NEW MEXICO LAW REVIEW

Volume 18
Issue 1 *Winter 1988*

Winter 1988

Post-Minority Support for College Education - A Legally Enforceable Obligation in Divorce Proceedings

Kathleen Conrey Horan

POST-MINORITY SUPPORT FOR COLLEGE EDUCATION—A LEGALLY ENFORCEABLE OBLIGATION IN DIVORCE PROCEEDINGS?

KATHLEEN CONREY HORAN*

I. INTRODUCTION

When a child reaches the statutory age of majority, he is emancipated by operation of law. He may vote, sign contracts, and engage in the full panoply of "adult" privileges and responsibilities. He is presumed to be independent, and his parents' legal and financial obligations to him terminate.

Whether he is, in fact, independent is another issue. An example that comes readily to mind is a child who is physically or mentally handicapped who may remain dependent beyond the age of majority, possibly for life. Many states impose a duty of post-minority support upon parents of disabled children even after the children reach the statutory age of majority.[1] This Article focuses on whether it is appropriate to carve out a second exception to the general rule of automatic emancipation for adult children who remain financially dependent by virtue of their status as college students.

In 1971, the voting age was lowered from twenty-one to eighteen by adoption of the 26th Amendment.[2] This occurred in the wake of the Vietnam War and reflected the sentiment that if eighteen-year-olds were old enough to be drafted and sent to war, they were old enough to participate in the election of the politicians who made such decisions. Most states went beyond the requirements of the constitutional amendment, passing statutes which not only permitted eighteen-year-olds to vote, but reduced the age of majority to eighteen for most other purposes also.[3]

---

*Ms. Horan's article received the first place award in the 1986 Howard C. Schwab Memorial Award Contest in the field of family law. It first appeared in FAMILY LAW QUARTERLY Volume XX, Number 4, Winter 1987. She graduated from the University of New Mexico Law School in May 1986 and is now practicing with the law firm of Hatch, Beitler, Allen & Shepherd in Albuquerque, New Mexico.

1. Adult children who are physically or mentally disabled are frequently unable to earn a living. Parental support for them can be required under pauper statutes which exist in 46 states. North Carolina, Tennessee, Washington, and Wyoming do not have such provisions. Washburn, *Post-Majority Support: Oh Dad, Poor Dad*, 44 TEMP. L.Q. 319, 340 (1971). Since the child cannot physically provide for himself, the age of majority has no bearing. The obligation ceases only when the child's needs cease. *Id.* at 340)45. *See also* H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 495 (1968).

2. U.S. CONST. amend. XXVI, § 1.

3. An example is the New Mexico statute which provides: "[A]ny person who has reached his eighteenth birthday shall be considered to have reached his majority as provided in Section 12-2-2 NMSA 1978 and is an adult for all purposes the same as if he had reached his twenty-first birthday." N.M. STAT. ANN § 28-6-1 1978 (1987 Repl.).

It is doubtful that state legislatures considered all the areas that would be affected by these changes. Some states drafted specific provisions for perceived problem areas. New Jersey, for example, reduced the age of majority to eighteen for "all basic civil and contractual rights," but *raised* the drinking age from nineteen to twenty-one.[4] These states are the exception, however. Most states left interpretation application of the new law to the courts.

Family law litigation felt an immediate impact. Child support is for minor children.[5] Noncustodial parents nationwide sought to have the new laws interpreted to mean that the duty of child support had been reduced by three years.[6] The debate centered around the term "minority" in decrees issued before the new law. Did "minority" still mean twenty-one or did the statutory change affect existing decrees by reducing the support obligation to age eighteen?

In some states, statutes specified that the change would be prospective only, so that any previously existing privileges or obligations would not be affected.[7] Where the statute did not mandate prospective application only, some courts achieved that result by judicial construction. In other states, the courts noted that the intent of the child support provision was to provide support for minor children.[8] Because children now achieved adult status at eighteen, they were no longer entitled to parental support until they reached age twenty-one.[9]

The bulk of case law in the early 1970s concerned court interpretation of existing decrees. Sixteen years have passed since the constitutional amendment, and that issue is nearly moot.[10] The pressing issues now are whether a divorce court has statutory authority to compel post-minority support in divorce proceedings which began after the passage of the statutory change in the age of majority; whether divorcing parties may voluntarily elect to bind themselves to do so in an agreement that will

4. Basic civil and contractual rights include the following: the right to contract, sue, be sued and defend civil actions, serve on juries, marry, adopt children and bet. N.J. STAT. ANN. §9:17B-1 (West 1983).

5. This rule is derived from the policy that the child is a ward of the court. When the child ceases to be a ward of the court, the jurisdiction of the court over the child is terminated. Note, *Child Support Extended*, 10 GONZ. L. REV. 933 (1975).

6. Note, *Effect of Change in Age of Majority Upon Parents' Duty of Support*, 23 KANSAS L. REV. 181 (1974).

7. *E.g.*, Florida's statute provides: "This section shall operate prospectively and not retrospectively, and shall not affect the rights and obligations existing prior to July 1, 1973." FLA. STAT. ANN. §743.07(3) (West 1973).

8. The Kansas Supreme Court in Junghohann v. Junghohann, 213 Kan. 329, 516 P.2d 904 (1973), held that child support terminated when the child reached 18 (although 21 was the age of majority when the decree was entered) because the district court's continuing jurisdiction to enforce the decree terminated when the child reached majority.

9. *Id.*

10. In the fifteen years since the age of majority was reduced, nearly all children who were then minors have reached majority.

be enforceable later; and whether statutes which currently prohibit courts from ordering post-minority support should be modified.

The reduction in the age of majority to eighteen made an existing problem more acute. Whereas a twenty-one-year old may be almost through college, many eighteen-year-olds are still in high school. Prior to the change in the age of majority, courts could provide for college tuition (in the appropriate case) by increasing the amount of child support as needed when the child entered college. Though many college students did not graduate until after their twenty-first birthdays, the issue of post-minority support was infrequently litigated because the hardship on the child or custodial parent to provide for a final year of college was less burdensome.[11]

The reduced age of majority created an additional problem, one of jurisdiction.[12] Equity suggested continued support in many circumstances, yet jurisdictional considerations seemed to preclude further intervention by the courts once the children reached majority. The continuing jurisdiction of the divorce court over child custody and support is traditionally based on the notion that minor children are "wards of the court."[13] Thus, once the children reach majority, the court must relinquish control.[14]

What was to be done about providing support to children who were still in high school at age eighteen, or those who were younger at the time of divorce but who would clearly expect to attend college? Different jurisdictions arrived at different conclusions. Those jurisdictions can be broken down into three categories:

1. Jurisdictions which compel post-minority support, even absent an agreement by the parents, if the circumstances so dictate.
2. Jurisdictions which enforce post-minority support pursuant to an agreement by the parties which is either a separate contract, or has been incorporated into the divorce decree.
3. Jurisdictions which neither compel post-minority support nor enforce any agreement of a parent to provide for post-minority support.

