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College Expenses: A Legal Quagmire for Divorced Spouses

College costs are soaring, placing an additional financial burden on parents seeking to provide the best educational experience possible for their children. Today, the average national cost of a four year college education, including room and board, at a private college is $40,917 per year; at a public out-of-state college, $31,701 per year; and at a public in-state (SUNY) college, $18,391 per year.[1] It is no wonder then that divorced spouses find themselves entangled in post-divorce litigation concerning college expenses. This article extracts some key legal principles from the quagmire of case and statutory law that have evolved over the past 20 years.

Obligation Absent Agreement

Prior to 1989, the law generally held that, "absent unusual circumstances or a voluntary agreement," courts lacked the authority to order a parent to contribute toward college expenses.[2] With a college education becoming more of an inevitable step after high school, the Legislature enacted Domestic Relations Law §240 (1-b)(c)(7) authorizing courts, in their discretion, to "direct a parent to contribute to a child's private college education, even in the absence of special circumstances or a voluntary agreement."[3] Pursuant to that statute, absent an agreement, the court examines such factors as the educational background of the parents, the parents' financial ability to pay for college, and the child's academic ability.

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In exercising its discretion, a court may order a parent to contribute toward college costs, but generally only to the age of legal emancipation, 21, even though a child may not graduate from college until 22 years old or, oftentimes, older. The only way to insure that a parent's obligation for college expenses continues until the child graduates is to provide for it in a marital agreement.

And now, surprisingly, after considering the Third Department's recent opinion in *Shapiro v. Shapiro*,[4] the only way to ensure that the obligation for college expenses ends at age 21 is to explicitly provide for such limitation in an agreement as well. In *Shapiro*, the court found that plaintiff acknowledged during testimony that he had agreed to pay part of college education costs without a showing that he had intended to limit payments to the first three years of college. The court then affirmed the supreme court's order directing plaintiff to pay for the college expenses until each child reached 22 years old. Despite the fact that there was no written agreement in this case, the agreement of the parties was inferred from statements made by the non-custodial parent concerning his willingness to contribute to college expenses.

The courts have attempted to alleviate some of the financial burden on a non-custodial parent paying both child support and college room and board expenses by holding that where a parent is making payments toward college room and board while a child

attends college away from home, while simultaneously paying child support, it is appropriate to award the non-custodial parent a credit for one payment against the other.[5] But, (no surprise) it is not always so. The amount of the credit a court may allow is limited. The sum of the credit to be awarded against expenses for college room and board cannot invade the otherwise presumptive amount of child support paid for the remaining non-college-aged children.[6]

Obligation Pursuant to Agreement

Where a non-custodial parent is paying college room and board expenses pursuant to a marital agreement, as opposed to a court order after trial, the non-custodial parent is not given the benefit of a room and board offset against child support unless that agreement specifically so provides.[7] The courts have held that to permit a room and board credit against child support where the parties marital agreement does not provide for such a credit would eliminate entirely any meaningful contribution toward college expenses.[8]

The case law – holding that no credit against child support is available for college room and board paid pursuant to a marital agreement unless the agreement so allows – is further supported by standard language found in most marital agreements. Frequently, a marital agreement that makes provisions for a child's college costs will also provide that the non-custodial parent's child support obligation shall continue until age 22. Such marital agreements also generally provide that the child's residence at a college is not to be considered residence away from the custodial parent and is not, therefore, an emancipation event terminating the non-custodial parent's child support obligation.

The courts have refused to award a non-custodial parent a child support credit, *i.e.*, a downward modification in the support obligation, based upon college expenses paid, reasoning that to do so would repudiate the support obligation intended by such language.[9]

Voluntary Payments

Where a martial agreement is silent on the issue of college tuition, but the non-custodial parent nevertheless voluntarily pays the child's college costs, including room and board expenses, the courts have uniformly held that a dollar-for-dollar credit does not apply.[10] In *Ruane v. Ruane*, the Second Department went so far as to hold that any voluntary payment of tuition may not be recouped or credited against amounts owing under a pendente lite order that did not address the issue of tuition payments.[11] Likewise, courts have found that voluntary payments made by a parent for the benefit of his or her child may not be credited against support amounts due under a court order.[12]

Downward Modification

A non-custodial parent faced with the financial burden of having to pay college expenses and child support often seeks relief from the court in the form of a downward modification of his/her child support obligation by pleading a financial hardship. Such an application, depending upon the factual circumstances alleged, may be successful to reduce the child support obligation in the Judgment of Divorce if the movant satisfies his/her burden of proof. However, it is well-established that a downward modification of a support obligation in the Judgment of Divorce does not relieve that party of the contractual obligation to pay the higher sum specifically agreed to in a marital agreement that is incorporated into, but not merged with, the Judgment of Divorce.[13] So long as the marital agreement stands unimpeached, the court cannot alter or modify its provisions and it remains enforceable as a separate contractual obligation entered into by all parties.[14]

Conclusion

A simple search of the term "college expenses" in matrimonial case law turns up hundreds of cases, each of which presents a unique set of facts. Practitioners should be attentive to the ever evolving case law on the issue of college costs when drafting marital agreements and when they are faced with the prospect of having to litigate the issue because, in the frequent cases involving more than one child, hundreds of thousands of dollars are at stake.

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1. www.CollegeBoard.org, *College Costs: FAQs* (last visited Apr. 10, 2014).
2. *Samuels v. Venegas*, 126 A.D.2d 145 (1stDept. 1987).
3. *Matter of Ocasio v. Smith*, 70 A.D.3d 952 (2d Dept. 2010).
4. *Shapiro v. Shapiro*, 91 A.D.3d 1094 (3d Dept. 2012).
5. *Rohrs v. Rohrs*, 297 A.D.2d 317 (2d Dept. 2002).
6. *L.L. v. R.L.*, 36 Misc. 3d 777 (Sup. Ct., Monroe Co. 2012).
7. *Matter of Filosa v. Donnelly*, 94 A.D.3d 760 (2d Dept. 2012).
8. *Guryn v. Guryn*, 308 A.D.2d 564 (2d Dept. 2003).
9. *Id.*
10. *Horne v. Horne*, 22 N.Y.2d 219 (1968).
11. *Ruane v. Ruane*, 55 A.D.3d 586 (2d Dept. 2008).
12. *Finell v. Finell*, 25 A.D.3d 703 (2d Dept. 2006).
13. *Merl v. Merl*, 67 N.Y.2d 359, 362 (1986).
14. *Goldman v. Goldman*, 282 N.Y. 296 (1940).