

CHILD SUPPORT DURING COLLEGE

By: Jerry S. D'Aniello¹

“Child support and contributions to college expenses are two discrete yet related obligations imposed on parents.” Hudson v. Hudson, 315 N.J. Super 577, 584, 719 A.2d 211, 215 (App. Div. 1998) [Exhibit A]. While child support guidelines generally determine the amount of child support in New Jersey, our guidelines are not to be applied when a child is in college and is not living at home. Appendix IX-A-18 to R. 5:6A provides that the “Child support guidelines are intended to apply to children who are less than 18 years of age and who are more than 18 years of age but still attending high school or a similar secondary educational institution...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.” Appendix IX-A-18 also identifies the double-dip dilemma, which is the reason guidelines are not used for a child away at college, as follows:

“Many costs associated with college attendance (e.g., room, board, transportation) are included in the Appendix IX-F child support guidelines awards. Thus, a parent who is ordered to pay a guidelines-based child support award and part of the child’s college expenses is forced to make *duplicate expenditures* for the child (i.e., the PAR would be paying a share of the cost of food for the child to the primary household as well as a share of the cost of a meal plan or food allowance while the child is attending college). As a result, the level of total spending on the child would exceed that of intact families in a similar economic situation and the PAR’s share of the total spending on the child would increase beyond his or her income share. Requiring *duplicate expenditures* for a child is inconsistent with spending patterns of intact families and the economic theory of the child support guidelines.” (*emphasis added*)

¹ **Jerry S. D'Aniello** is a partner at Norris McLaughlin & Marcus, P.A. where he focuses his entire practice on Family Law. He is a Fellow of the American Academy of Matrimonial Lawyers and is Certified by the Supreme Court of New Jersey as a Matrimonial Law Attorney.

While a child's attendance at college is a change in circumstances warranting review of the child support amount, there is no presumption that a child's required financial needs lessen, and in fact "arguably other necessary expenses may increase when a child goes to college." Jacoby v. Jacoby, 427 N.J. Super. 109, 121 (2012) [**Exhibit B**] citing Dunn v. Dunn, 209 N.J. Super. 559, 570 (App. Div. 1986). Cases not governed by the child support guidelines must be analyzed pursuant to the factors listed in N.J.S.A. 2A:34-23A.

Pursuant to N.J.S.A. 2A:34-23A, "In determining the amount to be paid by a parent for support of the child and the period during which the duty of support is owed, the court in those cases not governed by court rule shall consider, but not be limited to, the following factors:

- (1) Needs of the child;
- (2) Standard of living and economic circumstances of each parent;
- (3) All sources of income and assets of each parent;
- (4) Earning ability of each parent, including education background, training, employment skills, work experience, custodial responsibility for children including the cost of providing child care and the length of time and cost of each parent to obtain training or experience for appropriate employment;
- (5) Need and capacity of the child for education, including higher education;
- (6) Age and health of the child and each parent;
- (7) Income, assets, and earning ability of the child;
- (8) Responsibility of the parents for the court-ordered support of others;
- (9) Reasonable debts and liabilities of each child and parent; and
- (10) Any other factors the court may deem relevant." Id.

The Court in Jacoby reversed and remanded a trial court decision that used the child support guidelines to set child support for a college student living away from home. However, the Court noted, "In the unusual circumstances where it is determined support for a college student living away from home should be calculated with reference to the Guidelines, the judge must specifically recite all findings underpinning such a

conclusion.” Id. at 121 (internal citation omitted). Accordingly, the court leaves open the ability to use guidelines only in unusual cases where the judge must clearly justify the decision.

While not at issue in Jacoby, with respect to the parties’ older child, the trial court previously determined child support by employing a formula. Id. at 114. The Court started with the child support guidelines and calculated the support for two children (\$194 per week) and then for one child (\$143 per week). Id. The judge took the difference of \$51 per week and determined 38% of the difference, representing “fixed” expenses, to be \$19. Then the Court subtracted \$19 from \$51 and determined 25% of the difference of \$32, representing controlled expenses, to be in \$8. Id. Those two sums were added and set as the support for the older child ($\$8 + \$19 = \$27$). Id.