A number of states permit court-initiated awards of post-minority support.[15] The child support statutes in Pennsylvania, for instance, use the

11. Marshall, *Post-Minority Child Support in Dissolution Proceedings*, 54 WASH. L. REV. 459, 462 (1979).

12. "If the statute allows support for minors only, the vast majority of cases holds that the court has no jurisdiction to order post-majority support." *See*, Washburn, *supra*, note 1, at 329.

13. Note, *Child Support Extended*, 10 GONZ. L. REV. 933 (1975).

14. *Id.*

15. Examples of states which currently permit court-compelled post-minority support include: New Hampshire, New York, Pennsylvania, New Jersey, California, Colorado, Washington, Iowa, Indiana, Oregon, Illinois, Mississippi, South Carolina, and Missouri. Annotation, 99 A.L.R.3d 322 (1980). Florida will compel post-minority support upon a finding of actual dependency, but attendance at college does not necessarily render a child dependent. *See* Slaton v. Slaton, 428 So. 2d 347 (Fla. 1 Dist. Ct. App. 1983).

term "child" without specifically restricting it to minors.[16] Other courts also have held that the term "child" does not preclude adult children and have awarded post-minority support.[17]

Other states enacted statutory changes enabling post-minority support after judicial decisions held that existing statutes precluded support for children over age eighteen. For example, in 1973, Washington adopted a statute[18] which was interpreted in *Childers v. Childers* as removing "a jurisdictional bar which previously prevented most postmajority child support."[19] In the above examples, post-minority support was permitted via statutory construction of provisions which do not limit support to minor children, or which have amended existing statutes explicitly to permit support awards to children over eighteen.

In contrast there are states with statutes which limit child support to "minor children."[20] The language is generally held to limit the court's equitable power in child support proceedings to children under the age of minority.[21] Such states typically preclude *any* post-minority intervention by the divorce court.[22] In *Helber v. Frazelle*,[23] an Arizona court held that although a father had agreed to provide his children with funds for college, the court was without power to enforce the agreement because the children were no longer minors.[24] The court further held that since the agreement had been incorporated in the divorce decree, it could not be enforced in a separate contract action.[25]

In the middle position are states which will not compel post-minority support unless the parties voluntarily agreed to undertake the responsibility to pay such support.[26] If the parties have agreed, the agreement is

16. PA. STAT. ANN. tit. 62, § 1973 (Purdon 1968) (relatives' responsibility for indigent children); PA. STAT. ANN. tit. 71, § 1783 (Purdon 1962) (relatives' responsibility for inmates of state institutions); § 131 (Purdon 1965) (actions for support and maintenance). *See* Lederer v. Lederer, 291 Pa. Super. 22, 435 A.2d 199 (1981).

17. Examples of states that imply jurisdiction based on the absence of the limiting term "minor" include: New Hampshire, New York, Pennsylvania, New Jersey, California, and Colorado. *See* French v. French, 117 N.H. 696, 378 A.2d 1127 (1977).

18. WASH. REV. CODE § 26.09.170 (1974).

19. Note, Child Support Extended, 10 GONZ. L. REV. 933 (1975) (citing In Re Marriage of Melville, 11 Wa. App. 879, 526 P.2d 1228 (1974)).

20. *See, e.g.*, N.M. STAT. ANN. § 40-4-7 (1978).

21. *See supra*.

22. *Id.*

23. 118 Ariz. 217, 575 P.2d 1243 (1978).

24. *Id.* at 575 P.2d 1244.

25. *Id.* An earlier Arizona case, Genda v. Superior Court, 103 Ariz. 240, 439 P.2d 811, overruled by Helber v. Frazelle, *supra* note 23. (1968), permitted post-minority support pursuant to an agreement. The *Genda* court acknowledged that this was an exception to the general rule against post-minority support, but reasoned that it was permissible as an exercise of the court's equitable power to enforce the contractual agreement of the parties.

26. Some states will enforce post-minority support pursuant to an agreement by the parties, including Michigan, Ohio, South Carolina, Georgia, South Dakota, Oklahoma, and Florida. The general rule in these states is as follows: "A husband may by agreement incorporated in the divorce

enforceable whether the agreement was incorporated into the final divorce decree or maintained as an independent contract.[27] The agreement is held valid and enforceable as a bargained-for contract between the parties,[28] or under a theory of promissory estoppel.[29] The agreement may then be enforced as a child support obligation by the divorce court or in a breach of contract action in a separate proceeding.[30]

This Article considers whether divorcing parties may create an enforceable agreement to finance their children's college educations, and whether, absent an agreement, a court may compel them to do so. The threshold determination is whether a divorce court has jurisdiction to determine support matters concerning an adult child. While most courts recognize the moral duty of parents to support their children,[31] absent "jurisdiction," there is no forum to enforce the duty.[32]

The next inquiry is whether it is appropriate for courts to intervene in the decision to send a child to college, a decision which is traditionally left to the parents' discretion. There are a number of conflicting policy considerations and no easy answers.

In some jurisdictions, courts award post-minority support in spite of apparent jurisdictional prohibitions.[33] In contrast, some states which do

---

decree . . . become obligated to provide a college education for his child even though the performance required by the decree may extend beyond the minority of the child." 27B C.J.S. *Divorce* § 319, 610 (1985).

27. *See*, Ovaitt v. Ovaitt, 43 Mich. App. 628, 204 N.W. 2d 753 (1972).

28. Michigan adopted Ohio's position that post-minority support was enforceable if the parties agreed to it. The Michigan court remarked that "it may be safely assumed that defendant (wife) in this case surrendered some rights as bargained-for consideration for plaintiff's (husband's) post-majority support agreement." Ovaitt v. Ovaitt, 43 Mich. App. 628, 632, 204 N.W.2d 753, 757 (1972). *See* Robrock v. Robrock, 167 Ohio St. 479, 150 N.E.2d 421 (1958); *see also* Kasper v. Metropolitan Life Ins. Co., 412 Mich. 232, 313 N.W.2d 904 (1981); Krueger v. Krueger, 88 Mich. App. 722, 278 N.W.2d 514 (1979).

