Loyola University Chicago Law Journal

Volume 22
Issue 3 *Spring 1991 Illinois Judicial Conference Symposium*

Article 7

1991

Support for a Child's Post-Majority Education

Jeff Atkinson

Support for a Child's Post-Majority Education*

*Jeff Atkinson***

I. INTRODUCTION

Support for a child's educational expenses is governed by paragraph 513 of the Illinois Marriage and Dissolution of Marriage Act.[1] This statute specifically allows a court to order educational

---

* This Article is based on materials I prepared for the March 1990 Illinois Judicial Conference for which I was the Professor-Reporter on Domestic Relations. Since there was a substantial period of time between the time I wrote the materials and publication of this Article, I have updated this Article to include a review of all cases involving support for a child's post-majority education published between 1978 and April 1991. The most recent volume of the *Northeastern Reporter (2d Series)* from which I obtained cases is Volume 567 (page 327). In addition to updating my materials, I also added to the Section on "Constitutionality of Post-Majority Support" an analysis of a parent's liberty interest in making decisions pertaining to support for a child's education.

** Jeff Atkinson, B.S., Northwestern University, and J.D., *summa cum laude*, DePaul University College of Law, is a visiting assistant professor at Loyola University Chicago School of Law, where he has taught Family Law as well as other subjects. For several years, Professor Atkinson has served as Chair of the American Bar Association Child Custody Committee and as a member of the ABA Family Advocate Editorial Board. In addition, Professor Atkinson is the author of a two-volume treatise entitled MODERN CHILD CUSTODY PRACTICE published by the Michie Company, Charlottesville, Virginia.

1. Paragraph 513 provides:

> Support for Non-minor Children and Educational Expenses. The court may award sums of money out of the property and income of either or both parties for the support of the child or children of the parties who have attained majority and are not otherwise emancipated only when such child is mentally or physically disabled; and the application therefor may be made before or after such child has attained majority age. The Court also may make such provision for the education and maintenance of the child or children, whether of minor or majority age, out of the property and income of either or both of its parents as equity may require, whether application is made therefor before or after such child has, or children have, attained majority age. The authority under this Section to make provision for education and maintenance extends not only to periods of college education or professional or other training after graduation from high school but also to any period during which a child of the parties is still attending high school, even though he or she attained the age of 18. In making such awards, the court shall consider all of the relevant factors which shall appear reasonable and necessary, including:
>
> (a) The financial resources of both parents.
>
> (b) The standard of living the child would have enjoyed had the marriage not been dissolved.
>
> (c) The financial resources of the child.

ILL. REV. STAT. ch. 40, para. 513 (1989).

support for a child before or after the child has reached the age of majority. Educational support may include tuition, books, transportation, health care, and reasonable living expenses, including living expenses for a child who resides at home.[2] Post-majority support may include support for trade school education as well as college education.[3] Paragraph 513 allows a court to order support for a child's education "as equity may require" and directs the court to "consider all relevant factors which appear reasonable and necessary, including:

(a) The financial resources of both parents,

(b) The standard of living the child would have enjoyed had the marriage not been dissolved, and

(c) The financial resources of the child."[4]

This Article discusses the constitutionality of paragraph 513 of the Illinois Marriage and Dissolution of Marriage Act and the issue of standing of parents and children who seek post-majority educational support. The Article then discusses the three factors set forth in paragraph 513, plus a variety of other factors considered by courts in determining educational support for children of divorced parents. The use of trusts to provide educational support after the death of a parent is also examined.

II. CONSTITUTIONALITY OF POST-MAJORITY SUPPORT

The Illinois Supreme Court has upheld the constitutionality of paragraph 513 of the Illinois Marriage and Dissolution of Marriage Act. In *Kujawinski v. Kujawinski*,[5] a father argued that the statute violated principles of equal protection by requiring divorced parents to pay for a child's post-majority education while not imposing such a burden on non-divorced parents. The supreme court stated that it did not need to reach the question of whether a duty of educational support could be imposed on non-divorced parents since, even if such a distinction were valid, the obligation imposed on divorced parents "is reasonably related to a

2. *In re* Marriage of Pauley, 104 Ill. App. 3d 100, 104-05, 432 N.E.2d 661, 665 (4th Dist. 1982) (listing the specified expenses except transportation and health care); *see also In re* Marriage of Falat, 201 Ill. App. 3d 320, 327, 559 N.E.2d 33, 37-38 (1st Dist. 1990) ("[e]ducational expenses entitle a mother to receive reasonable living expenses in addition to the cost of tuition and books when the children are residing at home while attending college").

3. *See In re* Support of Pearson, 111 Ill. 2d 545, 552, 490 N.E.2d 1274, 1277 (1986), discussed *infra* text accompanying notes 30-34, 45-46.

