Unknown U: Emerging College Issues In Divorce Actions

By Grace Roessler, Esq. and Alissa Brill, Esq.

Parents face a slew of decisions regarding their children's higher education and expenses. Where should our children go to college? Can we afford private school tuition? Do we need to take out a parent plus loan? For parents who are divorcing or are divorced, these questions are hot button issues. Preferably, parents can agree as to the school selection and funding process and draft sufficient language in their agreements that will clearly set forth each party's obligations for school. But if the parties cannot come to agreement, the Court determines the school choice and parent contribution level on a case by case basis. Whether gearing up for litigation or drafting terms to an agreement, parents should be prepared to address these critical issues. This article provides a survey of recent case law and a series of best practices to assist parties navigate issues relating to college for divorcing parents.

Relevant Case Law

Recent cases reveal that parents should be prepared to contribute to college expenses if their court-approved separation agreement requires it or mentions anticipated contribution generally. Conversely, parents will likely not be ordered to pay for college expenses if contribution was not contemplated or specifically mentioned in the separation agreement/ judgment, if the expenses are unreasonable, or if a parent has been substantially excluded from the school decision-making process, but this is very dependent on the particular facts of a case. Courts will issue orders only where college is imminent. For example:

In Browne v. Browne, an unpublished 1:18 decision, the Appeals Court found that upcoming or current college educational expenses for a child is a material change in circumstances sufficient to warrant a modification to a separation agreement, and ordered the father to contribute equally to the children's college costs. 02-P-388, 61 Mass. App. Ct. 1115 (2004). At the time of the parties' divorce, the children were two and four years old. The separation agreement was silent as to each party's obligation to pay for college educational costs until each of the children reached college age, but the parties specifically noted that "the parties shall consult with each other prior to making decisions regarding the education of the minor children." The Appeals Court reasoned that, due to the uncertainty of the parties' financial situations at the time of divorce, it was reasonable to defer the precise terms to a later time.

In Whelan v. Frisbee, the Appeals Court upheld the lower court's modification to the separation agreement where the terms regarding the parents' contribution to college were vague and open-ended. 29 Mass. App. Ct. 76 (1990). The parties' separation agreement ordered mother to make "whatever contribution she determines in good faith she is able to provide" and utilize "any excess funds are on hand and received from the husband for child support". Mother informed Father she could not contribute. Prior to the children attending their first semester of college, Father filed a modification requesting termination of his child support obligation and alimony with a request to apply what he would pay in child support directly to the children's college

expenses. The Court found that the time the parties entered into their separation agreement, they intended Mother would contribute to college. The Court also found, after review of Mother's finances, that she had the ability to contribute to the college expenses. She owned real estate in Rockport worth $250,000, additional assets worth $96,320, and took out a business loan of $100,000 to buy a catering business for which she received no income. The Court consequently relinquished Mother's receipt of $200.00 weekly child support and allowed Father to pay the same directly to the school, which represented "Mother's contribution" to college.

In D.E. v. F.G., an unreported 1:28 decision, the Appeals Court declined to order the Father to contribute to the child's college costs when the parties' paternity agreement did not require Father to contribute to college and Mother did not include Father in any aspect of the child's college education decisions. No. 13-P-1566, 87 Mass. App. Ct. 1104 (2015). The son enrolled at McGill University from fall of 2007 through fall of 2009, then moved to South Carolina to live with his girlfriend and work. He then moved permanently to Florida and enrolled in Broward College when he turned 21 and obtained his associate's degree. Mother paid for the child's college tuition at McGill University and Broward College. Father paid child support to the Mother of $12,000 per year through the child's 23rd birthday, including periods when the child was in and out of full-time school. The Appeals Court upheld the lower court's decision to deny Mother's request to order Father to contribute to college (after the fact) or order retroactive increase in child support from the child's 18th to 23rd birthday, since it was a reasonable amount for the child's maintenance while he was principally dependent on mother. The Court also refused to obligate the Father to contribute to the child's college costs when the parties' paternity agreement did not obligate the Father to do so.