29. Even where there was no written agreement by the noncustodial parent to provide college support, some courts have enforced payment under a theory of promissory estoppel. In Zimmerman v. Zimmerman, 8 FAM. L. REP. (BNA) 2184 (N.Y. Jan. 18, 1982), a father orally agreed to pay for college if his daughter attended a local college. She did. The father started paying the bill but later stopped. He was held liable for the tuition. The majority opinion held the promise enforceable as an oral contract that could be performed within one year which thus did not violate the statute of frauds. The concurring opinion held that the father had made a promise which he should have reasonably expected his daughter to rely on and which she did in fact rely on to her detriment. *Id.* at 2185.

30. The *Ovaitt* court allowed the custodial parent to enforce the agreement (for post-minority support directly without resorting to a separate action in contract or *quantum meruit*) to obviate "circuity of action." *Oviatt*, 43 Mich. App. at 633, 204 N.W.2d at 758. The court noted the possibility that there may not be an independent basis to support a separate cause of action once the agreement is merged in the judgment. *Id.* at 628, 204 N.W.2d 753. Other jurisdictions have so held. *See, e.g.*, Spingola v. Spingola, 93 N.M. 598, 603 P.2d 708 (1979).

31. Washburn, *supra* note 1, at 319.

32. *Id.*

33. In New York, the statutory duty of support terminates at age 21, but there is a judicially defined standard of exceptional circumstances which courts rely on in awarding post-minority support. *See* Lord v. Lord, 96 Misc. 2d 434, 409 N.Y.S.2d 46 (1978).

not permit post-minority support have preordained that result, perhaps intentionally, by framing the question in terms of jurisdiction.[34] This discussion first examines the role of statutory construction in determining whether a divorce court has jurisdiction to award post-minority support. The Article then considers the underlying policy concerns which should be the focus of discussion once jurisdictional barriers and narrow questions of statutory construction have been resolved.

II. JURISDICTIONAL CONSIDERATIONS

"Jurisdiction" in this context refers to the continuing, equitable jurisdiction that a court has over the issues and parties to a divorce after it has rendered an initial decision.[35] It should not be confused with initial subject matter jurisdiction to determine domestic relations matters, including issues of child support, which is a separate question. Statutes confer jurisdiction over adult children by implication or by express language.

A. Implied Jurisdiction

A number of state courts[36] cited the absence of restrictive language in their statutes to conclude that post-minority support could be compelled. A New Hampshire case, *French v. French*,[37] is illustrative. In determining that there was jurisdiction, the court noted that in the statute pertaining to custody, support, and education of children, the word "minor" did not appear.[38] The court reasoned that "because jurisdiction to award education expenses is not limited as a matter of law to jurisdiction over minors, if the legislature had intended that there be such a limitation, it could easily have said so."[39]

French was followed in subsequent New Hampshire cases[40] and was frequently cited by other states construing similar statutes.[41] In 1985, however, New Hampshire's statute was amended and now provides that "[u]nless the court . . . specifies differently, the amount of a child support obligation . . . shall remain as stated . . . until . . . all dependent chil-

34. *See Spingola*, 93 N.M. 598, 603 P.2d 708.

35. Washburn, *supra* note 1, at 329-31. *See also* 27B C.J.S. *Divorce* § 303, 421-25 (1985).

36. *See, e.g.*, New Hampshire, New York, Pennsylvania, and New Jersey; *supra* notes 16 and 17, *infra* note 45.

37. 117 N.H. 696, 378 A.2d 1127 (1977).

38. *Id.* at 698, 378 A.2d at 1129.

39. *Id.*

40. *See* Bernier v. Bernier, 125 N.H. 517, 484 A.2d 1088 (1984); Heinze v. Heinze, 122 N.H. 358, 444 A.2d 559 (1982); Merrifield v. Merrifield, 122 N.H. 372, 445 A.2d 1087 (1982).

41. *See* Parrish v. Parrish, 138 Mich. App. 546, 361 N.W.2d 366 (1984); Olson v. Olson, 445 N.E.2d 1386 (Ind. Ct. App. 1983); Kamp v. Kamp, 640 P.2d 48 (Wyo. 1982); Hinchey v. Hinchey, 625 P.2d 297 (Alaska 1981).

dren for whom support is provided in the order shall terminate their high school education or reach the age of eighteen years, whichever is later . . . at which time the child support obligation terminates without further legal action."[42] The statute then provides for post-minority support if a child is handicapped.[43]

New York statutes explicitly provide for court jurisdiction to award support until the child reaches age twenty-one.[44] Nonetheless, New York courts have struggled with the issue of whether a child over age twenty-one who is attending college may obtain continued court-ordered support.[45] New York statutes mandate parental responsibility for poor or incapacitated children.[46] Before 1966, there was no express restriction of the support obligation solely to minors, and most New York courts extended the child support duty beyond majority if it seemed appropriate to do so.[47] In 1966, the Family Court Act was amended to include language that "a parent shall be responsible only for the support of a minor child."[48] Despite the addition of the word "minor," the courts continued to award post-minority support where there were "exceptional circumstances."[49] What constitutes exceptional circumstances has been defined by case law.[50]

A representative case is *Lord v. Lord*.[51] In *Lord* the court found exceptional circumstances because both parents were college graduates, both could afford to support the child through college, and two older siblings were already in college.[52] The court conceded that "absent exceptional circumstances, the father's obligation to support a child terminates when the child becomes twenty-one."[53] The court then went on to hold that, absent precedent spelling out what exceptional circumstances were, the above-cited facts should "cross the threshold."[54]