4. ILL. REV. STAT. ch. 40, para. 513 (1989).

5. 71 Ill. 2d 563, 376 N.E.2d 1382 (1978).

legitimate legislative purpose . . . . It is certainly a legitimate legislative purpose to minimize any economic and educational disadvantages to children of divorced parents."[6] Further, the court noted, "it is not the isolated exception" that noncustodial divorced parents may be less willing to support their children than parents who are not divorced.[7]

Although the Illinois Supreme Court and the courts of some other states have upheld the constitutionality of statutes that require divorced parents to pay for a child's college education,[8] that view is not universal. Courts in New Jersey and Florida, for example, have commented in dicta "that the state would have no reasonable grounds to treat the adult children of divorced parents any different than the adult children of married parents."[9]

Court-ordered support for a child's education raises another constitutional issue that has not been addressed by Illinois courts of review. This unexamined issue is whether court-ordered support invades a parent's due process right (or liberty interest) in family privacy, including the right to determine support for a child's education.

There is ample dicta regarding the rights of both parents to manage their children's affairs. For example, in *Weinberger v. Wiesenfeld*,[10] which dealt with social security survivor's benefits, the United States Supreme Court stated, "[A] father, no less than a mother, has a constitutionally protected right to the . . . 'custody and management' of 'the children he has sired and raised . . . .' "[11] In *Stanley v. Illinois*,[12] which dealt with the custodial rights of unwed fathers, the Court stated, "The rights to conceive and raise one's children have been deemed 'essential', 'basic civil rights of man', and '[r]ights far more precious . . . than property rights.' "[13] One can argue that part of a parent's right to raise a child and direct a child's affairs is the right to exert influence over a child's

6. *Id.* at 579, 580, 376 N.E.2d at 1389, 1390.

7. *Id.* at 579, 376 N.E.2d at 1389-90.

8. *See, e.g.*, *Ex parte* Bayliss, 550 So. 2d 986 (Ala. 1989); Neudecker v. Neudecker, 566 N.E.2d 557, 563-64 (Ind. Ct. App. 1991); Childers v. Childers, 89 Wash. 2d 592, 605-06, 575 P.2d 201 (1978).

9. Kern v. Kern, 360 So. 2d 482, 485 (Fla. Dist. Ct. App. 1978); *accord* Sakovits v. Sakovits, 178 N.J. Super. 623, 630, 429 A.2d 1091, 1095 (Ch. Div. 1981) (quoting *Kern*).

10. 420 U.S. 636 (1975).

11. *Id.* at 652 (citations omitted).

12. 405 U.S. 645 (1972) (holding that an unmarried father cannot be deprived of custody of his children upon the death of the mother without a hearing).

13. *Id.* at 651.

educational choices, including a determination of the level of financial support to be provided by the parent for a child's education.

The right of parents to direct their children's education was recognized in *Wisconsin v. Yoder*,[14] in which Amish parents were allowed to withdraw their children from school after the eighth grade, even though state laws required school attendance until age sixteen. *Yoder*, however, was decided primarily on the basis of the parents' rights of religious freedom rather than a general right of a parent to direct a child's education. Thus, *Yoder* offers only moderate assistance to parents who wish to assert a privacy interest in a dispute over the level of support for a child's education.

Parents have a liberty interest in providing guidance for their child's education, particularly when the parents are asked to pay all or part of the educational expenses. However, the fact that a liberty interest is involved does not end the inquiry. The United States Supreme Court has recognized many liberty interests, but nonetheless has allowed state statutes to override these interests when there is a rational basis for doing so.[15]

Determining the constitutionality of a statute that requires support for a child's post-majority education could turn on the level of scrutiny the court applies to the statute. If a minimal rationality test is applied, an educational support statute is likely to be upheld because the statute advances legitimate state interests, namely, facilitating education for children (including adult children) and minimizing the effects of divorce on children. It should be noted that divorced parents already are treated differently with regard to financial matters than parents who are not divorced. For instance,

---

14. 406 U.S. 205 (1972).

15. In Cruzan v. Director, Missouri Department of Health, 110 S. Ct. 2841 (1990), the Supreme Court stated that forced administration of life-sustaining medical treatment implicates a liberty interest, but that the U.S. Constitution does not prohibit a state from requiring clear and convincing evidence of an incompetent's wishes to withdraw life support before such support could be withdrawn. *Id.* at 2852. The majority opinion, written by Chief Justice Rehnquist, said, "But determining that a person has a 'liberty interest' under the Due Process Clause does not end the inquiry; 'whether respondent's constitutional rights have been violated must be determined by balancing his liberty interests against the relevant state interests.'" *Id.* at 2851-52 (citations omitted).

