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Judith G. McMullen

*Marquette University Law School*, [judith.mcmullen@marquette.edu](mailto:judith.mcmullen@marquette.edu)

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# FATHER (OR MOTHER) KNOWS BEST: AN ARGUMENT AGAINST INCLUDING POST-MAJORITY EDUCATIONAL EXPENSES IN COURT-ORDERED CHILD SUPPORT

JUDITH G. McMULLEN\*

## INTRODUCTION

College, or technical training, has become a rite of passage for the majority of young people who aspire to be a part of the middle class. Every year, thousands of students begin post-high school education at a variety of colleges, universities and technical schools. Pursuing higher education is an important part of the American Dream for many people. However, educational costs have risen at a rate far outpacing inflation. Post-high school education is unattainable for many students without help from their parents, scholarships, loans, or all three.

This Article examines the nature of post-high school education<sup>1</sup> and discusses whether parents who have divorced should ever be required to pay for the education of the offspring of their failed marriage. As of this writing, only a handful of states empower judges to order payment of post-majority educational expenses.<sup>2</sup> Most states provide for imposition of child support obligations only until the child reaches age eighteen. Sometimes this is extended to age nineteen if the child is still attending high school full-time.<sup>3</sup> Parents are free to enter settlement agreements or other contracts to provide college expenses for their children, and those agreements will be enforced (or not) according to the principles of contract law.<sup>4</sup> However, parents of intact families can choose to provide college expenses or not, and many divorced parents are opposed to the policy of requiring them to provide what their married counterparts need not.

This Article concludes that the law should not force divorced parents to contribute to the post-majority education of their children. This conclusion is based on the nature of the transfer of funds from parents to children for the purpose of providing those children with higher education. In current society, payment of college and similar expenses is regarded as a wholly voluntary and gratuitous transfer from parent to child. More than a decade ago, Professor John H. Langbein wrote an article in which he argued that the character of family

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\* Associate Professor, Marquette University Law School. A.B., University of Notre Dame; J.D., Yale Law School.

1. While the thesis of this Article applies to all forms of post-majority education, such as college and technical training of various sorts, most of the specific references have to do with college education. This is partly because that is how the issue usually comes up in cases and articles, and partly because the large expenses associated with college make it an especially dramatic example of the economic issues to be discussed.

2. See *infra* text accompanying notes 23-46.

3. See, e.g., WIS. STAT. § 767.25(4) (1998).

4. See *infra* text accompanying notes 48-54.

wealth transmission had changed dramatically in the late Twentieth Century.<sup>5</sup> He claimed that rather than amassing fortunes to be inherited by their offspring, middle class parents now pass wealth along to the next generation by investing in children's skills and education. "Education is displacing inheritance," he said, and "lifetime transfers are displacing succession on death."<sup>6</sup> If, as Langbein suggests, the main form of inter-generational wealth transfer is indeed accomplished through parental investment in the education of their children, then court-imposed payments for higher education do not just provide another form of child-support, they amount to a form of forced heirship. Since parents are almost universally free to disinherit their children, parents should be equally free to refuse to pay for a college education.<sup>7</sup>

Part I of this Article explores the social and financial picture surrounding college expenses and discusses the current law concerning court-ordered payment of post-majority educational expenses by divorced parents. Part II of this Article further discusses Professor Langbein's characterization of educational investments as a form of inter-generational wealth transmission, and explains how his theory is relevant here. The tradition of allowing parents to disinherit their children is also discussed. Next, Part III develops the argument that allowing divorced parents to decide whether to contribute to their children's college education advances many of the positive goals sought in giving parents the freedom to disinherit their children and is consistent with legitimate goals in family law and in the law of inheritance. Finally, Part IV addresses some counterarguments to my thesis and then ends with a summary and conclusion.

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5. See John H. Langbein, *The Twentieth-Century Revolution in Family Wealth Transmission*, 86 MICH. L. REV. 722, 723 (1988).

6. *Id.* at 735.

7. This argument is quite different from the usual argument against forcing parents to pay for post-majority educational expenses: namely, that such a requirement would be inconsistent with other legal policies concerning children who have reached the age of eighteen. Parents in intact families are no longer legally obligated to support their offspring who have attained the age of majority, although of course they are free to do so if they wish. Persons who have reached the age of majority are granted many, but not all, of the privileges and obligations of adulthood. Requiring payment of educational expenses is inconsistent with the notion of emancipation from parental control and protection and may violate principles of equal protection. See *infra* text accompanying note 114.

It could be reasonably argued that eighteen is an unrealistically young age of majority, given that many persons are neither economically nor emotionally independent at that age. However, that is a subject for a different article. This Article takes eighteen as the age of majority in most states as a starting point, and goes on from there.

I. POST-MAJORITY EDUCATION AND THE IMPOSITION OF ITS COSTS  
ON DIVORCED PARENTS

A. *Current Economic Realities Surrounding Higher Education*

Formal education has assumed a position of major importance in American society, and its importance seems to grow with each passing year. When the United States shifted from a chiefly agrarian society in the Nineteenth Century, many workers flowed into industrial jobs in the towns and cities. While much emphasis has been placed on the vast differences between industrial and agrarian livelihoods, they did have one important characteristic in common: neither farm jobs nor factory jobs required book learning. Both provided work environments, as did the trades of colonial times, where the worker needed only a strong body and a willing attitude, and then learned on the job.<sup>8</sup> Except for “learned professions,” like law, teaching and medicine, it remained possible for relatively uneducated but willing workers to earn middle class incomes well into the second half of the Twentieth Century.<sup>9</sup> Then everything changed.

As production became more mechanized and labor unions lost power, American industry suffered from foreign competition in the late Twentieth Century. Industrial jobs became more scarce. The jobs that remained required greater skills, including computer proficiency in many cases. Even farming changed, with the family farm increasingly losing out to big farm conglomerates run according to the principles taught in agricultural and business school.<sup>10</sup> Whereas previous generations could obtain and hold good jobs without even the benefit of a high school education, today’s workers have menial job prospects if they have only a high school diploma.

The futures of students who do not go to college appear dim. A forecast by the Bureau of Labor Statistics . . . predicts that while demands for workers with even a little college will increase, demands for workers with only a high school diploma will decline—and the jobs offered will not likely be permanent. Steady jobs with career prospects are in decline, while part-time, temporary, and contract employment, all of which lack job security, are on the rise. . . . Recent labor market studies characterize young workers with few educational credentials as floundering from one short-term job to another.<sup>11</sup>

Technical training, trade school, college, and even post-graduate education are essential for most jobs currently capable of funding a middle class standard of living. Persons without this training are often relegated to low-paying jobs in the service sector. In *No Shame in My Game*, anthropologist Katherine S.

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8. See Langbein, *supra* note 5, at 725.

9. *Id.*

10. See *id.* at 727-28.

11. KATHERINE S. NEWMAN, *NO SHAME IN MY GAME: THE WORKING POOR IN THE INNER CITY* 342 n.2 (1999) (citations omitted).

Newman examines the situation of over 300 residents of Harlem and Washington Heights. Although many of these people had graduated from high school, they were “working poor”: employed persons trapped in poverty that their minimum wage jobs could not eliminate. One man, William, commented ruefully on the relationship between education and better opportunities:

Nowadays a basic education is almost obsolete. When I was growing up in the seventies all you needed was basically a high school diploma and you would do just fine. If you had a bachelor’s degree, you were the man. A master’s, you were the epitome. Nowadays you need a Ph.D. just to break even. And a master’s just says you tried extra hard. That’s about it.<sup>12</sup>

William added: “You have a high school diploma, . . . you may as well stay at Burger Barn, ‘cause that’s as far you gonna go unless you get lucky and know somebody.”<sup>13</sup>

A parent working full-time in a minimum wage job cannot keep a family of four out of poverty. Even two parents working full time in minimum wage jobs will generate annual income far below the current median household income.<sup>14</sup> The picture is bleak indeed for the undereducated.

For many, the zenith of hope for a better education is represented by a college degree. “The market for higher education is so robust,” said Lawrence Gladieux, executive director for policy analysis at the College Board, a national non-profit organization that does an annual survey of college costs.<sup>15</sup> “People know that the best life chances and jobs come through college education.”<sup>16</sup>

At the same time post-secondary education became more important, it became significantly more expensive, at a rate outpacing inflation. Tuition increased by double digit percentages throughout the 1980s and early 1990s, and by the late 1990s the cost of a college education rose about four or five percent per year.<sup>17</sup> “Since 1980, the average tuition at four-year institutions has more than doubled after adjusting for inflation, while the median family income for the

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12. *Id.* at 139.