42. N.H. REV. STAT. ANN. § 458:35-C (1985).
43. *Id.*
44. N.Y. FAM. CT. ACT § 413 (McKinney 1984).
45. *See* Weber v. Weber, 51 Misc. 2d 1042, 274 N.Y.S. 2d 791 (Fam. Ct. 1966).
46. N.Y. Mental Hyg. Law § 43.03(a) (McKinney 1978); N.Y. Soc. Serv. Law § 101(1) (McKinney 1983); N.Y. Fam. Ct. Act § 415 (McKinney 1977); N.Y. Fam. Ct. Act. § 443 (McKinney 1983); N.Y. CODE CRIM. PROC. § 20.40(4)(A) (McKinney 1981).
47. Washburn, *supra* note 1, at 320.
48. *N.Y. Fam. Ct. Act* § 415 (McKinney 1977).
49. *N.Y. Fam. Ct. Act* § 443(b) (McKinney 1963) provided that: "An order of support under this section may not run beyond the child's minority. The court may, however, extend the duration of such an order beyond the child's minority if the child suffers physical or mental disabilities or if there are other exceptional circumstances that warrant such extension." This section was repealed, nonetheless courts continued to award post-majority support using the former standard.
50. *See* Lord v. Lord, 96 Misc. 2d 434, 409 N.Y.S.2d 46 (1978).
51. *Id.*
52. *Id.* at 436, 409 N.Y.S.2d at 48.
53. *Id.*
54. *Id.* at 43, 409 N.Y.S.2d at 49.

Subsequent decisions contain similar language,[55] and generally reflect the court's balancing of equitable considerations, including the needs, expectations, and abilities of the child, against the hardship that post-minority support will impose on the noncustodial parent.[56] New York's statute was amended in 1983 to include a list of "relevant factors" the court should look to in awarding child support.[57] These include "the physical and emotional health of the child, and his or her educational or vocational needs and aptitudes."[58] The commentator notes that "[t]his requirement should give added impetus to the trend toward ordering respondent parents to help pay for private schooling and college."[59]

Pennsylvania is another state whose child support statutes do not specifically restrict jurisdiction to minors.[60] Although not required by statute to do so, most Pennsylvania courts restrict support to minors.[61] However, a number of courts allow post-minority support on a finding that the circumstances in a particular case merit an award, and the resulting obligation will not result in undue hardship to the parent.[62]

In New Jersey, the age of majority is eighteen, but attaining the age of majority is only *prima facie* evidence of emancipation.[63] Whether a child is emancipated at age eighteen, with correlative termination of his rights to parental support, depends upon the facts of each case.[64]

---

55. *See, e.g.*, Vetrano v. Calvey, 477 N.Y.S.2d 522, 102 A.D.2d 932 (1984); Brundage v. Brundage, 474 N.Y.S.2d 546, 100 A.D.2d 887 (1984).

56. *Id.*

57. Section 413 now provides:

> The court shall make its award for child support after consideration of all relevant factors, including: (i) the financial resources of the parents and those of the child; (ii) the physical and emotional health of the child, and his or her educational or vocational needs and aptitudes; (iii) where practical and relevant, the standard of living the child would have enjoyed had the family remained intact; (iv) where practical and relevant, the tax consequences to the parties; and (v) the non-monetary contributions that the parents will make toward the care and well-being of the child.

N.Y. Fam. Ct. Act § 413 (McKinney 1984).

58. *Id.*

59. Besharov, *Supplementary Practice Commentary* which follows *N.Y. Fam. Ct. Act* § 416 (McKinney 1985).

60. Schearer v. Schearer, 208 Pa. Super. 196, 222 A.2d 620 (1966); Brown v. Weidner, 208 Pa. Super. 114, 220 A.2d 382 (1966); Commonwealth v. Camp, 11 Ches. Co. Rep. 214 (Pa. Q. S. 1962); Rice v. Rice, 1 Adams L.J. 91 (Pa. Q. S. 1959); In re McCready's Trust, 387 Pa. 107, 126 A.2d 429 (1956).

61. Larsen v. Larsen, 211 Pa. Super. 30, 234 A.2d 18 (1967); Decker v. Decker, 204 Pa. Super. 156, 203 A.2d 343 (1964); Engel v. Gast, 3 Pa. D. & C.2d 193 (1954); In re George E. Earnshaw, Jr., 6 Ches. Co. Rep. 274 (Pa. C.P. 1954).

62. Lederer v. Lederer, 291 Pa. Super. 22, 435 A.2d 199 (1981); Decker v. Decker, 204 Pa. Super. 156, 203 A.2d 343 (1964); Groff v. Groff, 173 Pa. Super. 535, 98 A.2d 449 (1953).

63. Newburgh v. Arrigo, 88 N.J. 529, 443 A.2d 1031 (1982); Alford v. Somerset County Welfare Bd., 158 N.J. Super. 302, 310, 385 A.2d 1275, 1278 (1978); Turner v. McCune, 4 Mass. App. Ct. 864, 357 N.E.2d 942 (1976); Limpert v. Limpert, 119 N.J. Super. 438, 440, 292 A.2d 38, 39 (1972).

64. *Newburgh*, 88 N.J. at 536, 443 A.2d at 1038.

The general rule is that a parent is under no duty to contribute to the support of his child after the child has become emancipated.[65] Two exceptions to this rule have been suggested: an adult child suffering from a physical or mental deficiency,[66] and "the college education exception."[67] While parents are not generally under a duty to support children after the age or majority, appropriate circumstances may create a parental duty to assure a necessary education for their children.[68]

Colorado also determined that educationally dependent as well as physically or mentally handicapped children were entitled to post-minority support.[69] A 1983 Colorado decision, *Koltay v. Koltay*,[70] held that it was proper to order post-minority support for a disabled child still dependent on the parents for support.[71] The Colorado Court of Appeals extended that ruling in *In Re Marriage of Plummer*[72] to include post-minority support for education. The court reasoned that the attainment of age eighteen only creates a presumption of emancipation which may be overcome by a finding of continuing dependency, either because of disability or because of continuing educational needs.[73] The court was guided by the stated legislative intent that the statute be liberally construed in order "[t]o mitigate the potential harm to the spouses and their children caused by the process of legal dissolution of marriage. . . ."[74]

California is another state that is liberalizing its position on post-minority support. The Court of Appeals in *Rebensdorf v. Rebensdorf*[75] recently upheld a son's right to maintain an action in equity to enforce a post-minority parental duty of support. The plaintiff was an eighteen-year-old high school student who claimed that he could not afford to remain in school without his father's help.[76] The California statute governing support provides that "[i]t is the duty of the father, the mother, and the children of any person in need who is unable to maintain himself by work, to maintain such person to the extent of their ability."[77] The *Rebensdorf* court noted that "[w]hile no appellate decisions require such support, neither are there any cases giving the parents the right to terminate support at age eighteen."[78] The court speculated that the dearth of case law "may