The Jacoby Court also made clear that the child support guidelines may be applied based upon the Court’s discretion for students over age 18 who commute to college. Id. at 120. See, also, Pedrick v. Goodman, 2008 WL 4949776, *4 (App. Div. Nov. 21, 2008) [**Exhibit C**] (holding that there was no misapplication of discretion in applying child support guidelines where two children remained in Plaintiff’s household and commuted to County Community College). The Pedrick Court stated, “[T]he change in the children’s school would insignificantly alter the guidelines’ support calculation.”

While there is no set formula to determine child support for a student who goes away to college, the Court, in the unpublished opinion of Neuberger v. Friedman, 2012 WL 5258302 (App. Div. Oct. 25, 2012) [**Exhibit D**], upheld a calculation to determine child support for a student away at college, but only because the Appellate Division concluded that the trial judge

had made extensive findings of “financial circumstances and other relevant considerations” set forth in N.J.S.A. 2A:34-23A. The relevant Order provided:

“There is no formula in establishing the appropriate adjustment for child support when a child goes away for college. As previously stated, the Child Support Guidelines ... provide a guidepost in reminding the [c]ourt that 65% of all household spending is related to pooled items.... The truth ... [is that] [Friedman's] mortgage, utilities, and many of the expenses needed to run the household, which [Julia] will still spend some time at, will not change. There are however, variable expenses, representing the approximate value of 35% of the child support attributable to [Julia], which [Friedman] will not be encumbered with during the approximately nine months of the year she is away at college. However, defendant's expenses for [Sarah] will not change at all.” Id. at 4.

While a formula was referenced, it did not take the place of a substantive analysis of the statutory factors.

In another unpublished opinion, Engelke v. Engelke, 2010 WL 3257866 (App. Div. Aug. 13, 2010) [**Exhibit E**], the Court reversed and remanded the trial court decision regarding child support for a child in college for failure to make specific findings of fact and conclusions of law. Id. at 6. However, within the opinion, with respect to the older child, the trial court utilized a formula establishing that child support should be set at 38% of the support amount, representing the fixed expenses. Neither party appealed that part of the lower court’s decision.

While the use of a formula is appealing, it cannot be the only analysis relied upon by our courts. In cases where children attend college and live away from home, the court must engage in an analysis of the factors enumerated in N.J.S.A. 2A:34-23A, rather than succumb to formulaic temptations. On the other hand, parties are free to indulge in the simplicity a formula offers, and they have the luxury of surrendering to formulaic temptations. Formulas make for easier agreements, saving the parties from future stress and anxiety, uncertainty, litigation, and counsel fees. Parties can cap contributions and plan for their obligations. Also, adult children can understand parameters and adjust their expectations accordingly.

Questions for Discussion:

- Are formulas that are agreed upon by the parties enforceable?
- Are agreements reached on child support handled differently than agreements reached on college contributions?
- Does the analysis change depending on who is challenging the agreement?
 - is there a change in circumstances?
 - is it fundamentally unfair, inequitable?
 - fact sensitive analysis is necessary on a case-by-case basis

An agreement of the parties adds a contractual dimension to the validity of such provisions, although ultimately, enforcement remains a judicial responsibility subject to judicial discretion and supervision. See Peterson v. Peterson, 85 N.J. 638, 644 (1981) and Lepis v. Lepis, 83 N.J. 139, 149 (1980). One could argue that a party seeking to challenge the enforceability of the contractual provision or the formula in the Marital Settlement Agreement should shoulder the burden of showing “its terms, in light of changed circumstances, are unfair and unjust.” Peterson at 644.

A Proposed Formula for Consideration and Discussion

Before contemplating any formula as part of a settlement analysis, it is important to identify what child support dollars represent.

Appendix IX-A provides that 38% of the child support represents fixed costs, those incurred even when the child is not residing with the parent. Housing-related expenses (e.g., dwelling, utilities, household furnishings and household care items) are considered fixed costs. Further, 25% of the child support award represents controlled expenses, over which the PPR, as the primary caretaker of the child, has direct control. This category includes clothing, personal care, entertainment, and miscellaneous expenses. Variable costs, representing 37% of the support amount, are incurred only when the child is with the parent (i.e., they follow the child). This category includes transportation and food.