In Rosen v. Rosen, the Appeals Court upheld the lower court's requirement that a mother contribute her proportionate share of the child's college costs (10%) regardless of whether she was sufficiently included in the college selection process. 90 Mass. App. Ct. 677 (2016). The parties' separation agreement provided that the parties would jointly determine where the children would attend college, with regard to the children's wishes, welfare, needs and aptitudes and that the parents would contribute to the best of their financial ability. The father paid the children's college education costs and/or incurred loans on behalf of the children for college. Father filed a complaint for modification, seeking among other things, termination of his child support retroactive to December 2011, when all three of the children resided with him. The lower court judge also ordered mother to reimburse father 17% of the college expenses he incurred through December 2011, and 10% of college expenses going forward. The mother argued that she should not have to contribute to the college expenses because she was excluded from the college selection process. However, the Appeals Court determined that the children selected their colleges without regard to either parents' ability to contribute to the college tuition, and the separation agreement did not explicitly make the parties' contribution contingent upon being included in the college selection process. The court also found that Mother had not objected to the college choice, and did contribute to some of one child's semester costs.

In Mandel v. Mandel, the Appeals Court vacated and remanded the lower court's reduction of a father's college contribution from $17,000 per year to $7,800 per year where the Judge did not offer sufficient reasons for the reduction of Father's obligation. 74. Mass. App. Ct. 348 (2009). The parties' separation agreement required both parties to contribute one half of their daughters' "college education expenses". The agreement also gave the parties the right to equally participate

in the school selection, but did not outline steps for what should occur in the event of a disagreement.

The parties never reached agreement on the school selection. The child, with Mother's blessing, enrolled at a private university with tuition of $34,000 per year. Father claimed that he was excluded from the school selection process. He also claimed that his contribution of 50% was conditioned on her enrollment at a public school, despite the fact that the agreement did not specifically limit his contribution to said condition. When the Father refused to pay his half, the Wife filed a contempt. The lower court found that the mother and daughter selected a school "financially out of reach" for the Father, and reduced his contribution level.

The Appeals Court determined that the parties had not specifically outlined in their agreement what should occur in the event of a dispute over school choice; however, in the event of disagreement, the parties likely intended that each would be responsible for 50% of *reasonable* college expenses.

Citing Hamilton v. Pappalardo, the Appeals Court noted the relevant equitable factors to determine whether college expenses are reasonable: financial resources of both parties, the standard of living the which would have enjoyed if the marriage had not been dissolved, the financial resources of the child, the cost of the school, the programs offered at the school, the child's scholastic aptitude, how the school meets the child's goals, and the benefits the child will receive from attending the school. See 42 Mass. App. Ct.471, 477 (1997). The Court also noted from Books v. Piela that "children's needs are to be defined, at least in part, by their parents' standard of living' which in some cases 'includes the ability to provide certain opportunities … such as private school education"'. See 61 Mass. App. Ct.731, 737 (2004).

Here, the Court noted that there was insufficient evidence presented on many of the factors, specifically the child's needs (her scholastic aptitude, course of study, any benefits that she would receive in attending the specific private school or any alternate schools, and how they might meet the child's education goals), and whether the tuition for the private school was out of reach for the Father. The Court also noted that Father did not raise his objection to the daughter's school choice or contribution until after the child had started school and Mother filed the contempt, despite his knowledge that she intended to enroll in the school.

In the most recent case on the subject of college contribution, Godfried Feinstein v. Feinstein, 18-P-274 (2019), Father filed a contempt action against Mother alleging violations of their separation agreement by unilaterally committing the parties' eldest child to a university. The parties' separation agreement required that college choice be made jointly and that neither party should commit the child to an educational institution without the prior agreement of the other party, with college contribution costs split as 55% to be paid by Father and 45% to be paid by Mother. Father worked at a private university, where the parties' child could have attended tuition-free, but the child had notified Father he did not intend to apply to that university; the child also shared a list of schools to which he was going to apply as well. The Father expressed concerns about the college selection process seven days prior to the date decisions were needed to be made. As the child had only been accepted to one university, Mother committed the child there. While the trial judge found no willful violation by Mother and, thus, found her not guilty of contempt, the judge limited Father's college contribution to 55% only of the cost of tuition,