13. *Id.*

14. This can be illustrated with data from the Census Bureau report for 1998, as reported in the *New York Times*. See Louis Uchitelle, *Rising Incomes Lift 1.1 Million out of Poverty*, N.Y. TIMES, Oct. 1, 1999, at A20. A worker employed forty hours a week for fifty-two weeks a year would earn a gross income of \$10,712. This is significantly below the 1998 poverty line income of \$16,655 for a family of four. Even if both parents work full time for minimum wage, the resulting family income of \$21,424 is far below the 1998 median household income of \$38,885. Median household income includes even one person households, however. When the \$21,424 income is compared to the 1998 median *family* income of \$46,737, the picture is even bleaker. See *id.*

15. Ethan Bronner, *College Tuition Rises 4%, Outpacing Inflation*, N.Y. TIMES, Oct. 8, 1998, at A18.

16. *Id.*

17. See *id.*

parents of college-age children has increased just [twelve] percent.”<sup>18</sup> Data released by the College Board shows that for the 1998-1999 school year, tuition and fees averaged \$3243 at four-year public institutions, and averaged \$14,508 at private four-year colleges.<sup>19</sup> These figures prompted Donald M. Stewart, president of the College Board, to comment: “The cost of attending college presents a steadily rising challenge to many Americans, particularly the most financially disadvantaged.”<sup>20</sup>

However, other factors make the college accessibility picture less bleak. In fact, there is a wide variety of financial aid available. While some of the aid is based on merit, nearly eighty percent is need-based.<sup>21</sup> While high-priced schools like Bennington or Yale may terrify prospective students and their parents with their high price tags, “nearly seventy percent of four-year undergrads opt for lower-cost public universities. . . . What’s more, a growing number of public universities, unwilling to lose their best students to another state, give qualified residents a free or near-free ride.”<sup>22</sup> Thus, even students who are at a financial disadvantage have a realistic opportunity to obtain a college education, with all of its attendant benefits.

#### *B. Current Law Concerning Imposition of College Expenses on Divorced Parents*

A number of states have specific cases or statutes that provide for the possibility of imposition of post-majority college expenses on one or both parents, where their marriage has ended in divorce.<sup>23</sup> Other states, while authorizing no outside imposition of such obligations, will nonetheless enforce

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18. Ben Wildavsky, *Paying for College: Is that the Real Price?*, U.S. NEWS & WORLD REP., Sept. 6, 1999, at 64.

19. See Bronner, *supra* note 15, at A18.

20. *Id.*

21. See Wildavsky, *supra* note 18, at 70.

A new study by University of Michigan researchers Donald Heller and Thomas Nelson Laird found that [seventy-eight] percent of the grant money awarded by four-year colleges and universities in 1995 was need based. While spending on merit grants grew substantially, rising [ninety-seven] percent between 1989 and 1995, need awards grew even faster, rising 114 percent over the same period.

*Id.*

22. *Id.* at 64-65.

23. See Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law: Century Ends with Unresolved Issues*, 33 FAM. L.Q. 865, 910 (2000). According to Elrod and Spector, college expenses may currently be imposed on divorced parents in Alabama, Alaska, the District of Columbia, Hawaii, Illinois, Indiana, Iowa, Massachusetts, Michigan, Missouri, New Hampshire, New Jersey, New York, Oregon, South Carolina, Tennessee and Washington. In addition, two other states, North Dakota and Colorado, have laws indicating that a court could order post-majority support in appropriate circumstances. See *Donarski v. Donarski*, 581 N.W.2d 130 (N.D. 1998); see also *infra* text accompanying notes 35-40.

private agreements between the parents.<sup>24</sup> No state currently has a formal incentives program, but courts may make *de facto* adjustments in other obligations where college expenses have been awarded.<sup>25</sup> Most states end child support obligations when a child turns eighteen, although many states will extend the payment period to age nineteen if the child is still a full-time high school student.<sup>26</sup> Married parents cannot be forced to pay post-majority educational expenses for their offspring.<sup>27</sup>

Perhaps the most straightforward justification for allowing court-ordered child support is a system that regards college students as dependents of their parents. An example of this approach can be found in the law of Washington D.C. where, for purposes of child support, a person remains a child until age twenty-one.<sup>28</sup> Thus, college expenses, like any educational expenses incurred by a child, are a proper use of child support payments. New Jersey law uses a similar justification, namely that emancipation occurs as the result of some event that makes the child self-supporting, and is not purely age-based.<sup>29</sup> One New Jersey court coined the term "unemancipated adult" to describe this phenomenon.<sup>30</sup>

Sometimes, ordering payment for post-majority educational expenses is viewed as a permissible exercise of a family court's legitimate powers to allocate property and provide for reasonable support of children whose parents are divorcing. In *Ex parte Bayliss*,<sup>31</sup> the Alabama Supreme Court held that where a marriage was terminated by divorce, a court could use its equity powers to extend parental support obligations beyond the age of majority. The court held that when determining the appropriateness of post-minority support for college education, the trial court is required to consider "all relevant factors that shall appear reasonable and necessary, including primarily the financial resources of the parents and the child and the child's commitment to, and aptitude for, the requested education."<sup>32</sup> The court suggested, but did not require, that the trial court also consider other relevant factors, namely "the standard of living that the child would have enjoyed if the marriage had not been dissolved and the family unit had been preserved and the child's relationship with his parents and

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24. See, e.g., *Steffes v. Steffes*, 560 N.W.2d 888 (N.D. 1997).

25. For example, a court may be more reluctant to award alimony, or may award a lesser amount, where the payor is already saddled with child support and college expenses.

26. See LESLIE J. HARRIS & LEE E. TEITELBAUM, *FAMILY LAW* 600 (2d ed. 2000).

27. See, e.g., *Childers v. Childers*, 575 P.2d 201 (Wash. 1978) (en banc), cited in HARRIS & TEITELBAUM, *supra* note 26, at 593.

28. See D.C. CODE ANN. § 30-401 (1999); see also *Butler v. Butler*, 496 A.2d 621, 622 (D.C. 1985) (per curiam).

29. See *Sakovits v. Sakovits*, 429 A.2d 1091, 1093-94 (N.J. Super. Ct. Ch. Div. 1981).

30. See James G. O'Donohue, *Back to School: The Nearly Unavoidable Responsibility for College Expenses*, 149 N.J. L.J. 745 (1997) (quoting *Blum v. Ader*, 652 A.2d 176, 177 (N.J. Super. Ct. App. Div. 1994)).

31. 550 So. 2d 986 (Ala. 1989).

32. *Id.* at 987.

responsiveness to parental advice and guidance.”<sup>33</sup> It appears from subsequent Alabama cases that the *Bayliss* standards are applied rather liberally to favor a child who is requesting college support.<sup>34</sup>

A North Dakota case, *Donarski v. Donarski*,<sup>35</sup> provides another example of court-ordered college support based on the general discretionary power of the court. The court held that its statutory discretion to order payment of post-minority support included the power to award college expenses in appropriate circumstances.<sup>36</sup> The relevant statutory section deals primarily with the authority of the court to order support past age eighteen when the child is living at home and is still enrolled in high school. The statute also provides that “[t]his section does not preclude the entry of an order for child support which continues after the child reaches age eighteen, if the parties agree, or if the court determines the support to be appropriate.”<sup>37</sup> The court’s finding that it had the power to order college support was apparently based on this language, as well as North Dakota precedent that pre-dated this version of the statute. However, Chief Justice VandeWalle and Justice Sandstrom dissented from this section of the opinion. “The language ‘does not preclude’ is not a grant of authority,” said Justice Sandstrom.<sup>38</sup> He went on to question the court’s reliance on Alabama and New Jersey precedent:

While both of these states have general support statutes similar to ours, both the Alabama and New Jersey courts have interpreted children to mean dependent children, even if over the age of majority. . . . For us to reach this result, however, we must ignore N.D.C.C. § 14-10-01, which states the term “child” means “minor” and a minor is a person under [eighteen]. . . . Apparently, the Alabama and New Jersey courts were not so bound.<sup>39</sup>

Several states have statutes that specifically grant judges discretion to order parents to pay post-secondary educational expenses in appropriate circumstances. For example, Colorado judges are authorized to terminate ordinary child support payments and instead issue an order “requiring both parents to contribute a sum determined to be reasonable for the education expenses of the child, taking into

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33. *Id.*

34. *See, e.g., Kent v. Kent*, 587 So. 2d 409, 412 (Ala. Civ. App. 1991). Here, the appellate court upheld a trial court order that required the father to pay tuition, books, and some support while his son was enrolled in college. This order was upheld despite the fact that the father was not wealthy and had concerns about being laid off. Moreover, the father and son had no real relationship with each other, and the son had achieved only a “C” average in his first quarter college grades.

35. 581 N.W.2d 130 (N.D. 1998).

36. *See id.* at 135-36; N.D. CENT. CODE § 14-09-08.2(6) (1999).

37. N.D. CENT. CODE § 14-09-08.2(6) (1999) (emphasis added).

38. *Donarski*, 581 N.W.2d at 139 (citation omitted).