65. Sakovits v. Sakovits, 178 N.J. Super. 623, 429 A.2d 1091 (1981).
66. *Id.* at 625, 429 A.2d at 1093.
67. *Id.*
68. *Newburgh*, 88 N.J. at 536, 443 A.2d at 1038.
69. Koltay v. Koltay, 667 P.2d 1374 (Colo. 1983).
70. *Id.*
71. *Id.*
72. 703 P.2d 657 (Colo. App. 1985).
73. *Id.* at 658-59.
74. COLO. REV. STAT. § 14-10-102(b) (1973).
75. 169 Cal. App. 3d 138, 215 Cal. Rptr. 76 (1985).
76. *Id.*
77. CAL. CIV. CODE § 206 (West 1985).
78. *Rebensdorf*, 169 Cal. App. 3d at 144, 215 Cal. Rptr. at 79.

be accounted for by the simple fact that most people assume such a parental obligation presently exists."[79]

The risk of implying jurisdiction from the absence of a contrary provision was illustrated by the recent statutory change in New Hampshire.[80] Following *French*,[81] the New Hampshire legislature amended the vague statute to prevent the court from continuing to construe the statute as providing for post-minority support.[82]

Post-minority support was similarly fated in Alaska. In 1981, the Alaska Supreme Court decided *Hinchey v. Hinchey*.[83] The court interpreted the state support statute and employed reasoning very similar to that of *French*.[84] The court awarded post-minority support reasoning that since the statute contained no express limitations, "we think the term 'children' in the context employed, is ambiguous and thus subject to judicial construction."[85] A few years after *Hinchey* was decided, the Alaska court in *Dowling v. Dowling*[86] interpreted the same statutory language to preclude post-minority support and to specifically overrule *Hinchey*.[87] While the basic support statute does not contain the language "minor,"[88] other related statutes do.[89] *Dowling* criticized the *Hinchey* court for not considering other relevant statutes in determining legislative intent.[90] "In light of these provisions, we are not convinced that the legislature intended to provide for post-majority educational support. . . ."[91]

The Alaska cases illustrate the conflicting interpretations that result from implying legislative intent from ambiguously phrased statutes. Such conflicts can be avoided by enacting statutes which specify whether post-minority support is permissible.

B. Express Jurisdiction

In a growing number of states, the legislatures have enacted specific

79. *Id.*
80. *See supra* note 42.
81. *See supra* note 37.
82. *See supra* note 42.
83. 625 P.2d 297 (Alaska 1981).
84. *See supra* note 37.
85. 625 P.2d 297, 300 (Alaska 1981).
86. 679 P.2d 480 (Alaska 1984).
87. *Id.* at 483.
88. The Alaska statute which provides for child support states, in pertinent part, that: "[T]he court may provide . . . for the payment . . . as may be just and proper for the parties to contribute toward the nurture and education of their children . . ." ALASKA STAT. § 25.24.160 (1983).
89. *See, e.g.*, Section 25.24.170 which authorizes a court to modify a child support order to provide "for the care . . . of the minor children." ALASKA STAT. § 25.24.170 (1983). Section 11.51.120 states that a person is criminally liable if, "[b]eing a person legally charged with the support of a child under 18 years of age, the person fails without lawful excuse to provide support for the child." ALASKA STAT. § 11.51.120 (1983).
90. *Dowling*, 679 P.2d at 483.
91. *Id.*

statutory changes in their domestic relations law to permit post-minority support.[92] Washington is perhaps the best example of legislative efforts. Washington courts have traditionally recognized the duty of a noncustodial parent to provide support for children who are in college.[93] Although such support was previously limited to the children's minority, this limitation was not a significant problem until the age of majority was reduced from twenty-one to eighteen. Most students were approaching economic independence or the completion of their education by age twenty-one.[94] As previously mentioned, the problem became significant in 1971 when eighteen became the age of majority.[95]

In 1973, the legislature passed the 1973 Washington Dissolution Act.[96] It provided:

> In a proceeding for dissolution of marriage, legal separation, declaration of invalidity, maintenance, or child support, after considering all relevant factors but without regard to marital misconduct, the court may order either or both parents owing a duty of support to any child of the marriage dependent upon either or both spouses to pay an amount reasonable or necessary for his support.[97]

The Act further stated that child support would terminate on emancipation of the child unless expressed otherwise in the decree.[98]

The provisions of the new Act pertaining to post-minority child support were interpreted in *Childers v. Childers*.[99] In *Childers*, the court found from the language of the Dissolution Act that the legislature intended to remove the jurisdictional bar previously prohibiting an order of post-minority support in dissolution proceedings.[100] This determination was based on the fact that the legislature had specifically changed the word "minor" to "dependent" and had included a provision allowing courts to specify a time other than emancipation of the child for termination of support.[101]

The court in *Childers* then outlined an expanded definition of "dependent" wherein

> age is but one factor. Other factors would include the child's needs, prospects, desires, aptitudes, abilities, and disabilities, and the par-

92. *See e.g.*, Oregon, Washington, Iowa, Illinois, and Indiana. *See supra* note 15.
93. Esteb v. Esteb, 138 Wash. 174, 244 P. 264 (1926).
94. Marshall, *Post-Minority Child Support in Dissolution Proceedings*, 54 WASH. L. REV. 459, 462 (1979).
95. *Id.*.
96. WASH REV. CODE ANN. § 26.09.100 (1976).
97. *Id.*
98. WASH REV. CODE ANN. § 26.09.170 (1976).
99. 89 Wash. 2d 592, 575 P.2d 201 (1978).
100. *Id.* at 595, 575 P.2d at 204-05.
101. *Id.*

> ents' level of education, standard of living, and current and future resources. Also to be considered is the amount and type of support (i.e., the advantages, educational and otherwise) that the child would have been afforded if his parents had stayed together.[102]

The *Childers* court concluded that if, but for the divorce, the children would most likely have remained dependent on their father past the age of eighteen while they were in college, the court could define them as dependents within the meaning of the statute.[103] Subsequent case law in Washington has reaffirmed the court's interpretation of the statute in *Childers*.[104]

Another state which has enacted a specific statutory amendment to provide for post-minority support is Iowa. Although "minor child" means any person under eighteen,[105] the Iowa statute specifically provides for continued support "for a child who is between the ages of eighteen and twenty-two years who is regularly attending . . . [high school or its equivalent] or is, . . . in good faith, a full-time student in a college . . . or has been accepted for admission to a college. . . ."[106]

The purpose of the statutory amendment in Iowa was to bring the obligation of support more in line with changing concepts of adulthood.[107] The court in *In re Marriage of Vrban*[108] found that it is neither arbitrary nor unreasonable for the legislature to statutorily require divorced persons to support their children in college, (although there is no such requirement for married parents), because such a requirement is necessary to further the state interest in the education of children of divorced parents.[109] The court concluded that promoting higher education is a legitimate state interest.[110]

Indiana has a similar statute, which provides for the award of "[s]ums for the child's education in elementary and secondary schools and at institutions of higher learning, taking into account the child's aptitude and ability and the ability of the parent or parents to meet these expenses."[111]

---

102. *Id.* at 595, 575 P.2d at 205.