room and board at U-Mass. The Appeals Court found that "under proper circumstances, a unilateral commitment to a college could constitute a material change of circumstances" warranting modification of required college contribution. However, the Court did not feel the information provided was sufficient, nor were there sufficient findings to explain the basis for a material change in circumstances, and therefore vacated and remanded the part of the judgment modifying Father's required college contribution. Timing is also an essential factor in whether the parties may specifically determine college contribution or wait several years to modify the agreement, when the children are closer to college age. Courts and parties are discouraged from setting child college expense responsibilities if college is not "imminent" for the parties' children. For example, the Appeals Court found it premature for the lower court to order the father to pay for college expenses of his then ten and thirteen years old children. See Ketterle v. Ketterle, 61 Mass. App. Ct. 758, 766 (2004). See also L.W.K. v. E.R.C., 432 Mass 438 (2000)(post-secondary education order premature for ten year old child); Lang v. Koon, 61 Mass. App. Ct. 22 (2004)(post-secondary education order premature for eleven and fifteen year old children).

Best Practices

Considering the above cases, the best practices in crafting language for separation agreements or modification agreements are as follows, based on how old the children are when the parties separate.

Separation Agreement Created When Parties Have Young Children (Under 16)

As evidenced by the cases above, including specific language regarding a commitment to contribute towards college when a child is far from college bound age is generally frowned upon. The costs for college seem to increase year by year, and it is hard to predict what the future holds in terms of a party's financial capacity to contribute. Consequently, if a child is far from college bound age, the best types of agreements address college contribution *generally*, but do not commit the parties to a set amount.

"General commitments" may include provisions such as: (1) the child shall have the opportunity to attend a post-secondary educational institution; (2) choice of where the child attends shall be made jointly with due regard for the child's interests, aptitude and abilities as well as the cost of the institution; and (3) the parties shall contribute to the child's college educational expenses based on each party's ability to pay and financial circumstances at the time. Parties may want to even include the Hamilton v. Pappalardo reasonable factors in the agreement.

"Jointly" should be explicitly defined as neither parent making a commitment to an educational institution on behalf of the child without notifying the other parent, consulting with the other parent and obtaining the other parent's written approval for the child to be enrolled at that institution.

Also, agreements may include a commitment for either or both parties to contribute towards a 529 plan for the child's benefit in regular increments or in proportion to their income and/or how to split the cost of college preparation expenses (testing, application fees, costs associated with college tours, etc.).

It may be useful to set a cap or maximum contribution for which each party will be responsible. This will not negate a party's ability to agree to contribute more when the time comes, if they so choose, but it will set expectations (and allow them to plan how to save). This language is often written as "Either party will be expected to contribute no more than one-third or one-half of the cost of attendance at the University of Massachusetts at Amherst, the latter mimicking the language of the Child Support Guidelines." It should also specify what "costs of attendance" means; whether it be just tuition and fees, or is also inclusive of room and board, transportation to and from college, books and/or other fees. It should also be specified that this is only contribution towards undergraduate education, for a maximum of four academic years and only until the child attains the age of 23 years.

Most important is to make it explicit that the issue of college education costs is modifiable in the future and that each party has the right to file a complaint for modification if the parties cannot reach an agreement as to how they will financially contribute towards college in the future or if they cannot agree as to where the child will attend school.

Separation Agreements Created for Parties with College-Age Children (16 and Up)

If the parties divorce at a time close to when their child or children are college bound or, if the parties seek to jointly modify the exhibit from their older separation agreement related to college education as their child(ren) approach college age, many provisions should be considered, and the parties should work towards a narrowly tailored, detailed set of obligations.

In addition to reiterating the general commitment that a child have the opportunity to attend a post-secondary educational institution, the requirement that the decision for where the child attends be made jointly and the definition of "jointly" should be included.

If one or both of the parties seek to tie his or her financial contribution directly to inclusion in the college selection process, then there should be explicit language as such. For example: "Neither parent nor the child shall make a commitment to an educational institution on behalf of the child without notifying the other parent, consulting with the other parent and obtaining the other parent's written approval for the child to be enrolled at that institution. If one parent and/or the child commit to enrollment at a college institution without approval by/consultation with the other parent, then that parent who did not provide approval/was not consulted shall not be obligated to contribute financially at all towards the child's college education and any future paragraph of this exhibit outlining that parent's financial obligation will be null and void." Another alternative is for one parent not providing approval/not being consulted regarding college selection will limit their financial contribution to be no more than one-third or one-half of the cost of attendance at the University of Massachusetts at Amherst; this protects that parent if the child ends up enrolling at a very expensive private institution.