In a footnote, the *Cruzan* Court discussed the difference between the terms "right" and "interest." "Although many state courts have held that a right to refuse treatment is encompassed by a generalized constitutional right of privacy, we have never so held. We believe this issue is more properly analyzed in terms of a Fourteenth Amendment liberty interest." *Id.* at 2851 n.7. Thus, under the Supreme Court's terminology, "liberty interests" receive considerably less protection than "rights." As such, a parent's desire to exercise influence over a child's post-majority education by determining the level of support for that education is likely to be characterized as a "liberty interest" rather than a "right."

when parents divorce, the noncustodial parent's obligation of support for a minor child is set at a dollar amount by the court;[16] in contrast, a minor child in an intact marriage does not receive a court order of support at a fixed dollar amount.

If, instead of applying a minimal rationality test, the court employs a strict scrutiny test, the court presumably will apply the label of "fundamental right" to the parent's interest in raising his or her child and extend the scope of that right to include a parent's determination of educational support. In such an event, the statute probably would be found unconstitutional on the ground that a child's educational support is a matter of family privacy. As Professor Gerald Gunther has observed, such a level of scrutiny usually is "strict" in theory and "fatal" in fact.[17]

Courts, however, in deciding the level of support for a child's education, are not likely to find that the parent's interest encompasses a fundamental right. The interest is important, but it does not rise to the level of such well-established fundamental rights such as the right to marry,[18] to procreate,[19] to hold religious beliefs,[20] or to due process before complete loss of custody of one's child.[21] Those fundamental rights are related to the essence of the intimate associations and beliefs in one's life. Whether or not a parent decides to pay for a child's education is not as close to the core of personhood and privacy as other rights which have been held to be fundamental. The penumbra, so to speak, of the fundamental right to raise and manage one's child does not cast its

16. Illinois' guidelines for minimum amounts of child support are based on a percentage of the non-custodial parent's net income and the number of children, although the financial resources of the custodial parent also may be considered. ILL. REV. STAT. ch. 40, para. 505(a) (1989). Many other states explicitly consider the income of both parents in determining guideline amounts of child support. *See* J. Atkinson, 2 MODERN CHILD CUSTODY PRACTICE § 10.35 (1986 & Supp. 1990).

17. Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

18. *See* Loving v. Virginia, 388 U.S. 1, 11-12 (1967) (striking down a law against interracial marriages).

19. *See* Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (holding the state cannot make use of contraceptives by married persons a crime; nor can the state punish someone for providing married persons with contraceptives or information about them); Skinner v. Oklahoma, 316 U.S. 535, 541-43 (1942) (invalidating a statute that provided for the sterilization of persons convicted two or more times of "felonies involving moral turpitude").

20. *See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (reversing convictions of Jehovah's Witnesses for soliciting contributions without a state license).

21. Stanley v. Illinois, 405 U.S. 645 (1972).

shadow so far as to give fundamental-right protection to a parent's decisions on post-majority educational support.

Although a parent's decision on post-majority support for the child does not involve a fundamental right, a statute that mandates such support should be subject to something more than a minimal rationality test. The interests involved encompass not just an economic issue, but also an issue of family privacy—the interests of a parent in influencing a child's educational choices and allocating family resources through the presence or absence of economic support. For such a blend of economic and privacy interests, a mid-tier level of scrutiny is appropriate. As such, the statute must be more than minimally related to a legitimate government interest. The relationship must be "substantial" and the government interest must be "important."[22]

A post-majority support statute such as Illinois' would satisfy that standard. Education of children and young adults is an important governmental interest. The future of our country in a competitive world depends, in large measure, on quality education. In addition, protecting children from the adverse effects of divorce is also an important governmental interest, particularly when the government is in the business of regulating divorces. A post-majority support statute is "substantially related" to that interest by specifically allowing allocation of funds for a child's education.

The interest in family privacy is at least partially accommodated by the Illinois statute. Paragraph 513 of the Illinois Marriage and Dissolution of Marriage Act does not require post-majority support in all cases. Instead, the statute gives the court discretion to order support after consideration of "all relevant factors."[23] Thus, a parent who has a good reason for not supporting a child's post-majority education (or not supporting the education at the level desired by the child or other parent) could have that interest honored by the court. Undoubtedly, many family members would prefer not to have matters of family privacy aired and decided in court, but it is the nature of divorce that some matters that formerly were decided within the privacy of the family move to a more public forum.

The determination of the constitutionality of a post-majority educational support statute is not changed by application of a mid-tier level of scrutiny versus a minimal-rationality test. Under

22. Craig v. Boren, 429 U.S. 190, 197 (1976) (invalidating a statute that applied different minimum drinking ages for males and females).