103. *Id.* at 596, 575 P.2d at 206.

104. Krueger v. Krueger, 37 Wash. App. 329, 679 P.2d 961 (1984). Washington courts generally require that post-minority support be provided for in the original divorce decree; *see* Main v. Main, 38 Wash. App. 351, 684 P.2d 1381 (1984); Gimlet v. Gimlet, 95 Wash. 2d 699, 629 P.2d 450 (1981). On the other hand, some courts award post-minority support, not originally provided for in the decree, on the basis of a change of circumstances; *see* In re Studebaker, 36 Wash. App. 815, 677 P.2d 789 (1984).

105. IOWA CODE § 598.1(3) (1972).

106. *Id.* § 598.1(2).

107. In re Marriage of Briggs, 225 N.W.2d 911 (Iowa 1975).

108. 293 N.W.2d 198 (Iowa 1980).

109. *Id.* at 202.

110. *Id.*

111. IND. CODE ANN. § 31-1-11.5-12(b)(1) (West 1984).

The duty to support a child ceases when the child reaches his twenty-first birthday, unless "[t]he child is emancipated prior to reaching twenty-one (21) years of age, in which case the child support, except for the educational needs outlined in subsection (b)(1), terminates at the time of emancipation; however, an order for educational needs may continue in effect until further order of the court."[112]

With such broad powers of discretion given to the court, it is not surprising that recent Indiana case law concerns not whether post-minority support is permissible, but rather, the extent of the obligation.[113] One such case concerned the issue of whether a father must pay tuition for private college if public education is available.[114] The Indiana court stated that a judge

> must first ascertain what advantages are offered by the more expensive college in relation to the child's individual needs, aptitude, ability and the child's anticipated vocation. It must then weigh these advantages against the increased hardship that would be imposed on the father to determine whether the additional expense is reasonable under the circumstances.[115]

Another Indiana case involved a father's duty to resume paying support if a child drops out and then goes back to school.[116] The court held that the father was not relieved of his court obligation to provide college expenses even when his daughter withdrew from school at the end of her first semester to attend beautician's school.[117] When she re-enrolled twenty months later, the duty was revived.[118]

Despite Indiana's liberal provision for post-minority support, a college education is not necessarily required to be given a child as a matter of legal duty.[119] In *Gower v. Gower*,[120] the court reaffirmed the principle that the issue of post-minority support lies entirely within the discretion of the trial court.[121]

Oregon, too, has a recent statutory amendment which has been construed to permit post-minority support.[122] A 1983 amendment to the Oregon support statute provided that a "court is not required to order support for any minor child who has become self-supporting, emancipated or

112. IND. CODE ANN. § 31-1-11.5-12(d)(1) (West 1984).
113. Rohn v. Thuma, 408 N.E.2d 578 (Ind. Ct. App. 1980).
114. *Id.*
115. *Id.* at 583.
116. Thiele v. Thiele, 479 N.E.2d 1324 (Ind. Ct. App. 1985).
117. *Id.*
118. *Id.*
119. Gower v. Gower, 427 N.E.2d 703, 706 (Ind. Ct. App. 1981).
120. *Id.*
121. *Id.*
122. OR. REV. STAT. § 107.105(1)(c) (1983).

married, or *has ceased to attend school* after the age of 18."(emphasis added)[123] It further provided that in making the support determination, the court shall consider "[t]he expenses attributable to the physical, emotional and educational needs of the child."[124] The Oregon Court of Appeals in *Miller v. Miller*[125] interpreted the new Oregon statute. The *Miller* court found that "[t]he concept of emancipation has no relevancy to a parent's obligation of school support for a child" between the ages of eighteen and twenty-one, and reversed the trial court's termination of support for a child who had turned eighteen.[126]

States which favor post-minority support are passing specific enabling legislation.[127] In some states the original support statutes were passed long before the age of majority was reduced.[128] In such cases, legislatures cannot have intended a specific result because the problem of post-minority support did not yet exist. It is not surprising that courts interpreting such statutes have arrived at different conclusions. As noted above, the problem of inconsistent statutory interpretation has been resolved through the enactment of new support statutes which expressly confer or withhold jurisdiction from the divorce court.

III. POLICY CONSIDERATIONS

It would be misleading to say that there is a national trend toward permitting post-minority support. While some states are indeed passing legislation toward that end and some courts are interpreting ambiguous statutes in such a way as to permit post-minority support for education, post-minority support remains a minority view.[129] In fact, there are other states that once permitted post-minority support and have since changed their views.[130] While many commentators feel that states should remove jurisdictional bars to post-minority support and permit the award of post-minority educational support based on the facts of each case,[131] there are compelling arguments on both sides of the issue.

A. Arguments In Favor of Post-minority Support

Lenore Weitzman, in her recently published text, *The Divorce Revo-*

123. *Id.* (Emphasis added).

124. *See id.* § 107.105(1)(c)(E).

125. 9 FAM. L. REP. (BNA) 2407 (Or. Ct. App. 1983).

126. *Id.* at 2407.

127. WASH. REV. CODE § 26.09.170 (1974), OR. REV.STAT. § 107.105 (1)(c)(E)(1983), ILL. REV. STAT. Ch. 40, para. 513 (1977), IOWA CODE § 598.1 (1972), IND. CODE § 31-1-11.5-12 (1984).

128. *See, e.g.*, New York statutes, *supra* note 46.

129. A. Crawford, *Graduate School Support: One Last Dip Into the Proverbial Parental Pocketbook*, 56 IND. L.J. 541 (1981); Marshall, *supra* note 95, at 460; Washburn, *supra* note 1.