The agreement should list a timeline for when discussions regarding college choice and parental contribution should be held, affording one parent the ability to seek court action if the other parent does not engage in such discussions. This timeline of discussions should begin long before the enrollment deadline the spring of the child's senior year of high school, likely in the child's junior year of high school.

It should also be specified that this is only contribution towards undergraduate education, for a maximum of four academic years (eight semesters or twelve trimesters, depending on the school's academic calendar) and only until the child attains the age of 23 years. If the parties want to tie financial contribution to the child maintaining a full course load, maintaining a certain GPA and/or any other specific requirements, this should be detailed.

It is important to include language requiring that the parties assist the child to seek and obtain financial assistance through submission of a FAFSA, applying for scholarships and other loans/grants and shall timely cooperate in filling out any reasonably required documentation for this. It is also a good idea to have the parents commit to having their child sign a waiver under the Family Educational Rights and Privacy Act (FERPA), permitting the parents to have access to his/her academic information such as matriculation, course enrollment, grades and other performance records. This is important because, once the child turns 18, this information will not be available to the parents unless the child grants this access.

There should also be a provision explicitly delineating what each party's contribution will be towards the child's college expenses.[1] Some parties may choose to break it down by a set percentage contribution (and possibly require the child to contribute some towards their own education) or proportional to the parties' income. If the parties choose to contribute based on income proportionality, how this will be determined should be defined. One option would be to require an annual exchange of tax returns and/or W-2s, 1099s and K-1s by a date certain and to then use the prior year's numbers to determine the proportional responsibility by dividing one party's total annual income (could be inclusive or exclusive of bonuses and commissions, depending on agreement) over the total annual income of both parties combined. Another option would be to exchange recent paystubs at the time each semester's bill arrives to determine present income proportionality (as the parties' prior year tax returns might be quite outdated for fall semesters).

The parties should also define how they will split the cost of college preparation expenses (testing, application fees, costs associated with college tours, etc.), as well as contribution towards the child's actual cost of attendance. The agreement should also specify what "costs of attendance" means; whether it be just tuition and fees, or is also inclusive of room and board (and whether this be on or off campus), meal plan, transportation to and from college, books, and/or other fees.

If one or both of the parties contributed towards a 529 plan for the child's benefit then there should be language about contribution first coming from the 529 plan until it is exhausted. Also,

[1] Please note, if the parties seek to have the beginning of contributing towards a child's college education change the child support obligation, then that exhibit will also need to be modified or drafted accordingly.

if only one party contributed/maintained a 529 plan, then that party may want to specify that funds utilized from the 529 plan will only count as contribution towards their share of the financial obligation. If both parties contributed towards a 529 plan but in different proportions to one another, the parties may want to specify that funds utilized from the 529 plan count as each party's respective contribution in proportion to how the 529 plan was funded by them.

The timing of when the parent is obligated to make the financial contribution, i.e. within 14 days of receiving a copy of the semester tuition bill from the child, other parent or when posted online by the school, should be specified. If the contribution will be reimbursing one parent or the child who fronted the cost of something, then the timeline for reimbursement and what the process will look like (written request showing receipt or paid invoice/bill) should be specified. A next steps mechanism if one party fails to timely make or pay the proper amount for a contribution or reimbursement should be lined out. This could be an immediate right to file a Complaint for Contempt or could be an alternative dispute resolution mechanism.

Lastly, the parties should clearly define under what circumstances and when one parent may bring an issue to the court's attention, either for a Complaint for Modification (whether a material change of circumstances standard applies and what might/might not constitute this) or Complaint for Contempt.

Conclusion:

Parties will generally need to address college issues in their separation agreements, and the level of detail will often be determined by the age of the children at the parties' separation. It is in the best interests of all involved to clearly set out expectations in separation agreements as soon as possible, to allow parents to save, and to provide children an understanding of the financial implications of their college selection.