39. *Id.* at 140 (internal citations omitted).



account the resources of each parent and the child."<sup>40</sup> The Iowa Code provides that a "court may order a postsecondary education subsidy if good cause is shown."<sup>41</sup> Another example can be found in the Indiana Code which provides that "[t]he child support order or an educational support order may also include, where appropriate: (1) amounts for the child's education in elementary and secondary schools and at institutions of higher learning."<sup>42</sup>

Whether states authorize post-majority support orders by statute or by common law, there are some limits placed on the amount a court may order. The Colorado statute limits each parent's contribution "to an amount not to exceed the amount listed under the schedule of basic child support obligations in paragraph (b) of subsection (10) of this section for the number of children receiving postsecondary education."<sup>43</sup> The Iowa statute directs the court to base the cost of postsecondary education on only necessary costs "of attending an in-state public institution for a course of instruction leading to an undergraduate degree."<sup>44</sup> Cases and statutes alike require courts to assess the appropriateness of a college support order on factors such as the child's abilities<sup>45</sup> and the financial situations of the child and the parents.<sup>46</sup> Courts "may also consider the standard of living the child would have enjoyed if the divorce had not occurred and the child's relationship with his or her parents."<sup>47</sup>

In addition, "[m]ost states will enforce an agreement of the parties."<sup>48</sup> "Courts generally hold that the parties may take on more extensive obligations than a court could impose on them."<sup>49</sup> Payment of post-secondary educational expenses may well be negotiated as part of a larger settlement agreement, and may be incorporated into the divorce judgment. In these cases, the court may use its power to both interpret and enforce the terms of the agreement. For example,

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40. COLO. REV. STAT. ANN. § 14-10-115(1.5)(b)(I) (West 2000).

41. IOWA CODE § 598.21(5A) (2000).

42. IND. CODE ANN. § 31-16-6-2(a)(1) (2000).

43. COLO. REV. STAT. ANN. § 14-10-115(1.5)(b)(I) (West 2000).

44. IOWA CODE § 598.21(5A)(a)(1) (2000).

45. See e.g., *id.* § 598.21(5A)(a); *DeLong v. DeLong*, 315 N.E.2d 412, 417 (Ind. App. 1974) (citing IND. CODE § 31-1-12-15 (1971)); *Donarski v. Donarski*, 581 N.W.2d 130, 136 (N.D. 1998) (citing *Newburgh v. Arrigo*, 443 A.2d 1031, 1038-39 (N.J. 1982)).

46. See, e.g., COLO. REV. STAT. ANN. § 14-10-115(1.5)(b)(I) (West 2000); IOWA CODE § 598.21(5A)(a) (2000); *Baggett v. Foster*, 622 So. 2d 350, 351 (Ala. Civ. App. 1992) (citing *Ex parte Bayliss*, 550 So. 2d 986 (Ala. 1989)).

47. *Baggett*, 622 So. 2d at 351 (citing *Ex parte Bayliss*, 550 So. 2d at 986).

48. Linda D. Elrod et al., *A Review of the Year in Family Law: Children's Issues Dominate*, 32 FAM. L.Q. 661, 714 n.2 (1999).

49. HARRIS & TEITELBAUM, *supra* note 26, at 720. The authors intended their statement to cover family contracts generally, but chose a post-majority support case as their example (citing *Solomon v. Findley*, 808 P.2d 294 (Ariz. 1991), *aff'g* 796 P.2d 477 (Ariz. Ct. App. 1990) (upholding an agreement to support a child during post-majority schooling, even though the Arizona court could not have ordered that behavior in the absence of an agreement)).

in *Allard v. Allard*,<sup>50</sup> a separation agreement, which had been incorporated into the judgment, provided that the husband would “pay for a four-year college education for each of the children at a Missouri state-supported university which include room, board, tuition, books, college incidentals, and said child’s necessary clothing.”<sup>51</sup> When their older son entered college, the father refused to pay. The mother brought suit to enforce the separation agreement. After accepting evidence of the exact cost of the son’s tuition, room and board, books and clothes, and after taking account of grants received by the son, the trial court ordered the father to pay the balance due for the son’s freshman year.<sup>52</sup> The appellate court upheld the trial court’s decision, noting that “[s]eparation agreements in anticipation of dissolution, if not unconscionable, are now binding on the court. When incorporated into the judgment, they are ‘enforceable by all the remedies available for enforcement of a judgment.’”<sup>53</sup> The court rejected the father’s argument that the agreement to provide college support was vague and therefore unenforceable, stating “[o]ur opinion determines that the agreement for child support incorporated into the judgment was amenable to being made certain by evidence, and was made certain and enforceable.”<sup>54</sup> Thus, even fairly broad or general contracts to pay will be interpreted and enforced when actual expenses are presented.

## II. INHERITANCE, DISINHERITANCE, AND THE AMERICAN CHILD

### A. *The Revolution in Family Wealth Transmission According to Langbein*

In his 1988 article, *The Twentieth-Century Revolution in Family Wealth Transmission*, John Langbein said “[f]undamental changes in the very nature of wealth have radically altered traditional patterns of family wealth transmission, increasing the importance of lifetime transfers and decreasing the importance of wealth transfer on death.”<sup>55</sup> To support this claim, Langbein develops two themes. First, he describes the shift from a pattern of parent-child wealth transmission wherein the wealth consisted of a farm or business, to a pattern where wealth transmission centers on the parents’ investment in children’s skills.<sup>56</sup> Second, Langbein points out that the same parents who invest much of their wealth in the education of their offspring are also living much longer than did parents in previous generations. The expenses associated with the parents’ old age reduce any remainder that might otherwise be inherited.<sup>57</sup>

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50. 856 S.W.2d 64 (Mo. Ct. App. 1993).

51. *Id.* at 65 (quoting a term of the separation agreement).

52. *See id.* at 66.

53. *Id.* at 69 (citing *Bryson v. Bryson*, 624 S.W.2d 92, 96 (Mo. Ct. App. 1981); MO. REV. STAT. § 452.325.5 (1986)).

54. *Id.* at 70 n.8.

55. Langbein, *supra* note 5, at 722.

56. *See id.* at 723.

57. *See id.* Langbein points out that this depletion of the parent’s estate is exacerbated by

Langbein notes that in previous times, transfer of the family farm or family business would give children a means of earning a living and consequent protection from living out their lives in menial servitude to someone else.<sup>58</sup> “In today’s economic order, it is education more than property, the new human capital rather than the old physical capital, that similarly advantages a child.”<sup>59</sup> Langbein does not restrict his thesis to college education, noting that “[t]he process of delivering educational advantage to children begins when they are very young.”<sup>60</sup> He cites preschool education, private schools, and moves to better school districts for primary and secondary schools as examples of parental investment in education.<sup>61</sup> College, with its huge and ever-rising costs, is an even clearer illustration of his thesis. Langbein cites a 1987 story in *Newsweek*, which figured the annual undergraduate tuition and fees at Johns Hopkins for that year at \$15,410, a figure which Langbein points out constitutes thirty-one percent of an annual family income of \$50,000.<sup>62</sup>

Now it is quite obvious that very few families can afford to pay thirty-one percent of family income, or anything near it, on what we would call—in an accounting sense—a current basis. That is especially true when the family has more than one child in the educational mill at the same time. For most families, therefore, these education expenses represent capital transfers in a quite literal sense. The money comes from savings, that is, from the family’s capital or debt is assumed, meaning that the money is borrowed from the family’s future capital.<sup>63</sup>

Langbein points out that the guidelines for financial aid used by universities explicitly consider all family wealth, and not just income.<sup>64</sup> “[T]he greater the family wealth, the higher the fraction that the parents are expected to transfer to the child in support of the child’s education.”<sup>65</sup> Langbein cites an example from the *Newsweek* article, a parent named Mr. Lu, who refinanced his mortgage, sold some investments, and took out loans to pay for one son to attend Princeton and another son to attend Harvard Law School. “I’ve told my sons,” Mr. Lu said, “your education is going to be your inheritance.”<sup>66</sup>

Langbein concedes that his thesis applies most readily to the middle class, since the very wealthy will likely have plenty left over to inherit after both the

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characteristics of pension funds, especially “the bias toward annuitization. When wealth is annuitized, virtually nothing is left for transfer on death.” *Id.* at 724.

58. *See id.* at 732.

59. *Id.* at 732-33.

60. *Id.* at 733.

61. *See id.*

62. *See id.* at 734 (citing Harry Anderson et al., *Fuming Over College Costs*, *NEWSWEEK*, May 18, 1987, at 66).

63. *Id.*

64. *See id.* at 734-35.

65. *Id.* at 735.

66. *Id.* (citing Anderson et al., *supra* note 62, at 67).

costs of their children's education and the costs of retirement, and the poor have neither the money required for college nor any estate for their children to inherit.<sup>67</sup> However, he claims that a change in attitude towards wealth is present even among the rich. He cites Warren Buffett and Eugene Lang as examples of wealthy men who have stated that they will disinherit their children so that the children can make it on their own.<sup>68</sup> "[T]he disdain for customary modes of wealth transfer that Messrs. Buffett and Lang are voicing presupposes that these gentlemen have already achieved for their children the characteristic wealth transfer of modern times, the investment in human capital through education," Langbein says.<sup>69</sup> He concludes: "More and more, Americans expect personal wealth to take the form of earned income, that is, we expect it to be a return on human capital."<sup>70</sup>

Langbein's thesis is just as true today as it was when he wrote the article over a decade ago. The average tuition and fees cited earlier in the article are no more affordable to a family earning \$50,000 annually than they were in the late 1980's.<sup>71</sup> Post-high school education is as important as ever.