23. ILL. REV. STAT. ch. 40, para. 513 (1989), quoted in full *supra* note 1.

either approach, the statute would be upheld. Nonetheless, the application of a mid-tier level of scrutiny gives respect to the privacy interests involved.

Further, respect for the privacy interest should carry over to the trial court. Courts should not automatically order educational support just because the parents can afford it and the child apparently would benefit by additional education. Courts should examine a variety of factors relevant to family decision-making. For example, if a mother and father had worked to support themselves while in college and during their marriage, and the parents thought that self-support would be a good experience for their children as well, the court probably should honor that earlier decision in the event that the issue subsequently is litigated. Most of the remainder of this Article, after a brief discussion of standing, will analyze the factors that courts consider when determining post-majority educational support.

III. STANDING

Either parent—custodial or noncustodial—may bring an action to seek support for a child's educational expenses. However, there seems to be a conflict in Illinois among the appellate courts regarding whether a child can bring an action for educational support in the child's own name. In *Miller v. Miller*,[24] the Illinois Appellate Court for the Third District held that an eighteen-year-old child who sought support from both parents for his college education did not have standing to bring an action under the Illinois Marriage and Dissolution of Marriage Act. A similar result was reached in a Second District case, *In re Marriage of Garrison*.[25] In both *Miller* and *Garrison*, the courts stated that the decision to give a child standing to proceed against the child's parents for educational expenses should be made by the legislature rather than the judiciary.

In a Fourth District case, however, an eighteen-year-old child and his mother successfully brought an action against the father for the child's college support, but the court did not specifically address the issue of standing.[26] Additionally, in a First District decision, also entitled *Miller v. Miller*[27] (but involving different parties than the Third District *Miller* case), a young man who had reached the age of majority was found to have standing as a third-

24. 160 Ill. App. 3d 354, 356-57, 513 N.E.2d 605, 607 (3d Dist. 1987).
25. 99 Ill. App. 3d 717, 425 N.E.2d 518 (2d Dist. 1981).
26. Wait v. Wait, 158 Ill. App. 3d 271, 273-74, 510 N.E.2d 600, 602 (4th Dist. 1987).
27. 163 Ill. App. 3d 602, 516 N.E.2d 837 (1st Dist. 1987).

party beneficiary to enforce a settlement agreement between his parents that provided for his college support. The parents in that case purported to modify their settlement agreement so that the mother received additional money in exchange for not requiring the father to pay for their son's college education, as had been required by the initial agreement. The court held that this modification was not enforceable against the son.[28]

This decision can be distinguished from the Third District *Miller* case because the First District case involved an existing settlement agreement that named the child as a beneficiary. In contrast, the Third District case involved an attempt by a child to obtain support solely under paragraph 513 of the Act, not on the basis of an existing agreement. In other words, the child who was the beneficiary of the agreement had a vested interest in support that was not afforded by the statute alone, although one could argue that both children needed support. This conflict among appellate districts continues because the Illinois Supreme Court has not ruled on the issue of a child's standing to seek support.

IV. Factors for Determining Post-Majority Child Support

A. Financial Resources of the Parents

"The financial resources of both parents" is the first enumerated factor for consideration under paragraph 513 of the Act.[29] The Illinois Supreme Court has held that "[t]he court should not order a parent to pay more for educational expenses than he or she can afford. A party's ability to pay must be evaluated with regard to the party's resources at the time of the hearing."[30] In the same ruling, the court noted that the statute, with its use of the verb "may," gives the trial court discretion on whether to order educational support. The statute does not require that all divorced parents pay for their child's post-high school education.[31] Examples of the relationship between parents' financial resources and the level of support that is ordered by courts are presented throughout this Section.

28. *Id.* at 620, 516 N.E.2d at 849.

29. Ill. Rev. Stat. ch. 40, para. 513(a) (1989).

30. *In re* Support of Pearson, 111 Ill. 2d 545, 552, 490 N.E.2d 1274, 1277 (1986) (citations omitted).

31. *Id.* at 551, 490 N.E.2d at 1277.

B. Standard of Living; Educational Expenses of Older Children

The second enumerated factor in paragraph 513 is "the standard of living the child would have enjoyed had the marriage not been dissolved."[32] In *In re Support of Pearson*,[33] the court held that "the most probative evidence of this factor" was what the parents had spent for the education of their other children prior to dissolution of the marriage.[34] In *Pearson*, the father had a net income of $28,000 per year and had spent, at most, $3,602 per year for his older children's education. Thus, the court was not very sympathetic to the mother, who sought $14,000 per year for two years for their child to attend an out-of-state auto mechanics school. The supreme court affirmed the trial court's decision to set support at $1,200 per year for two years because the evidence suggested the child could attend a local community college's automotive school for far less cost.