The Court in Jacoby referenced a formula that accounted for fixed and controlled expenses. In Engelke, the Court accounted for only fixed expenses. There are certainly controlled expenses incurred for a student living on campus, since clothing, personal items, and entertainment are still anticipated expenses. The fixed costs remain intact as well. The portion of child support allocated for variable expenses could be eliminated or paid directly to a child while that child is living away at college. Jacoby specifically provides that it may also be “more appropriate for a parent to provide direct payments to the student for some of the child support needs rather than to the other parent.” Jacoby at 122.

A question arises as to summer and winter breaks, during which time students will frequently return to the parent of primary residence. During those times, the variable costs are again incurred. The child support amount should account for those weeks during which school is not in session and variable costs are again incurred. The total child support with no elimination of variable expenses could be paid during those weeks. However, the total support amount should be annualized so that the same support is paid each week to avoid administration problems with wage garnishment.

For example, suppose the child support guidelines amount for a student residing at college is \$200 per week. The school calendar has summer break for eight weeks and winter break for four weeks, for a total of twelve weeks. During those twelve weeks of the year, the full \$200 per week should be paid ($\$200 \times 12 = \$2,400$). During the remaining forty weeks of the year, a reduced amount accounting only for fixed expenses (38%) and controlled expenses (25%) of the support amount should be paid, eliminating the 37% for variable expenses. The support amount would therefore be 63% of the guidelines amount during those weeks ($38\% + 25\% = 63\%$). In that calculation, the support amount would be \$126 per week for forty weeks ($200 \times$

63% = \$126). Over forty weeks, this amounts to \$5,040 ($\$126 \times 40 = \$5,040$). The total for fifty-two weeks should then be calculated, adding \$2,400 and \$5,040, resulting in annual child support of \$7,440. Divided by fifty-two weeks, the support amount comes to \$143 per week.

A formula can easily resolve a complex problem that frequently requires plenary hearings to resolve, allowing parents to instead reserve their financial resources for tuition bills, while still ensuring that the child has the financial resources to meet his or her needs.

Marital Settlement Agreement Tips:

- Define college expenses (even if you cannot agree on how they will be paid). Absent an agreement, our courts consider the criteria in Newburgh v. Arrigo, 88 N.J. 529 [443 A.2d 1031] (1982), to determine parent's obligation to contribute to college costs. Typically, college expenses include tuition, room and board, books, and fees. However, consider other items such as SAT and PSAT review courses and exam fees, college application fees, costs associated with visiting colleges, reasonable travel while in college, fraternity/sorority expenses, mandatory equipment (e.g., laptop, iPad, internet services, etc.). You can include direct contributions to the child (Jacoby at 122) for clothing, entertainment, etc. which takes care of the controlled expenses too, which represent 25% of child support.
- How will college expenses be paid (e.g., caps, formulas, etc.)? Define formula or mechanism to determine child support when children are in college. Discuss possible language.
- If the payment of college expenses is not agreed to in the Marital Settlement Agreement, at least agree upon timing: when will the college expense issue be decided? Consider including language stating that this will be addressed and agreed upon in junior year or beginning of senior year of high school at the latest. Insert mediation clause so that the parties must attend mediation if they fail to agree by a certain date.
- Consider a provision requiring college savings account or funding a college account with equitable distribution. N.J.S.A. 2A:34-23 authorizes Family Court to create "trusts or other security devices" for medical and educational expenses. In fact, that's precisely what Judge Jones did in Black, by requiring the parties to contribute to accounts for 8 years.

Practice Tips:

- Photocopy the Newburgh factors and the N.J.S.A. 2A:34A factors, and give them to clients to obtain comments in writing. This is useful for trial preparation and for preparation of briefs for court.
- Involve the other parent in the college selection process. Invite them to visit a school with the child.
- Advise your client to raise issues early, before enrolling or before starting college.