Why then would I argue that any parents, divorced or still-married, have the right to refuse to finance this important benefit for their children? Simply because I agree with Langbein that education is a form of intergenerational wealth transfer, or inheritance, and in this country, testators are practically unfettered in their ability to disinherit their children.<sup>72</sup>

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67. *See id.* at 724.

68. *See id.* at 737-38.

69. *Id.* at 738.

70. *Id.*

71. However, the competition for good students has made at least some schools more responsive to the financial stresses of families. For example,

[i]n January 1998, Princeton University announced that for most families with incomes below \$90,000, the school would no longer consider the value of the family's home when calculating ability to pay. Middle-income students could also expect more grants and fewer loans. MIT and Stanford, among other schools, have followed with similar measures.

Wildavsky, *supra* note 18, at 68.

More recently, Princeton announced that it would provide scholarships in lieu of loans to undergraduates who are eligible for financial aid so that students "would not have to worry about paying back thousands of dollars for their education." Karen W. Arenson, *Princeton to Replace Loans with Student Scholarships*, N.Y. TIMES, Jan. 28, 2001, at 24.

72. It is, to be fair, an open question whether the right to disinherit children, even minor children, should be quite so unfettered. However, it does seem that the law should be consistent across similar situations, and it is the contention of this Article that similar considerations inform the decision about whether to provide college education, life-time gifts, or bequests to one's offspring.

### B. *Disinheriting the American Child*

In the United States, it is perfectly legal for a parent to disinherit his child.<sup>73</sup> “Under the banner of freedom of testation, American inheritance law permits disinheritance of even the decedent’s closest family dependents. Indeed, in most states today parents can disinherit minor, disabled, and unborn children without cause or remedy.”<sup>74</sup>

In general, a parent may disinherit a child by expressly stating an intent to do so and by completely disposing of his estate to other persons.<sup>75</sup> Even these requirements are not solely meant to discourage disinheritance, but rather to assure that it is what the testator intended<sup>76</sup> and to ensure that any property which is not covered by the will does not go to the child as intestate property.<sup>77</sup> The first requirement guards against inadvertent disinheritance, as where one child’s name is accidentally omitted from the final will draft. The second requirement assures that property does not reach the child through intestate succession, which governs whenever a will does not effectively dispose of all the decedent’s property.

Courts uphold parental disinheritance of offspring, unless there is evidence of fraud or lack of testamentary capacity. However, the law favors testamentary gifts to offspring as a matter of policy, so it is fair to say that courts are generous in interpreting ambiguous circumstances in favor of the children. “A testator . . . may bequeath his entire estate to strangers, to the exclusion of his wife and children, but in such case the will should be closely scrutinized, and upon the slightest evidence of aberration of intellect, or collusion or fraud, or any undue influence or unfair dealing, probate should be refused.”<sup>78</sup> Nonetheless, disinheritance of a child is far from conclusive proof of lack of testamentary capacity. “[A] parent may, in his will, disinherit a child without laboring under an insane delusion.”<sup>79</sup> If a will can survive contest, the disinheritance of children

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73. Louisiana is currently the only exception to the rule that a parent can intentionally disinherit even a minor child. See Ralph C. Brashier, *Protecting the Child from Disinheritance: Must Louisiana Stand Alone?*, 57 LA. L. REV. 1 (1996). However, many states have so-called pretermitted heir statutes, which protect against unintentional disinheritance of children.

74. Frances H. Foster, *Linking Support and Inheritance: A New Model from China*, 1999 WIS. L. REV. 1199, 1217-18 (citations omitted).

75. See JESSE DUKEMINIER & STANLEY M. JOHANSON, *WILLS, TRUSTS, AND ESTATES* 90 (6th ed. 2000).

76. See *id.* at 536-50.

77. See *id.* at 90.

78. GA. CODE ANN. § 113-106 (1959), cited in Lawrence M. Friedman, *The Law of the Living, the Law of the Dead: Property, Succession, and Society*, 1966 WIS. L. REV. 340, 358-59. See also DUKEMINIER & JOHANSON, *supra* note 75, at 536-37 (“The law does not favor cutting children out of the parent’s estate when the testator leaves no spouse. To this end, a number of doctrines have been flexibly used to protect children, with the consequence that disinheritance is almost always a risky affair. A will disinheriting a child virtually invites a will contest.”).

79. *Flaherty v. Feldner*, 419 N.W.2d 908, 911 (N.D. 1988) (Vande Walle, J., concurring),

is perfectly legal.

Under traditional doctrine, parents can even disinherit minor children. While minor children can be disinherited, a spouse cannot be. There is an expectation that the surviving parent will continue to provide for the children, and indeed is legally obligated to do so if the children are minors. Part of this support is likely to come from the spousal share.

Modern succession law . . . unmistakably prefers the nuclear family (and especially the wife) over more distant kin. To say that the law favors the nuclear family seems rather paradoxical at first glance, in view of the stubborn persistence of the right to disinherit children completely and without stating cause. In fact, however, disinheritance of children is both common and natural. The average man marries only once and his widow is the mother of his children. She succeeds to the husband's rights as guardian of the children and head of the family. Under these conditions, it is not "unnatural" to leave nothing to the children. The right to disinherit children survives in modern American law, whatever its antecedents, not only because of a bias in favor of freedom of testation, but because disinheritance is functional for the majority of testators. Indeed, one reason often given to convince people that they need to have a will is precisely that without one minor children share in the estate. An awkward, costly guardianship then has to be set up, and the wife's economic control of family property, even her position as head of the family, may be impaired.<sup>80</sup>

Despite periodic calls for reform in scholarly literature, American law has proved surprisingly resistant to inheritance laws that would offer protection against disinheritance to a child of a testator.<sup>81</sup> Early in American legal history, English law heavily influenced American inheritance law. However, English

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*cited in* Donarski v. Donarski, 581 N.W.2d 130, 140 (N.D. 1998) (Sandstrom, J., dissenting).

80. Friedman, *supra* note 78, at 362-63 (citation omitted).

81. "Scholars have sporadically focused their attention on the disinherited American child. Indeed, one of the leading writers on inheritance law indicated in 1940 that a move was unmistakably under way to limit the unfettered freedom of American testators to disinherit children." Ralph C. Brashier, *Disinheritance and the Modern Family*, 45 CASE W. RES. L. REV. 83, 84 n.4 (1994) (citing Joseph Dainow, *Limitations on Testamentary Freedom in England*, 25 CORNELL L.Q. 337, 338 (1940); Herbert D. Laube, *The Right of a Testator to Pauperize His Helpless Dependents*, 13 CORNELL L.Q. 559, 594 (1928)).

*See also* Foster, *supra* note 74, at 1207-17 (describing the scholarly debate about the merits, or lack thereof, of the American system, which allows such unrestricted disinheritance of children). Foster points out that scholars and reformers have borrowed heavily from foreign models to provide examples of possible reforms. *See id.* at 1208. Foster notes that scholars have placed particular emphasis on two approaches: forced heirship provisions (which give a fixed, minimum percentage of the estate to certain family members, such as the decedent's spouse or offspring), and family maintenance systems (which allow a court to alter a will or intestate distribution so as to address the needs of a decedent's dependents). *See id.* at 1210-11.

rules that protected children from complete disinheritance never caught on here. Until the Fourteenth Century, English law guaranteed children a forced share of a decedent's chattels.<sup>82</sup> With respect to real property, the doctrine of primogeniture protected the testator's eldest living son.<sup>83</sup> Despite a brief flirtation with forced shares in personalty, the American states rejected the approach.<sup>84</sup> Likewise, primogeniture was "never cordially received in this country."<sup>85</sup> Perhaps American states rejected these rules for the same reasons that Blackstone surmised caused English law to eventually abandon them:

[T]he children or heirs at law were incapable of exclusion by will. Till at length it was found, that so strict a rule of inheritance *made heirs disobedient and headstrong*, defrauded creditors of their just debts, and prevented many provident fathers from dividing or charging their estates, as the exigencies of their families required.<sup>86</sup>

There has been much scholarly discussion of the reasons U.S. law is so tolerant of the disinheritance of children, despite the fact that many, if not most developed countries prohibit the complete disinheritance of offspring.<sup>87</sup> In cases where there is no proof of fraud or undue influence, American law has a number of reasons for allowing testators to disinherit their own children.

For one thing, freedom of testation, or the right to dispose of one's own property as one wishes, is given great weight in the law of wills. As I have pointed out elsewhere, estate planning in the United States today indulges the plans and whims of property owners.<sup>88</sup> Potential beneficiaries of a person's estate have no ownership rights to his property while he is alive, and no absolute

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82. See Brashier, *supra* note 81, at 113-14. Brashier notes that while the right had almost disappeared by the end of the Fourteenth Century, it lasted longer in some areas, most notably London, where it prevailed until 1724. See *id.* at 114 n.104 (citing George W. Keeton & L.C.B. Gower, *Freedom of Testation in English Law*, 20 IOWA L. REV. 326, 338 (1935)).