The "standard of living" factor referred to in paragraph 513 puts the court in the position of trying to determine what the parents would have contributed to their child's education had the parents' marriage not ended.[35] In making this determination, the court might consider the level and quality of education that the parents received and the ambitions that the parents had for their children. For example, if the parents are well-educated, they may have provided for their children to be similarly educated, at least had the marriage remained intact. On the other hand, some parents may have worked their way through school and expect their children to do the same.

C. Financial Resources of the Child

The third enumerated factor in paragraph 513 is "the financial resources of the child."[36] The statute does not require that a child help pay for his or her own education, but as a matter of practice, most courts will expect a child to make some financial contribution. In one case, a father argued that his daughter should spend more of her own personal assets on her education.[37] The daughter was the beneficiary of trust accounts worth approximately $8,000,

32. ILL. REV. STAT. ch. 40, para. 513(b) (1989).
33. 111 Ill. 2d 545, 490 N.E.2d 1274 (1986).
34. *Id.* at 551, 490 N.E.2d at 1277.
35. *See generally* Kujawinski v. Kujawinski, 71 Ill. 2d 563, 580-81, 376 N.E.2d 1382, 1390 (1978).
36. ILL. REV. STAT. ch. 40, para. 513(c) (1989).
37. Larsen v. Larsen, 126 Ill. App. 3d 1072, 1074, 468 N.E.2d 165, 167 (3d Dist. 1984).

and she had a $10,000 joint checking account with her mother. The court held that "[c]hildren of divorced parents are not required as a matter of law to spend their own funds in obtaining a college education. Rather, the extent of a child's contribution is left to the trial court's discretion . . . ."[38] Nonetheless, the appellate court noted with approval that the trial court had instructed the child to apply $1,200 in earnings from her job at a McDonald's restaurant toward her college expenses.

In another case, a father argued that his eighteen-year-old son should apply for student loans to finance the son's education at Washington University in St. Louis, the costs for which were about $13,000 per year after subtraction of an educational grant.[39] The court held that it was well within the trial court's discretion to order the father to pay $11,000 per year so that the son would not have to incur substantial debt, especially since the father earned in excess of $80,000 per year. The court also noted that the son was a work-study student who worked twenty-five to forty hours per week in the summer.[40]

In another case, a father tried to argue his daughter's living arrangement as a defense to a petition for educational support.[41] The father asserted that because his daughter was living with an unmarried friend, she was emancipated, and therefore he should not have to pay her educational support. The court held that the daughter's emancipation did not preclude support and her "living situation [was] completely irrelevant to the issues at bar."[42]

In commenting on the importance of a child making a contribution to his or her educational support, one appellate court referred to the employment of a twenty-two-year-old student who was living with his mother and said, "We think that his income should have been devoted to obtaining his education and not to enhancing

38. *Id.*

39. Gribb v. Triezenberg, 188 Ill. App. 3d 695, 697, 544 N.E.2d 444, 448-49 (4th Dist. 1989).

40. In *In re* Marriage of Korte, 193 Ill. App. 3d 243, 549 N.E.2d 906 (4th Dist. 1990), the court said, "We recognize that the child has a duty to lessen the parent's financial burden of college expenses . . . . While loans for education are available, it cannot be said that the trial court must in every case require the student to seek a loan." *Id.* at 249, 549 N.E.2d at 910. In this case, the court noted the daughter had lessened her parent's burden by attending a relatively inexpensive school, and the court ordered the father to pay college support even though the daughter's process for seeking a loan had not yet been completed. *Id.*

41. *In re* Marriage of Greenberg, 102 Ill. App. 3d 938, 429 N.E.2d 1334 (1st Dist. 1981).

42. *Id.* at 948, 429 N.E.2d at 1342.

his lifestyle."[43] In another case, a court commented that "[p]arents are often called upon to make sacrifices to obtain a college education for their children. But the children must also cooperate to lessen the burden to their parents in whatever way they can."[44]

D. Public v. Private Institutions

The cost of attending a public educational institution is a benchmark in establishing educational support; nevertheless, a court may order a parent to pay higher costs for a private institution if the facts of a particular case so warrant. In *In re Support of Pearson*,[45] the Illinois Supreme Court observed, "While in some instances it may be proper for the court to provide for a child's attendance at a private school, the child's access to a less expensive public institution is a factor to be considered."[46] The mother in *Pearson* sought to require the father to contribute to the costs of their son attending a two-year Connecticut automotive school with a tuition of $14,000 per year. The supreme court affirmed a trial court decision that refused to require the father to pay such high costs because Triton Community College, in Cook County, Illinois, offered a similar program for $2,013 per year. In addition, the court noted that the father had a net income of only $28,000 per year and $12,000 of that amount went to the mother as an alimony payment. Therefore, educational support was set at $1,200 per year.