130. *E.g.*, Dowling v. Dowling, 679 P.2d 480 (Alaska 1984).

131. *See, e.g.*, Washburn, *supra* note 1, at 354-55.

lution, notes that when neither parent has a legal obligation to support college age children, divorced mothers have *de facto* responsibility.[132] A study she conducted at Stanford revealed that while mothers typically have less money than fathers, a larger percentage of them contribute to the children's post-minority support.[133] Students of divorced parents who were polled reported that they considered their mother's home "their home."[134] They also said they were more likely to ask their mothers than their fathers for money even though they realized their mother's financial resources were more limited because they felt that their fathers expected them to work and support themselves in college.[135] Weitzman explains this phenomenon by citing with approval the language of the Washington Supreme Court in *Childers:* "Parents, when deprived of the custody of their children, very often refuse to do for such children what natural instinct would ordinarily prompt them to do."[136]

The custodial parent may be faced with a double dilemma of child support funds terminating just when her expenses reach an all-time high.[137] This is further complicated if the noncustodial parent's income becomes a factor in eligibility for financial aid. If the father's income is adequate to support the children during college, aid may be denied even if the father is not, in fact, supplying support.[138] Weitzman feels that children of divorced parents are at a particular disadvantage for these reasons and feels that laws should be passed to protect them.

Washington's 1973 Marriage Dissolution Act[139] is an example of a statutory change designed to address these inequities. In *Childers v. Childers,*[140] the Court of Appeals overturned a lower court's award of post-minority support as violative of the privileges and immunities clause of the state constitution and the equal protection clause of the United States Constitution.[141] The court reasoned that there were not reasonable grounds for making a distinction between divorced parents and married parents, because the latter were "free to bid their children a fiscal farewell at age 18."[142]

The Supreme Court reversed the appellate court, reasoning that while

132. L. WEITZMAN, THE DIVORCE REVOLUTION 278 (1985).
133. *Id.* at 279.
134. *Id.*
135. *Id.*
136. Childers v. Childers, 89 Wash. 2d 592, 599, 575 P.2d 201, 208 (1978).
137. WEITZMAN, *supra* note 132, at 278.
138. *Id.* at 279.
139. WASH. REV. CODE § 26.09.170 (1974).
140. 15 Wash. App. 792, 552 P.2d 83.
141. *Id.*
142. *Id.* at 792, 552 P.2d at 85.

the imposition of an *absolute* duty to provide educational support only on divorced parents might be an unreasonable classification, it was not the policy of the state to require *all* divorced parents to provide children with a college education.[143] Further, it was within the court's equitable powers to minimize the disadvantages of children from broken homes: "In allowing for divorce, the state undertakes to protect its victims."[144] The court determined that, in allowing divorce, the state created an equal protection problem for children of divorced parents in that the children were deprived of economic advantages which they would have enjoyed absent divorce and which children of married parents retain.[145] The Washington Supreme Court concluded that "[e]ven if the legislation does create a classification, it rests upon a reasonable basis."[146] The reasonableness of the classification overcame the equal protection challenge to the statutory classification because it did not involve a suspect group or fundamental right.[147]

The desirability of providing children with a college education is a recurring theme in arguments for post-minority support. Advocates of statutory change compare times past when a college education was only available to the privileged few, to modern times when a college education has become an economic necessity.[148] One court noted: "In the past, a college education was reserved for the elite, but the vital impulse of egalitarianism has inspired the creation of a wide variety of educational institutions that provide post-secondary education for practically everyone."[149] The court in *French v. French*[150] expressed similar sentiments. "[A] college education is indispensable for success in obtaining and holding a reasonably well-paid and secure position."[151] Given a father's duty at common law to supply "necessaries" to his minor children,[152] if a college education is deemed a necessity, the courts may be justified in imposing that duty on parents, at least during the minority of their children.[153] Yet, given the reduced age of majority, a child would have completed, at most, one year of college. The result leads to a right without a remedy.

143. *Childers*, 89 Wash. 2d 592, 598, 575 P.2d 201, 207.
144. *Id.*, 575 P.2d at 207.
145. *Id.*, 575 P.2d at 209.
146. *Id.*, 575 P.2d at 208.
147. *Id.*, 575 P.2d at 209.
148. Washburn, *supra* note 1, at 326.
149. Newburgh, *supra* note 63, at 1038.
150. 117 N.H. at 698, 378 A.2d at 1129.
151. *Id.*
152. Jackman v. Short, 165 Or. 626, 109 P.2d 860 (1941); Commonwealth v. Howell, 198 Pa. Super. 396, 181 A.2d 903 (1962); Esteb v. Esteb, 138 Wash. 174, 244 P. 264 (1926).
153. Herbert v. Herbert, 198 Misc. 515, 98 N.Y.S. 2d 846 (1950).

This discussion raises the issue of whether emancipation should occur by operation of law. Is it rational to make age eighteen an automatic cutoff? A noted commentator argues that since the child's employment opportunities do not improve merely because he reaches majority, his support, which is based partly on his need, should not automatically terminate when he reaches majority.[154] If a child cannot get a suitable job without a college education, or if he is incapable of earning a living while attending school, then he is not emancipated.[155] "The extent of support should be determined by the facts of each case; the age of the child is merely one of these factors and should not be determinative."[156]

It is ironic that legislatures reduced the age of majority in a period when college education was becoming available to all. In the past, when a college education was relatively uncommon, children were accustomed to supporting themselves at an earlier age. In contrast, today children remain in school longer, so they tend not to mature or become self-sufficient until later in life.[157] Thus, they are maturing later and assuming responsibility earlier.

Finally, and perhaps most persuasive, is the fact that in states where post-minority support is permitted, there is a factual determination of appropriateness done on a case-by-case basis. Courts are not compelled to award support; they are merely given discretion to do so. In states where such support is permitted, the case law has typically evolved a list of factors to be considered by the court as a prerequisite to the award.[158]

These lists typically include some variation of the following factors: whether the parent, if still living with the child, would have contributed toward the costs of higher education; the effect of the background, values, and goals of the parent on the reasonableness of the expectation of the child for higher education; the amount sought; the ability of the parent to pay that cost; the financial resources of both parents and of the child, the commitment to and aptitude of the child; the child's ability to earn income during the school year or vacation; the availability of financial aid; the child's relationship to the paying parent, including mutual affection and shared goals, as well as responsiveness to parental advice and guidance.[159]

The goal of post-minority support is restitutionary. The court is acting *in loco parentis* in an attempt to place the child in the position he would

154. Washburn, *supra* note 1, at 329.
155. *Id.*
156. *Id.* at 328.
157. *Id.* at 329.
158. *See, e.g.*, Newburgh v. Arrigo, 88 N.J. 529, 536, 443 A.2d 1031, 1038 (1982).
159. *Id.* at 537, 443 A.2d at 1038-1039.

have been in but for the divorce.[160] Properly awarded, it serves to mitigate the harsh economic impact of divorce on children.