83. See *id.* at 114-15 nn.104-06. Brashier cites J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 293 (3d ed. 1990) and A.W.B. SIMPSON, A HISTORY OF THE LAND LAW 191 (2d ed. 1986) for the proposition that compulsory primogeniture was effectively eliminated with the Statute of Wills. See *id.* at 114 n.104. However, Brashier also notes that primogeniture was not officially abolished in England until 1925. See *id.* at 115 n.106.

84. See *id.* (citing MARYLYNN SALMON, WOMEN AND THE LAW OF PROPERTY IN EARLY AMERICA 149 (1986) (noting that in colonial Maryland, a testator's children had a forced share in their father's personal property)).

85. *Id.* at 115 n.106 (quoting THOMAS F. BERGIN & PAUL G. HASKELL, PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS 9 (2d ed. 1984)).

86. 2 WILLIAM BLACKSTONE, COMMENTARIES \*12, cited in DUKEMINIER & JOHANSON, *supra* note 75, at 1-2 (emphasis added).

87. See Ronald Chester, *Disinheritance and the American Child: An Alternative from British Columbia*, 1998 UTAH L. REV. 1, 2-4.

88. See Judith G. McMullen, *Family Support of the Disabled: A Legislative Proposal to Create Incentives to Support Disabled Family Members*, 23 U. MICH. J.L. REFORM 439, 442 (1990).

right to receive anything after his death.<sup>89</sup> The sole exception to this is the surviving spouse, who is protected from complete disinheritance.<sup>90</sup>

Another explanation for allowing disinheritance of children is that allowing testators to include or exclude children from shares in an estate may motivate the younger generation to be more attentive in caring for the needs of the older generation.<sup>91</sup> If offspring bear many of the financial and psychological costs of caring for their elders, that burden is less likely to be assumed by society.

Still another rationale is the presumed propensity of parents to act in the best interests of their children and other descendants. “[T]he parent more often than not will know better how to dispose of his property than will the state [which imposes] an inflexible blanket rule.”<sup>92</sup> Perhaps a testator prefers to disinherit a child so that the child’s incentive to achieve will not be dulled by an inherited nest egg. Sometimes parents of severely disabled children elect to disinherit them so as not to disturb eligibility for government aid programs which the disabled offspring might otherwise have. At other times, disinheriting children in favor of their surviving parent may indirectly benefit the children by preserving the parent’s position of power and influence within the family. In these cases, the children may well be better off in the long run if they are disinherited, and their parents are in the ideal position to know this and to act upon it.

At any rate, parents’ right to disinherit children is clearly established in all states but Louisiana. Of course, even if parents do not formally disinherit children in their wills, they can accomplish the same result by spending the entire estate during their own lifetimes. Longer life expectancies make it more likely that parents will spend their estates on ordinary living expenses, medical expenses, nursing home expenses or retirement luxuries such as travel or hobbies.<sup>93</sup> The most generous of will provisions cannot transfer money that is no longer in a parent’s estate. Thus, some children inherit nothing without any affirmative act of disinheritance on their parents’ part.

The above reasons may explain why American law allows the disinheritance of children. The next question is why an individual testator might choose to disinherit a child despite what Deborah A. Batts refers to as “the power of the

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89. See *id.* at 443 (citing Carol Dry Doup, Note, *Family Maintenance: An Inheritance Scheme for the Living*, 8 RUTGERS-CAM. L.J. 673, 674-75 (1977)).

90. See generally DUKEMINIER & JOHANSON, *supra* note 75, at 471-536.

91. See WILLIAM M. MCGOVERN, JR. ET AL., WILLS, TRUSTS AND ESTATES 88 (1988) (citing 2 BRACTON, DE LEGIBUS ET CONSUEUDINIBUS ANGLIAE 181 (Samuel E. Thorne trans., George E. Woodbine ed., 1968) (discussing King Lear, “who was mistreated by his daughters as soon as their share of his estate was secure”)).

92. MCGOVERN ET AL., *supra* note 91, at 88 (quoting Max Nathan, Jr., *An Assault on the Citadel: A Rejection of Forced Heirship*, 52 TUL. L. REV. 5, 19 (1977)).

93. See generally Langbein, *supra* note 5 (stating that Americans have high expectations about quality of life in retirement and are apparently willing to spend what they have to achieve that quality. They appear disinclined to scrimp on their lifestyle to preserve an inheritance for their offspring, if indeed parents were ever inclined to do so.).



call of the blood."<sup>94</sup> There are several recognized reasons for a testator's decision to disinherit one or more of his children. As mentioned, the most problematic situation is where a testator may have diminished mental capacity,<sup>95</sup> or may be responding to fraud or undue influence.<sup>96</sup> If these situations occur (and can be proven) the will may be denied probate or another remedy could be provided by the court.

However, a testator could have one of several other reasons for disinheriting a child. The choice to spend resources rather than save them for the next generation, the preference towards giving property to a surviving spouse rather than descendants, the belief that the children have received enough from the parents already, the desire to keep children loyal and well-behaved, and the desire to make children independent are all recognized as reasons for the disinheritance of children. As will be discussed in Part III of this Article, similar reasons may lead parents to withhold payments for a child's higher education.

Sometimes, whether by design or by the chance of living a longer life with associated expenses, a testator may spend all his resources, leaving nothing to be inherited by a child. Greater life expectancies mean that people can expect to be alive for more retirement years. Expectations of a "good" retirement, including travel and leisure activities, make seniors more likely to spend their nest eggs than ever before. However, while this pattern of spending may result in nothing being left for the children to inherit, there may not be a deliberate disinheritance. In many cases, there will still be a will dividing property among the children, however there might not be any property to actually distribute when the time comes.

There are situations where a parent deliberately disinherits a child by stating in his will that the child is disinherited, or by simply leaving everything to someone else.<sup>97</sup> In many cases, a testator simply wants to leave the entire estate to the surviving spouse. This ensures that the surviving spouse will maintain the same standard of living as the couple had when both members were living, and satisfies notions that the property really belonged to both of them. "[T]he vast majority of couples, when surveyed, want the surviving spouse to inherit the

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94. Deborah A. Batts, *I Didn't Ask to Be Born: The American Law of Disinheritance and a Proposal for Change to a System of Protected Inheritance*, 41 HASTINGS L.J. 1197, 1264-65 (1990).

95. One example might be where an Alzheimer's patient no longer remembers one or more of his children. He would lack testamentary capacity, but if he executed a will without capacity, that would have to be proven in order to have the will denied probate.

96. If a third party tells the testator that his son is dead, but the son is not dead and the third party knows it, the will is fraudulently procured if the testator disinherits his son as a result. If instead of lying about the son's fate, the third party uses a variety of coercive and manipulative methods to get the testator to leave everything to him rather than to the son, then the disinheritance would be the result of undue influence.

97. However, to avoid claims of inadvertent disinheritance under pretermitted heir statutes, such a testator would be well advised to mention the children somewhere in the document.

entire estate.”<sup>98</sup> Traditionally, the expectation has been that the remaining estate would pass to the children at the death of the surviving spouse. This prompted at least one scholar, Jeffrey P. Rosenfeld, to claim that leaving everything to the surviving spouse to guarantee a certain standard of living is not really disinheritance because “there is no intention of depriving (children) of their inheritance for any longer than the surviving spouse’s lifetime.”<sup>99</sup> However, this expectation may not be fulfilled in cases where the surviving spouse remarries. In those cases, the needs of the second surviving spouse may be of greater concern to the testator, who may follow the same pattern of leaving the whole estate to the surviving spouse. The children from the first marriage may never inherit at all, since a surviving stepparent may have a first family of her own.<sup>100</sup> Despite Rosenfeld’s assertion, this really *is* disinheritance of the children from the first marriage.

In other cases, a testator may have made other provisions for surviving children, such as trusts, joint property or lifetime gifts, and may not wish for the children to inherit additional property from the estate.<sup>101</sup> For example, in their study of family distribution patterns, Sussman, Cates and Smith cite the example of a seventy-four-year-old widower who was disinheriting four children in favor of a fifth, who was caring for him. He stated that he had already given enough to the four children who were disinherited.<sup>102</sup> However, Sussman, Cates and Smith also cite the case of a sixty-seven-year-old widow who disinherited her two sons in favor of her three daughters. The will stated: “I have made no provision for Carl and Frederick, since I have given them a share of my estate

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98. Chester, *supra* note 87, at 4 n.16 (quoting CAROLE SHAMMAS ET AL., *INHERITANCE IN AMERICA FROM COLONIAL TIMES TO THE PRESENT* 211 (1987)).

