There are currently three tax incentives available from the federal government, the Hope Scholarship, the Lifetime Learning Credit, and the American Opportunity Credit. These credits may be claimed by filing Form 8863 with the federal tax return for the appropriate year. The credits are limited to qualified tuition expenses incurred by students for vocational, undergraduate and/or graduate studies. These are credits that can be chosen yearly. They are nonrefundable and may not be claimed using the same expenses for which a taxpayer received another tax benefit. Only one taxpayer (parent or child) can claim the credit in a given year. Students can choose the credit themselves, especially if they have sufficient income or their parents cannot take advantage of the credit (*i.e.,* high-income taxpayers and phase-out of the credit). Certain limitations and qualifications are applicable for these credits.

The American Opportunity Credit is available for tax years beginning Jan. 1, 2009, and ending Dec. 31, 2010. This credit is limited to the student's first four years of post-secondary education. There are financial limitations involved, and the phase-out starts at certain defined income levels for single- or joint-filers.

The Hope Scholarship, available only for the first two years, is a credit equal to 100 percent of the first $1,200 of qualified tuition expenses and 50 percent of the next $1,200 of qualified tuition paid during that year. For 2009, the limit was $1,800. This credit is allowed per student. There are additional qualifications and limitations that each taxpayer must follow to avail themselves of the credit, including phase-outs for high-income earners.

The Lifetime Learning Credit, available any year, is equal to 20 percent of the first $10,000 of tuition expenses, or $2,000 yearly. This credit is allowed per taxpayer. It does not vary with the number of eligible students in a household. As long as the student is enrolled in a qualified institution, for one or

more courses, they are eligible for the credit. Phase-outs for higher earners apply as well.

You cannot claim both the Hope Scholarship and the Lifetime Learning Credit for the same taxable year. For both the Hope Scholarship and Lifetime Learning Credit the taxpayers, if married, must file a joint return. Filing separate returns, if married, precludes either from taking the credit. Because there are restrictions and limitations, taxpayers must carefully coordinate and calculate which credit applies and/or is more beneficial for a given year. The credits are only available to the parent claiming the child as a dependent on his or her tax return. Thus, the parent claiming the child as a dependent receives beneficial tax credits. That consideration should be included in the parties' review, analysis, and presentation to the court.

TO TRY OR NOT TO TRY… WHAT ARE THE REAL ISSUES?

It is the opinion of the authors that a motion seeking to compel a party to contribute to college need not necessarily result in a plenary hearing. In *Lepis*, the court set forth a three-step process through which the court should consider a modification of child support or alimony application. The steps are summarized as follows: 1) *prima facie* showing of a permanent and substantial change in circumstances; 2) exchange of discovery; then, 3) determination by the court if there is a material question of fact. If there is no material question of fact, then the court may determine support without holding a hearing. In other words, the modification of support could be decided on 'the papers.' Indeed, unless a party is able to establish a dispute as to the incomes of the parties in a guidelines case, or the lifestyle in an above-guidelines case, then the court is often capable of determining child support without taking testimony from the parties. Since the parental contribution to college is derived from the parental obligation to provide 'support' for the children born of a marriage, then the analysis set forth in *Lepis* should be applied to post-judgment applications for college contribution. Certainly attendance at college and the expenses related thereto are a substantial change of circumstances, although every parent hopes not permanent.

More recently the courts have held that a plenary hearing is not required where a party seeks to remove the child(ren) from the state. In *Barblock*, the Hon. Jack Sabatino, J.A.D., wrote for the panel noting that a plenary hearing was not necessary since there was no "genuine issue of fact …bearing upon a critical question" in the case.[53]

In a college contribution case, a plenary hearing might be required under certain circumstances. As we are all aware each case is unique and deference should be given to the particular facts and circumstances of each family that avails itself of the courts of this state. However, in many cases the ultimate determination of the *Newburgh* factors can be considered by the court without the necessity of a plenary hearing. Such a result considers the "costs, both financial and personal, that the litigants will incur in preparing for and participating in such proceedings."[54] However, the court cannot reach a proper conclusion unless all of the factors are addressed in the written submissions of the parties and supported by appropriate documentation. Indeed, it is often the incomplete submissions of one or both of the parties, which tend to create the necessity for a plenary hearing, as opposed to true disputes of material facts.

In short, if the court is presented with an application by the custodial parent for college contribution, the authors suggest that the first stage of *Lepis* has been met. That applicant should include a detailed analysis of all relevant factors, along with all of the relevant financial information needed by the court. If the noncustodial parent does not supply the court with sufficient reply and financial information, then discovery can be permitted. The parties may be given a period of time to engage in discovery and the economic mediation, as provided for in Rule 5:5-6, may be utilized. The parties may be ordered to engage in a four-party conference or some other form of settlement conference prior to their return to court. At that point, if no agreement can be reached then the parties should re-submit a 'complete' college contribution application to the court or supplement the original application. It is only at that point, with all the appropriate information presented, that the court can determine whether a plenary hearing is necessary.

If there are material facts in dispute, then a plenary hearing should be conducted. However, the hearing should be limited to those facts in dispute. It is not necessary to spend hours or days of trial establishing facts that the court can readily ascertain from the written submissions. Indeed, practitioners are encouraged to use joint submissions or stipulations to achieve a less expensive and more expedient, equitable result.