Similarly, one father, an attorney, whose income decreased from $96,000 to approximately $40,000, was not obliged to pay $30,000 or more per year to send his two children to the University of California.[47] In reversing and remanding the case, the appellate court indicated that the appropriate frame of reference for determining the father's educational support obligation, if any, was the cost of a state school.

On the other hand, parents with higher incomes may indeed be required to pay for private schools. In one case, a father with an adjusted gross income of $47,000 per year was required to pay $3,500 per semester for the full cost of his daughter's tuition and

43. *In re* Marriage of Brust, 145 Ill. App. 3d 257, 262, 495 N.E.2d 133, 136 (5th Dist. 1986).

44. *In re* Marriage of Booth, 122 Ill. App. 2d 1, 6, 258 N.E.2d 834, 837 (1st Dist. 1970).

45. 111 Ill. 2d 545, 490 N.E.2d 1274 (1986).

46. *Id.* at 551-52, 490 N.E.2d at 1277.

47. *In re* Marriage of Calisoff, 176 Ill. App. 3d 721, 729-30, 531 N.E.2d 810, 816-17 (1st Dist. 1988).

board at Washington University in St. Louis.[48] An additional factor in setting this level of support was that the father had earlier acquiesced to his daughter attending that institution.[49]

A parent's relatively high income does not mean that the parent will be obliged to pay for any private school that the child or the child's custodial parent desires. In one case, a mother appealed from an order that required the father to pay their daughter's educational expenses up to a maximum of what it would cost to send their daughter to Mundelein College in Illinois for four years. (Mundelein was the school in which their daughter currently was enrolled.)[50] The mother had argued against such a limit on support. In the words of the appellate court, "[The mother's] position is basically that [the father] should be required to pay the cost of whatever education Jacqueline wants, wherever she wants to get it, for however long she wants, on whatever basis (full- or part-time) she wants."[51]

The appellate court upheld the order, fixed to the Mundelein College rates, as reasonable and particularly appropriate. The court observed that the mother previously had enrolled the daughter in the most expensive boarding school in Illinois without telling the father and later had enrolled the child at Mundelein College after her junior year of high school, again without telling the father. (Mundelein was willing to accept the child on her academic record without a high school diploma.)[52]

E. Allocating Educational Support Between the Parents

A moderately common approach to ordering educational support for a child is to require both parents to pay the child's expenses in proportion to the parents' incomes. The order may provide, either explicitly or implicitly, that child is responsible for some portion of his or her educational expenses. For example, in a Second District case, the appellate court affirmed an order in which the father was to pay 65% of the children's education costs;

48. Greiman v. Friedman, 90 Ill. App. 3d 941, 946-47, 414 N.E.2d 77, 82 (1st Dist. 1980).

49. *Id.* at 947, 414 N.E.2d at 82; *see also* Gribb v. Triezenberg, 188 Ill. App. 3d 695, 702-03, 544 N.E.2d 444, 447 (4th Dist. 1989) (affirming an order that a father who earned $77,000 per year pay $11,000 per year for his son to attend Washington University; total costs of attending the University were approximately $13,000).

50. Ingrassia v. Ingrassia, 156 Ill. App. 3d 483, 493, 509 N.E.2d 729, 736 (2d Dist. 1987).

51. *Id.* at 493, 509 N.E.2d at 737.

52. *Id.* at 496-97, 509 N.E.2d at 737-38.

the mother, 23%; and each daughter, 12%.[53] The allocation between father and mother was in approximate proportion to their incomes.

Although several courts have allocated support in proportion to the parties' incomes, the Fourth District Appellate Court has held that it is an abuse of discretion to apportion support based solely on a ratio of the parties' gross incomes. In *In re Marriage of Stockton*,[54] the court stated that the amounts of support set by the trial court may have been correct, but the method of arriving at these figures was wrong. In remanding the case, the appellate court sought to insure that all appropriate equitable factors, not just the incomes of the parties, were considered.

In determining the responsibility of each parent for support, the court also may consider the contribution of a parent who maintains a home for the child (usually the custodial parent). In one case, a mother who had been the custodial parent before her daughter went to college was not obliged to make cash payments in direct support of her daughter's educational expenses.[55] The court noted that the mother purchased clothes for the daughter, laundered the daughter's clothes when she came home from school, and maintained a home where the daughter stayed during the summer.