99. *Id.* at 5 n.25 (quoting Jeffrey P. Rosenfeld, *Disinheritance and Will Contests*, in *FAMILY SYSTEMS AND INHERITANCE PATTERNS* 77 (Judith N. Cates & Marvin B. Sussman eds., 1982)).

100. See MARVIN B. SUSSMAN ET AL., *THE FAMILY AND INHERITANCE* 89-95 (1970) (discussing different examples of disinheritance of children from a first marriage in favor of a second spouse, and also discussing the interested parties’ perceptions of the fairness of the results). In general, children from the first marriage did not begrudge the inheritance by the second spouse, especially if the second spouse had helped to build up the estate. However, they had a greater discomfort level if the estate had been partly built up through the efforts of their deceased parent, especially if the second spouse had children of his or her own, who might well inherit to their exclusion. See *id.* at 95.

101. Indeed, a parent may come to the conclusion that a child has already been adequately provided for because the parent has expended substantial resources, or even gone into debt, to pay the expenses of higher education for the child.

102. See SUSSMAN ET AL., *supra* note 100, at 101; see also Langbein, *supra* note 5, at 735 (“I’ve told my sons, your education is going to be your inheritance.” (comment by Mr. Lu)). Of course, the implication of Mr. Lu’s comment is that there will not be anything left to inherit. However, his comment could also be understood to mean that after his sizeable investment in his sons’ education, he no longer feels compelled to leave them anything and may instead spend it or bequeath it to someone else.

during my lifetime."<sup>103</sup> The authors reported that the share referred to in the will was \$1000 that each of the five children received when the widow sold her home. In later interviews, the five children had vastly different theories about why the brothers were disinherited. The daughters thought that it was because the sons had ignored their mother; the brothers denied this. One daughter believed that the mother had in fact depleted her bank account in favor of the boys. One of the sons theorized that his sisters had plied the mother with drinks, and she had plied the sisters with money. The entire estate was worth \$5000.<sup>104</sup> If nothing else, this case illustrates that a parent's perception that the parent has already adequately provided for a disinherited child may not be shared by the child.

Related to the belief that the testator has already adequately provided for his child elsewhere is the perception that a child should be disinherited because he does not need the money, in contrast to other children, who may need it more. Sussman, Cates and Smith cite several instances of this rationale. In one case, a sixty-two-year-old widow planned to leave her estate to her daughter, with her daughter's children as contingent beneficiaries. She disinherited her son, with whom she was apparently on cordial terms, stating that her "son can take care of himself."<sup>105</sup> In another case, an eighty-five-year-old widow planned to disinherit the older of her two sons. She stated "that the disinherited son is doing quite well, but that the younger son has been involved in numerous unsuccessful business ventures and needs the money."<sup>106</sup> In a variation on this theme, a parent may disinherit a disabled child in order to preserve his eligibility for government benefit programs.<sup>107</sup>

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103. SUSSMAN ET AL., *supra* note 100, at 99.

104. *See id.*

105. *Id.* at 101.

106. *Id.*

107. *See generally* Lawrence A. Frolik, *Estate Planning for Parents of Mentally Disabled Children*, 40 U. PITT. L. REV. 305 (1979); McMullen, *supra* note 88; Carol Ann Mooney, *Discretionary Trusts: An Estate Plan to Supplement Public Assistance for Disabled Persons*, 25 ARIZ. L. REV. 939 (1983). As these articles point out, disinheritance is sometimes regarded by parents as the lesser of two evils. When disabled adult children have financial needs beyond what a parent could provide, the parent may allow the child to be emancipated, and the child will be eligible for public benefit programs. However, benefit programs have strict eligibility requirements. Any financial windfall, such as an inheritance, will make the child ineligible for benefits programs. Money from a support trust will have the same effect. In addition, any funds received by the disabled child may be immediately targeted for repayment of past expenses paid by the state.

[P]ayments to the child will reduce or cause termination of disability payments, but unless the gift or inheritance is extremely large, it may not meaningfully or continuously improve the beneficiary's standard of living. Moreover, when the gift or inherited property is exhausted, there may be a delay in reinstating payment of the disability benefits. Faced with such ungratifying prospects, many people will conclude that a gift or bequest is not a good idea and will search for other options.

McMullen, *supra* note 88, at 450. As McMullen, Frolik and Mooney point out, disinheritance is one of those options. The articles go on to explore the possibility of a totally discretionary, or

Some testators disinherit children to punish them for neglecting their parents, or for other behavior that the parents deem unacceptable, such as marrying outside the family faith. Sometimes this is done by placing a condition on the inheritance—if the condition is met, the child receives the inheritance; if not, the child is disinherited. For example, a Jewish father might condition his son's inheritance on the son's marriage to a Jewish girl by a certain deadline. If the son is not so married, he loses his inheritance.<sup>108</sup> In other situations, testators may use a will to reward desirable behavior, such as caring for the testator in his declining years, while disinheriting children who have neglected their parents or failed to participate in the parents' care.<sup>109</sup> The impulse to use an inheritance to

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luxury trust.

The United States is not the only country where the expenses of supporting a disabled child may provide an incentive to disinherit that child. Foster cites the case of "a 'calculating' Chinese testator [who] deliberately impoverished his mentally and physically disabled daughter so that she would be supported at State expense." Foster, *supra* note 74, at 1220-21 (citing Case No. 41, in *YI AN SHUO FA: JICHENG FA [USING CASES TO EXPLAIN LAW: INHERITANCE LAW]* 75 (Li Qizhi et al. eds., 1986)). However, the United States is apparently more tolerant of the disinheritance solution. Foster reports that:

The case commentary castigated the testator, Gao Da, for his offenses against both his daughter and society as a whole:

"Gao Da did not leave the mandatory share of his estate to his daughter. He attempted to shift the burden of his daughter's livelihood to society. This type of 'calculation' infringes statutory provisions and is incorrect. Based on law and proceeding from reality, the court decided that Gao Da's will was invalid and redistributed the estate to promote the common interests of society and also to protect the legal rights and interests of Gao Da's daughter."

*Id.* at 1221 n.117 (quoting *YI AN SHUO FA, supra*, at 76).

108. See *Shapira v. Union Nat'l Bank*, 315 N.E.2d 825 (Ohio C.P. 1974) (holding that testator had a right to place restrictions on his bequests, and that the restrictions related to his son David's marital situation were neither unconstitutional nor a violation of public policy), *cited in* *DUKEMINIER & JOHANSON, supra* note 75, at 24.

109. See, e.g., *SUSSMAN ET AL., supra* note 100, at 98-100 (describing seven instances of disinheritance). These seven instances shared

'at least one common factor: the decedent lived with one of his children. In several of the cases, the aged parent was sufficiently incapacitated to require constant attention.

There seemed to be a consensus among the family members that a sibling who had given care to an aged parent should have received special consideration, even if the child had been living rent free.

*Id.* at 100. The authors go on to note, however, that some of the disinheritances were motivated by more than just who provided final care. In one case, for example, the disinherited daughter was a nun who had taken a vow of poverty. Her father had opposed her entering the convent. Despite the disinheritance of the nun, the sister who had taken care of the ailing father did not receive anything extra, but shared equally with her remaining siblings. See *id.* at 99-100. The disinheritance, then, was apparently not for the purpose of rewarding the caretaker child. Thus, this

reward behavior and disinheritance to punish wrongdoing may be the most universal of the possible motivations to disinherit a child.<sup>110</sup>

Finally, some parents are motivated to disinherit a child because the parents believe that inherited wealth keeps a child dependent and destroys his incentive to excel.<sup>111</sup> The billionaire Warren Buffet has stated that he intends to leave his fortune to charity rather than to his children because it would not be right for his children to inherit "a lifetime supply of food stamps just because they came out of the right womb."<sup>112</sup> Of course, it remains to be seen whether Mr. Buffett carries through with his planned disposition.

### III. ARGUMENT AGAINST ORDERING PARENTS TO PAY FOR COLLEGE EXPENSES

Should family courts have the discretion to order divorced parents to pay their children's college and other post-majority educational expenses? As noted above,<sup>113</sup> only a few states give courts that power. Perhaps the most widely cited argument against imposing a payment requirement on divorced parents is simply that parents whose marriages remain intact are under no obligation to pay for college or any other post-majority expenses. Therefore, the argument is that obliging divorced parents to pay is a violation of those parents' right to equal protection.<sup>114</sup>

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latter example is perhaps more illustrative of the punishment function of disinheritance than it is of the reward function.

110. See, e.g., Foster, *supra* note 74, at 1220 n.113 (citing Yu Lai v. Yu Jing & Chen Xia, in MIN SHANG FA SCHIWU YANJIU: JICHENG JUAN [A STUDY OF CIVIL AND COMMERCIAL LAW PRACTICE: INHERITANCE VOLUME 103 (Yang Zhenshan ed., 1993) (in which "a 'broken-hearted' mother . . . disinherited her adopted teenaged son [who was] a juvenile delinquent and truant since age seven"))).

