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.

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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.

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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.

Charles M. Rand *is the presiding judge of the family part in Camden County. He is currently the longest sitting family part presiding judge in the state of New Jersey, having spent approximately 16 years in the family part.* ***Amy Sara Cores*** *is a partner in the law firm of Hoffman, Schreiber & Cores, P.A. in Red Bank. She is certified by the Supreme Court of New Jersey as a matrimonial law attorney. Ms. Cores is an associate managing editor of the* New Jersey Family Lawyer, *and editor of the* Women in the Profession Section Newsletter. *She limits her practice to family law, including international family law and appeals.*