The issue of allocating support in proportion to income does not arise if the parties enter into a settlement agreement which provides otherwise. If the parties previously agreed that one parent would be fully responsible for college support, the agreement will be enforced as long as it is conscionable and meets the child's reasonable needs. The income of the party who is not obliged to pay under the agreement will not be relevant, although that party's income would be relevant in the absence of an agreement.[56]

F. Impact of Second Families

A parent's obligations to a second family are a relevant consider-

53. *In re* Marriage of Sreenan, 81 Ill. App. 3d 1025, 1027-29, 402 N.E.2d 348, 350-52 (2d Dist. 1980); *see also* Taylor v. Luntz, 89 Ill. App. 3d 278, 283, 411 N.E.2d 950, 954 (4th Dist. 1980) (affirming an order in which the trial judge said that the allocation between the parties was in proportion to their incomes).

54. 169 Ill. App. 3d 318, 523 N.E.2d 573 (4th Dist. 1988).

55. *In re* Marriage of Korte, 193 Ill. App. 3d 243, 249-50, 549 N.E.2d 906, 910-11 (4th Dist. 1990).

56. *In re* Marriage of Huston, 150 Ill. App. 3d 608, 613-14, 501 N.E.2d 1015, 1019 (5th Dist. 1986); *see also* Larsen v. Larsen, 126 Ill. App. 3d 1072, 1073, 468 N.E.2d 165, 167 (3rd Dist. 1984).

ation in setting the educational support for children of a first marriage.[57] More than one court has observed, " 'Realistically, defendant is obligated to support his present wife and child.' "[58] On the other hand, there is old dictum to the effect that a parent must meet the needs of a first family before meeting the needs of a second family.[59] Nevertheless, this dictum does not seem to be currently followed by the courts, and a parent's obligations to a second family are indeed a factor in setting support for a first family, although this factor may not be controlling.

In some cases, a parent's remarrying may have a positive impact on the parent's ability to pay educational support for children of a first marriage. If a new spouse of a parent works and helps pay family expenses, such as mortgage payments, property taxes, rent, and utilities, the new spouse's contribution will help free the income of the previously divorced parent to pay support to children from the first marriage. Therefore, the consideration is relevant in setting support.[60]

G. Child's Academic Performance

A child's academic performance is another relevant factor in determining educational support. A student who does well in school increases his or her likelihood of receiving an order of support.[61] Conversely, a student who performs poorly may receive no support or a reduced level of support. In *Greiman v. Friedman*,[62] the court said, "Undoubtedly, there may be situations in which a court may refuse to require a divorced parent to pay college expenses, as where the student repeatedly demonstrates a lack of ability or interest in his or her college pursuits."[63] Nevertheless, the court declined to adopt an absolute rule that a divorced parent has no duty to pay college expenses because of an allegedly poor academic per-

57. Greiman v. Friedman, 90 Ill. App. 3d 941, 948-49, 414 N.E.2d 77, 83 (1st Dist. 1980).

58. *Id.* at 948, 414 N.E.2d at 83 (quoting Tan v. Tan, 3 Ill. App. 3d 671, 675, 279 N.E.2d 486, 489 (1st Dist. 1972)).

59. *See, e.g.*, Gregory v. Gregory, 52 Ill. App. 2d 262, 268, 202 N.E.2d 139, 143 (5th Dist. 1964).

60. Wait v. Wait, 158 Ill. App. 3d 271, 273-74, 510 N.E.2d 600, 602 (4th Dist. 1987).

61. *See, e.g.*, Willcutts v. Willcutts, 88 Ill. App. 3d 813, 820, 410 N.E.2d 1057, 1062 (3rd Dist 1980) ("[t]he evidence leaves no doubt that Brian [a biology major with an "A" average] is a good student embarked upon a serious course of study and that he is deserving of the same financial assistance as his older brothers and sisters received in completing his college education").

62. 90 Ill. App. 3d 941, 414 N.E.2d 77 (1st Dist. 1980).

63. *Id.* at 946, 414 N.E.2d at 81-82.

formance. The court, however, did indicate that it was appropriate to condition the father's payments for one daughter on her maintaining at least a "C" grade-point average. (The daughter had received fifteen credit hours of "D's".) For another daughter, who required an extra semester to finish college, the court held that it was an appropriate exercise of discretion to require the parents to pay only one-half of the cost for the extra semester and require the daughter to pay the other half.

H. Quality of Relationship Between Parent and Child; Lack of Consultation

The quality of the relationship between a child and the parent or parents from whom support is sought is another factor in setting educational support, but the absence of a good relationship will not necessarily preclude support. In one Fourth District case, the court held that the father's claim of "no relationship" with his son could have been considered, and perhaps, should have been considered, by the trial court.[64] Nonetheless, the trial court's failure to do so was not reversible error.[65] Presumably, the worse the relationship or the more bad faith on the part of the child, the more likely a court would be to reduce or eliminate educational support.