111. See *supra* text accompanying note 70.

112. Richard I. Kirkland, Jr., *Should You Leave It All to the Children?*, FORTUNE, Sept. 26, 1986, at 18 (quoting Warren Buffett and discussing the disinheritance of children by wealthy parents).

113. See *supra* text accompanying notes 23-46.

114. This argument has had some success in the courts. See, e.g., Curtis v. Kline, 666 A.2d 265 (Pa. 1995). *Kline* involved a challenge to a 1993 Pennsylvania law (23 PA. CONST. STAT. § 4327(a) (1993)) that gave courts discretion to order separated, divorced or unmarried parents to pay post-secondary educational expenses of their children. See *id.* at 253. The court concluded that the statute violated the equal protection clause of the Fourteenth Amendment to the U.S. Constitution. See *id.* at 258. The court stated:

It will not do to argue that this classification is rationally related to the legitimate governmental purpose of obviating difficulties encountered by those in non-intact families who want parental financial assistance for post-secondary education, because such a statement of the governmental purpose assumes the validity of the classification. Recognizing that within the category of young adults in need of financial help to attend college there are some having a parent or parents unwilling to provide such help, the

If one approaches the question with the assumption that having one's education paid for by one's parents is a form of inheritance, other arguments emerge for not requiring divorced parents to pay the post-majority educational expenses of their children. The reasons that at least sometimes justify disinheritance of children at death can also be applied to justify refusal to pay for the children's college education during the parent's lifetime. Specifically, a divorced parent may choose not to pay college or other post-majority expenses for children of a former marriage because the parent prefers to spend the resources in other ways, because of the belief that the children have gotten enough support already, because the child's behavior is unacceptable to the parent, or because of a desire to have the child become independent.

Just as a testator may prefer to spend all of his money, or to leave all his property to a surviving spouse rather than to his children, a divorced parent may prefer to devote his current resources to a current spouse or minor children from a subsequent marriage. The case of *Blue v. Blue*<sup>115</sup> provides a fairly typical illustration of this phenomenon. The Blues separated in August 1987 when Mrs. Blue left the marital residence. Ten months later, Mr. Blue "decided that he needed to 'get on with his life' and purchased a \$114,000 five-bedroom home. . . . The monthly mortgage payment for this new home was \$1,187.00 a month or a monthly mortgage payment increase of \$900.00."<sup>116</sup> Mr. Blue moved into the new home with his girlfriend and her two minor children. According to the case, Mr. Blue paid all monthly living expenses for the new members of his household, with the exception of medical expenses and his girlfriend's car payments.<sup>117</sup>

Prior to his parents' separation, the Blues' son Reginald had attended Penn State at his parents' expense. After the separation, and apparently because of his new household expenses and new loyalties, Reginald's father refused to continue paying college expenses. Forced to work and take out loans, Reginald sued his father for college support.<sup>118</sup> Although two lower courts found in Reginald's

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question remains whether the authority of the state may be selectively applied to empower only those from non-intact families to compel such help. We hold that it may not. In the absence of an entitlement on the part of any individual to post-secondary education, or a generally applicable requirement that parents assist their adult children in obtaining such an education, we perceive no rational basis for the state government to provide only certain adult citizens with legal means to overcome the difficulties they encounter in pursuing that end.

*Id.* at 258-59 (footnotes omitted).

For a critical look at the *Kline* decision, see Charles F. Wilson, Note, *But Daddy, Why Can't I Go to College? The Frightening De-Kline of Support for Children's Post-Secondary Education*, 37 B.C. L. REV. 1099 (1996). *But see* Childers v. Childers, 575 P.2d 201 (Wash. 1978) (en banc), excerpted in HARRIS & TEITELBAUM, *supra* note 26, at 593-98.

115. 616 A.2d 628 (Pa. 1992).

116. *Id.* at 630.

117. *See id.*

118. However, as the court noted, "the son did not sue his mother under the same theory."

favor,<sup>119</sup> the Pennsylvania Supreme Court reversed, holding that the lower courts had abused their discretion in ordering the college payments. The supreme court dismissed Reginald's claim, noting that Pennsylvania law provided no right to have parents pay the expenses of higher education.<sup>120</sup>

The fact that Mr. Blue had spent lavishly on his new house and household members was apparently a deciding factor in the trial court's decision in favor of Reginald. "The trial court determined that the father caused his own undue hardship as the result of his real estate purchase."<sup>121</sup> However, except for a passing reference to the influence of this factor on the trial court's decision, the supreme court seemed to be totally unaffected by it. No judgment was uttered as to the reasonableness of the father's new spending pattern. The clear implication was that, in the absence of a contractual agreement binding the father to pay Reginald's college expense, the father's other spending decisions were simply irrelevant.

Payment of college expenses is by no means universal, even among parents whose marriages have remained intact. Aside from the expenses of second families, parents may choose not to support a child's college education because paying for post-majority expenses would jeopardize other financial goals, such as maintaining a comfortable lifestyle or saving for retirement. People need a good deal of money to retire comfortably, and middle-aged parents may prefer to assure their own financial security rather than spending heavily (or borrowing heavily) to pay for the college education of their children. "They're likely to be living a longer portion of their lives together as retirees than in the past, and their expectations for their post-work lives are higher than what previous generations set for themselves."<sup>122</sup> Factors such as the ages of the parents when the children are in college will influence the ability of the parents to contribute to tuition without jeopardizing their own financial future. Divorced parents share these same concerns with still-married parents and should be allowed to make the same considered judgments to address them.

As mentioned above, a testator might disinherit a child because of the belief that the parent has already provided adequately for the child, or because the parent believes that the child does not need the support.<sup>123</sup> Applied to the divorce

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*Id.* at 629 n.1.

119. The trial court ordered the father to pay \$4600 per year towards Reginald's college education. However, the court ordered Reginald to apply for and accept loans and grants, the amount of which would reduce his father's obligation. *See id.* at 630. The superior court affirmed the requirement that the father pay \$4600 per year, but reversed the trial court's requirement that Reginald seek loans and grants, reasoning that college expenses are the responsibility of parents. *See id.* (citing *Blue v. Blue*, 576 A.2d 1129 (Pa. Super. Ct. 1990)).

120. *See id.* at 632.

121. *Id.* at 631.

122. Laura Ramsay, *Navigating the Retirement Routine: For Some Couples the Lifestyle Change when One Retires Can Put a Strain on Their Marriage, Especially if Their Goals Are Not in Sync*, NAT'L POST, Oct. 11, 1999, at C13.

123. *See supra* text accompanying notes 101-07.

context, a non-custodial parent may feel that he has done more than enough by sacrificing to pay regular child support throughout the child's minority. In *Second Chances*, Judith Wallerstein and Sandra Blakeslee report that in their sample, this attitude was common among non-custodial fathers. "[T]hey tend to say, 'I paid my child support through the years. I met all my obligations. I've given my wife thousands of dollars, and now it's up to her.'"<sup>124</sup> Wallerstein and Blakeslee reported that this attitude prevailed even where the fathers could afford to help, valued education, and had cordial relations with their children.<sup>125</sup> Similarly, the parent might feel that the child has other resources to which he could turn for tuition payment, such as the loans and grants the father in *Blue* expected his child to use.

As previously discussed,<sup>126</sup> it is well known that at least some parents use disinheritance (or threats of it) to influence their children's actions, and to reward good behavior and punish bad behavior. Even in a non-estate planning setting, parents often use continued financial support as a reward or incentive as children grow older. However, if a divorced parent is legally obligated to pay for higher education, a child may cut off all contact, reject the parent's value system, and still collect the tuition money. This reduces a direct incentive for children to maintain a cordial relationship with non-custodial parents, and places those parents at an unfair disadvantage. A *Dear Abby* letter to newspaper advice columnist Abigail Van Beuren illustrates this point:

I found your response to the twins whose divorced father would not continue child support payments or pay for higher education to be factually accurate, but a bit narrow in its vision.

My wife left her home state 10 years ago for a much better job. After a child custody battle that almost bankrupted her, she was forced to leave her [eight]-year-old son and [six]-year-old daughter with her ex-husband. Despite a court order, her son refused to fly up to see her after the first few visits and was rarely available when she flew there. Football, basketball, friends—all held more importance than his mother. Despite her never missing a holiday gift, I can count on one hand the number of phone calls or thank-yous she has received. Care to guess how many times they forgot her birthday?

When it came time for him to choose a college, my wife offered to assist with tuition if he considered an Ivy League school or the school from which she and her former husband graduated. She was chastised for trying to "force" him to attend a college he did not wish to.

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124. JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, *SECOND CHANCES: MEN, WOMEN, AND CHILDREN A DECADE AFTER DIVORCE* 158-59 (1989).

125. *See id.* at 158.

126. *See supra* text accompanying notes 55-57.



Perhaps the twins should examine how they treated their father while the child support was paid consistently every month. Sounds like Dad held up his end. . . .