When the parents of a college-bound child are unable to reach a private agreement as to the allocation of college expenses, it is contrary to that child's best interest to cause the parents to engage in protracted and costly litigation. Indeed, the money spent on a full-fledged plenary hearing only decreases the pot available for college expenses. By providing the court with all of the information, the attorneys and litigants should hopefully avoid the necessity of a plenary hearing and provide the court with sufficient information to rule on the papers. This constitutes a true benefit to all and yields a bigger pot to help pay for the child's college expenses. ■

ENDNOTES

1. Alabama, Arizona, Colorado, Connecticut, District of Columbia, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Maryland, Massachusetts, Mississippi, Missouri, Montana, New Jersey, New York, North Dakota, Oregon, South Carolina, South Dakota, Utah, West Virginia and Washington.
2. The authors wish to thank Jennie A. Owens, Amanda Snyder, and Scott Matison, former law clerks to Judge Rand, for their assistance with researching this article.
3. *Newburgh v. Arrigo*, 88 N.J. 529 (1982).
4. *Barblock v. Barblock*, 383 N.J. Super. 114 (App. Div.), *certif. denied* 187 N.J. 81 (2006); *Hand v. Hand*, 391 N.J. Super. 102 (App. Div. 2007).
5. *Bishop v. Bishop*, 187 N.J. Super. 593, 598 (Ch. Div. 1995).
6. *Straver v. Straver*, 26 N.J. Misc. 218 (Ch. Div. 1948) *citing, Streitwolf v. Streitwolf*, 58 N.J. Eq. 563 (N.J. Ch. 1898).
7. *Strietwolf v. Streitwolf*, 58 N.J. Eq. 570, 571 (N.J. Err. & App. 1899).
8. *Streitwolf,* at 573 (N.J. Err. & App. 1899).
9. *Strietwolf*, at 572 (N.J. Err. & App. 1899).
10. *Strietwolf*, at 579 (N.J. Err. & App. 1899).
11. *Cohen v. Cohen*, 6 N.J. Super. 26, 30 (App. Div. 1950).
12. *Cohen*, at 30.
13. *Cohen*, at 31.
14. *Malkin v. Malkin*, 12 N.J. Super. 496 (App. Div. 1951).
15. *Rosenthal v. Rosenthal*, 19 N.J. Super. 521 (Ch. Div. 1952).
16. *Jonitz v. Jonitz*, 25 N.J. Super. 544 (App. Div. 1953).
17. *Id.*, at 548.
18. *Id.*, at 544.
19. *Id.*, at 556-7.
20. *Nebel v. Nebel*, 99 N.J. Super. 256 (Ch. Div. 1968).
21. The so-called "Rutgers Rule" was later disapproved of in *Finger v. Zenn*, 335 N.J. Super. 438 (App. Div. 2000). Then in *Colon v. Colon*, 2006 WL 2318250 (N.J. Super. A.D., Aug. 11, 2006) the court acknowledged that the limitation to contribution to a state school was overturned by *Finger*.
22. *Nebel*, at 259.
23. *Id.*, at 260.
24. *Id.*, at 264-5.
25. *Hoover v. Voigtman*, 103 N.J. Super. 535, 539-40 (App. Div. 1968).
26. *Id.*
27. *Khalaf v. Khalaf*, 58 N.J. 63 (1971).
28. *Id.*, at 136-7.
29. *Id.*, at 137.
30. *Schumm v. Schumm*, 122 N.J. Super. 146 (App. Div. 1973).
31. *Id.*, at 149.
32. *Newburgh*, at 534.
33. *Id.*, at 544.
34. *Id.*, at 545.
35. *Davidson v. Davidson,* 194 N.J. Super. 547 (Ch. Div. 1984).
36. *Lepis v. Lepis,* 83 N.J. 139, 148 (1980); *Schlemm v. Schlemm,* 31 N.J. 557, 581-82 (1960).
37. *Lepis*, *supra*, at 148-49; *Smith v. Smith,* 72 N.J. 350, 362 (1977).
38. *Gac v. Gac*, 186 N.J. 535 (2006).
39. *Martinetti v. Hickman*, 261 N.J. Super. 508 (App. Div. 1993).
40. *Martinetti,* at 512.
41. *White v. White*, 313 N.J. Super. 637 (Ch. Div. 1998).
42. *Johnson v. Bradbury*, 233 N.J. Super. 129, 136 (App. Div. 1989).
43. *White*.
44. *Finger v. Zenn*, 335 N.J. Super. 438 (App. Div. 2000).
45. 389 N.J. Super. 15 (App. Div. 2006).
46. *Moebring v. Maute*, 268 N.J. Super. 477 (1993).
47. *Moss v. Nedas*, 289 N.J. Super. 352 (App. Div. 1996).
48. *Id.*
49. *Id.*, at 360.
50. *Hudson v. Hudson*, 315 N.J. Super. 577 (App. Div. 1998).
51. *DeGraaff v. DeGraaff*, 163 N.J. Super. 578, 583 (App. Div. 1978).
52. Appendix TX-A, par. 18.
53. *Barblock*, *supra*. *See also, Hand*, *supra*.
54. *Barblock*, at 123.

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