A related issue is a parent's complaint that he or she was not adequately consulted about educational decisions. Courts have held that the failure to consult with the parent from whom payment is sought can be a factor in setting the amount to be provided by that parent, but the failure to consult will not automatically result in the termination of support.[66]

V. Use of Trusts For Educational Support

Paragraph 503(g) of the Illinois Marriage and Dissolution of Marriage Act[67] permits a court to establish a trust for the benefit of

64. Gribb v. Triezenberg, 188 Ill. App. 3d 695, 701, 703, 544 N.E.2d 444, 446, 448 (4th Dist. 1989).

65. *Id.*; *see also Willcutts*, 88 Ill. App. 3d at 819, 820, 410 N.E.2d at 1062 (citing *In re* Marriage of Sreenan, 81 Ill. App. 3d 1025, 1029, 402 N.E.2d 348, 352 (2d Dist. 1980) for the proposition that "it is well settled that this obligation to contribute to educational expenses is not conditioned upon a continued good relationship between parent and child").

66. *See supra* notes 64-65 and accompanying text.

67. Paragraph 503(g) provides:

> The court if necessary to protect and promote the best interests of the children may set aside a portion of the jointly or separately held estates of the parties in a separate fund or trust for the support, maintenance, education, and general welfare of any minor, dependent, or incompetent child of the parties.

the children out of the marital or non-marital property of the parents. This paragraph, when combined with paragraph 513 of the Act, permits a court to establish a trust for a child's post-majority educational expenses.[68] However, the fact that the parents have ample funds is not a sufficient basis for establishing a trust. "[A] trust can only be established if there is evidence showing a need to protect the interests of the children. Section 503(g) also demands a showing that the parent is unwilling or unable to make direct payments of support."[69]

Thus, in one case in which the father had not saved any of his prior disability settlements (amounting to $170,000), the court ordered him to establish a $10,000 educational trust for his children out of an upcoming disability payment,[70] despite his expressed disdain for higher education. The court further held, however, that to the extent that the children did not use the funds for their education, the funds would be returned to the father. Under the statute, any unused funds could not be turned over to the adult children as the trial court initially had ordered.[71]

VI. Effect of Death of a Parent

Paragraph 510(d) of the Marriage and Dissolution of Marriage Act, relating to the modification of child support payments, states, "When a parent obligated to pay support dies, the amount of support may be modified, revoked or commuted to a lump sum payment, to the extent just and appropriate in the circumstances . . . ."[72] A First District case, *In re Marriage of Treacy*, held that if a support order entered during the obligor's lifetime does not require the parent to pay educational support and does not expressly reserve the issue, a court is without power to order support for education after the obligor's death.[73]

This ruling seems odd because neither the language of paragraph 510 nor paragraph 513 limit the power of a court to modify support to include educational support following the death of an obligor. Indeed, the spirit of the Act seems to encourage granting

---

Ill. Rev. Stat. ch. 40, para. 503(g) (1989).

68. *In re* Marriage of Harsey, 193 Ill. App. 3d 415, 419, 549 N.E.2d 995, 997 (5th Dist. 1990).

69. *Id.*

70. *Id.* at 420-25, 549 N.E.2d at 997-1001.

71. *Id.* at 424-25, 549 N.E.2d at 1000-01.

72. Ill. Ann. Stat. ch. 40, para. 510(d) (Smith-Hurd Supp. 1991).

73. *In re* Marriage of Treacy, 204 Ill. App. 3d 282, 289, 562 N.E.2d 266, 270 (1st Dist. 1990).

support for a child's post-majority education following the death of an obligor, if the circumstances indicate such an order would be "just and appropriate." In *Treacy*, the dissent persuasively argued that "the fortuitous death of the parent controls the court's disposition, and the child is severely prejudiced. Such a result is not in harmony with the legislature's intent to mitigate the harm to children as a result of divorce."[74]

The issue has not yet been ruled upon by the Illinois Supreme Court. In the meantime, attorneys and judges who wish to leave open the possibility of support for a child's post-majority education would do well to make sure that the issue is explicitly reserved in the court's support order.

VII. CONCLUSION

The obligation of a parent to pay for a child's education after high school is not as strong as a parent's obligation to support a child during the child's minority. Nonetheless, Illinois statutes and case law provide that educational support can be ordered "as equity may require." The factors that a court may consider are many and the need for sensitivity is high as courts enter into an issue that traditionally has been resolved privately by parents and their children without outside intervention.

74. *Id.* (Jiganti, J., dissenting).