—Been There, Done That<sup>127</sup>

Presumably, the mother referred to in the letter withheld tuition contributions because the son would not consider a school she approved of and because the son apparently demonstrated no interest in having a good relationship with her. If the college support had been court-ordered, the mother would have had no opportunity to adjust her behavior in response to her son's attitude. Imposing the obligation to pay college tuition on a non-custodial parent may give too much power to the child and his custodial parent, with the non-custodial parent reduced to unwillingly writing checks to ungrateful offspring.

Although many still-married parents continue to offer cash or in-kind support, including tuition, until a child has completed college or other post-secondary education, these parental stipends are likely to be reserved for children who continue to behave in ways that are acceptable to the parents. It is not reasonable to deny to divorced parents this ability to use rewards to influence their children's behavior. This is particularly true where the divorce and the ensuing reduction in time spent with the children have already operated to deprive a non-custodial parent of many opportunities for influence.

Finally, a parent may decline to pay the costs of his child's higher education because of the parent's belief that the child should be independent. "At some point parents expect that the children will 'quit going to school and go to work,' or at least pay for their own additional training."<sup>128</sup> Once again, it seems that divorced parents should have this opportunity to influence their child's maturity, just as married parents do.

Ultimately, requiring parents to pay post-majority educational expenses is inconsistent with another trend in family law: the policy of allowing divorced persons to walk away from a marriage and make a completely fresh start. In addition, parents are not generally liable for the debts of their adult children, although sometimes exceptions are made where the children are disabled.

#### IV. OBJECTIONS TO THE ARGUMENT

There are at least three arguments in favor of allowing courts the discretion to order the payment of college expenses by divorced parents. First, some research has indicated that children of divorce are at greater risk, emotionally and financially, than are children in intact families. If this is true, these children and their custodial parents are less likely to be in a position to afford college expenses, especially in an atmosphere of rapidly rising costs. However, these same children may have an even greater need for higher education, to counterbalance some of their disadvantaged circumstances. Second, custodial

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127. Abigail Van Buren, *Dear Abby: Mom's Faithful Support Is Met Indifferently*, CHI. TRIB., Feb. 27, 1999, at 33.

128. HARRIS & TEITELBAUM, *supra* note 26, at 598.

parents appear to continue to shoulder, arguably voluntarily, many of the expenses. It is argued that it is unfair to expect them to do this alone. Third, giving courts the discretion to order payment of post-majority expenses will likely increase the number of parents who contribute to the education of their children.

As to the first argument, there have been studies that seem to indicate that children of divorce are at higher risk for social and economic difficulties. "The preponderance of the evidence suggests that, following divorce, custodial parents—almost always mothers—suffer considerable decline in economic well-being."<sup>129</sup> In one well-known study of the consequences of divorce, Lenore Weitzman argued that inadequate child support placed divorced women and their children in precarious financial circumstances:

[T]he data point to three conclusions. First, the amount of child support ordered is typically quite modest in terms of the father's ability to pay. Second, the amount of child support ordered is typically not enough to cover even half the cost of actually raising the children. Third, the major burden of child support is typically placed on the mother even though she normally has fewer resources and much less "ability to pay."<sup>130</sup>

Other studies have suggested that the disadvantages experienced by children of divorce are not only financial, but emotional as well. Wallerstein and Blakeslee reported that in the group they studied, one third of the children were doing significantly *worse* five years after the divorce, when factors such as depression, behavior and learning problems were considered.<sup>131</sup> One "meta-analysis confirmed that children in divorced families, on average, experience more problems and have a lower level of well-being than do children in continuously intact two parent families."<sup>132</sup>

The argument is thus made that provision of educational supports could help these disadvantaged children of divorce to improve their life chances. Better-

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129. Jay Teachman & Kathleen M. Paasch, *Financial Impact of Divorce on Children and Their Families*, in CTR. FOR THE FUTURE OF CHILDREN, THE DAVID & LUCILE PACKARD FOUNDATION, 4 THE FUTURE OF CHILDREN: CHILDREN AND DIVORCE 1, 63 (1994) [hereinafter CTR. FOR FUTURE OF CHILDREN].

130. LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION* 278 (1985). Weitzman argues that this negative effect is greatly exacerbated by the low percentage of fathers who are in compliance with their child support. She reports that more than half of women who are due child support do not receive the court-ordered support. *See id.* at 262.

131. *See* WALLERSTEIN & BLAKESLEE, *supra* note 124, at xvii.

132. Paul R. Amato, *Life-Span Adjustment of Children to Their Parents' Divorce*, in CTR. FOR FUTURE OF CHILDREN, *supra* note 129, at 145 (citing Paul R. Amato & Bruce Keith, *Parental Divorce and the Well-Being of Children: A Meta Analysis*, PSYCHOL. BULL. 26, 26-46 (1991)). This article analyzed the results of ninety-two studies involving over 13,000 children. "These problems include lower academic achievement, more behavioral problems, poorer psychological adjustment, more negative self-concepts, more social difficulties, and more problematic relationships with both mothers and fathers." *Id.* at 145.

educated children are more likely to be self-supporting at a reasonable level and are less likely to be a burden on society. However, there are a number of problems with this argument. First, emotional, behavioral and financial problems are not limited to children whose parents have divorced. Nor do all children of divorce experience problems of the same degree, kind and duration. “[A]lthough children of divorce differ, on average, from children in continuously intact two-parent families, there is a great deal of overlap between the two groups.”<sup>133</sup> Amato also notes that “the average differences between children from divorced and continuously intact families are small rather than large. This fact suggests that divorce is not as severe a stressor for children as are other things that can go wrong during childhood.”<sup>134</sup> Thus, unless we are willing to order college support for all children experiencing behavioral, emotional or financial problems, our solution will be both over and under inclusive. Second, legitimate policy concerns about the unique vulnerabilities of children of divorce could be addressed by other means, such as giving judges greater discretion over the use of support paid during minority, or offering tax or other incentives for parents who do provide extra educational support for their children.

The second argument also raises a good point, since it does appear that custodial parents often continue to support their children through college,<sup>135</sup> and it seems unfair to require them to shoulder this burden alone. This argument is made more compelling by the fact that mothers continue to retain primary custody in most cases, and mothers on average have fewer financial resources than their ex-husbands.<sup>136</sup> But it is important to remember that custodial parents are not being forced to support their children once those children have reached the age of majority. Even if it is true that custodial parents continue to provide support throughout college, they are doing so voluntarily. Why should the other parent be forced to pay more because of the way the custodial parent chooses to spend her resources? Contributing to college expenses might be a generous thing for the ex-spouse to do, but this does not justify making it a legal requirement.

Finally, it makes sense that requiring payment of post-majority educational expenses will increase the actual number of people who contribute to those expenses on behalf of their children. Not only will some parents pay because they have been ordered to do so, but more parents will agree to pay without being forced if they know that they will likely have to contribute something should the case go to trial.<sup>137</sup>

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133. *Id.* at 146.

134. *Id.* Amato continues: “For example, a recent meta-analysis of studies dealing with childhood sexual abuse revealed average effect sizes three to four times larger than those based on studies of children of divorce.” *Id.* (citing Kathleen A. Kendall-Tackett et al., *Impact of Sexual Abuse on Children: A Review and Synthesis of Recent Empirical Studies*, 113 *PSYCHOL. BULL.* 164, 164-80 (1993)).

135. See WEITZMAN, *supra* note 130, at 279.

136. See *id.*

137. See generally Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 *YALE L.J.* 950 (1979).

Voluntary contributions by able parents seem less likely in this group, given discouraging statistics on compliance with minority child support orders.<sup>138</sup> Knowing a judge could impose payments will encourage some people to make the payments without litigation. On the other hand, some people simply are not in the financial position to shoulder college costs. Analysis of when it would be fair to require payment will burden the judicial system. Moreover, given discouraging statistics on compliance with minority child support, there is no guarantee that a court-imposed order will *in fact* result in more parents paying for post-majority education. An order to pay post-majority educational support can be ignored just as readily as an order to pay child support during a child's minority. "[G]ood parents will always help their children, with or without the court orders, and bad parents will always figure out a way to dodge their responsibilities."<sup>139</sup>

#### CONCLUSION

This Article has attempted to show that divorced parents should not be forced to pay for the post-majority education of the children of their failed marriages. Education has become a form of intergenerational wealth transfer, as suggested by John Langbein in his 1998 article. Because parents are free to disinherit their children for any reason, they should be similarly free to decline to pay for the college costs of their children. The possible reasons for disinheritance or for refusal to pay post-majority educational costs are similar to each other, and similar as between divorced and married parents. Therefore, the result should be the same: the state should force neither divorced parents nor married parents to pay college or other post-majority educational expenses.

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138. See WEITZMAN, *supra* note 130, at 278.

139. Wilson, *supra* note 114, at 1100 (citing Interview with "40-ish" in the ChatWeb) (March 21, 1996)). "40-ish" had apparently had a bitter divorce from a successful physician. She alleged that her ex-husband had hidden most of the assets prior to the divorce hearing, so that she got very little property and only limited term support. The ex-husband, while supporting a lavish lifestyle for himself and his live-in girlfriend, refused to help his daughter with college expenses. See *id.*