B. Arguments Against Post-minority Support

The arguments against post-minority support tend to be less well articulated in the case law. This is true in part because many cases never proceed beyond the threshold question of jurisdiction. Absent jurisdiction, the discussion rarely proceeds to policy.

One policy issue that is frequently raised in opposition to compelled support, however, is whether it is constitutionally permissible to impose a duty of post-minority support on divorced parents where married parents have no similar obligation. The argument has not been successful.[161] Typically, the argument appears in decisions upholding an award of support. The court defends its award as rationally related to a legitimate state interest.[162]

Constitutional issues aside, there are some very real administrative problems that attend awarding support to an adult child who is for all other purposes independent. Courts frequently point to the fact that children of divorced parents should not be deprived of an education to which they would be entitled if their parents were married.[163] "While most parents willingly assist their adult children in obtaining a higher education . . . such support may be conditional or may be withdrawn at any time, and no one may bring an action to enforce continued payments."[164] Thus, a parent may retain control over an adult child to the extent the child is financial dependent.

In contrast, a parent who has been ordered to pay college tuition may have no choice over where his child goes to school, his field of study, academic performance, and living arrangements. Indeed, the relationship between the noncustodial parent and adult child may be so strained that a married parent with a similar relationship would decline support.

A number of recent cases in states which permit compelled support deal with the issues of whether it is appropriate to award support to a child who has not seen his father in several years[165] and whether a father

160. Marshall, *supra* note 94. "When the parents seek to alter their marital status, the *locus parentis* shifts from the parents to the dissolution court. The primary concern of the court becomes the welfare of the child, and it seeks to mitigate as far as possible the detrimental impact of dissolution upon the child. Thus, the court, acting *in loco parentis*, may extend the parental duty of support beyond nurture *per se* to serve the best interests of the child." Marshall, *supra* note 94, at 470-71. *See also* Inker & McGrath, *College Education of Minors, Part II*, BOSTON B.J. at 14-15 (June 1966).

161. *See, e.g., Childers, supra* note 143.

162. *Id.* at 592, 575 P.2d 209.

163. Grapin v. Grapin, 450 So. 2d 853 (Fla. 1984).

164. *Id.* at 854.

165. Hambrick v. Prestwood, 382 So. 2d 474 (Miss. 1980). The *Hambrick* court held that the duty of a father to send a child to college was dependent not only on the child's aptitude and qualifications for college, but on whether the child's behavior toward and relationship with the father

may insist that his child maintain a certain gradepoint.[166] The variations are endless and the enforcement thereof an administrative nightmare.

Another issue of concern is lack of notice. Consider the following scenario. Normally support terminates at majority, so a noncustodial parent can plan his finances accordingly. If, upon reaching majority, the child or his custodial parent can go back to court and have the decree modified to include higher education expenses, it places the noncustodial parent in a financially precarious position. Not only was the additional support unanticipated, but in many cases the support obligation is of indeterminate length.

Washington's Marriage Dissolution Act attempts to address the notice issue with a requirement that such support be expressly provided for in the decree.[167] Under the terms of the Act, the support-paying parent is given advance notice of the termination date or event, rather than being forced to wait for some elusive or fortuitous date of the dependency cessation.[168] Other jurisdictions frown on awarding such support until the issue is ripe, as occurs when the children have been accepted into or are attending college, or are approaching the college age and have the aptitude and inclination to attend a university.[169] The delay in the decision-making process in these latter cases is, however, inconsistent with the legal goal of resolution of issues upon dissolution of the marriage and relief from litigation.

Finally, many states ground the denial of post-minority support on the fact that while it may be inconvenient for an adult child to pay his own way through school, there is no reason he should not do so if he is healthy and able-bodied.[170] An adult child who attends college but is capable of working is not in need of support merely because he is in school.[171]

An underlying sentiment in these decisions seems to be that a system

---

makes the child "worthy" of the effort and burden it will cost the father. Where the daughter had not seen her father for six to seven years and was extremely hostile, the father had no duty to pay for his daughter's college education. *Id.* at 476.

166. Greiman v. Friedman, 90 Ill. App. 3d 941, 414 N.E.2d 77 (1980). *Greiman* concerned a father who stopped making voluntary payments for his daughters' tuition because of their poor scholastic record. The court held that a student's academic record is merely one relevant factor in deciding whether a father must pay college tuition. *Id.*

167. Gimlett v. Gimlett, 95 Wash. 2d 699, 629 P.2d 450 (1981).

168. *Id.* at 452.

169. *In re* Marriage of Vrban, 293 N.W.2d 198 (Iowa 1980) held that while the trial court did not err in ordering support to continue through college before the children had been accepted into college, it would have been better if the court had waited until the statutory conditions (of being admitted to or attending college) were met. *Id.*

170. *See* Mitchell v. Mitchell, 616 S.W.2d 753 (Ark. App. 1981); Grapin v. Grapin, 450 So. 2d 853 (Fla. 1984); Slaton v. Slaton, 428 So. 2d 347 (Fla. Dist. Ct. App. 1983); Vorisek v. Vorisek, 423 So. 2d 758 (La. App. 1982); Phillips v. Phillips, 339 So. 2d 1299 (La. App. 1976); *In re* Marriage of Berkbigler, 560 S.W.2d 36 (Mo. App. 1977).

171. *Vorisek*, 423 So. 2d 758. In Louisiana, "a major child may petition for support, if he is in necessitous circumstances." *Id.* at 765. But a child "who is in school, but capable of working, is not by the mere fact of his schooling in need of support." *Phillips*, 339 So. 2d at 1299.

of voluntary support to adult children from their parents is more likely to foster a close relationship between parents and children. For example, a Mississippi court in *Hambrick v. Prestwood*[172] held that the lower court had improperly required a father to pay for his daughter's college education where she disliked him, had no contact with him for six or seven years, and did not want to have any contact with him. The argument is not without merit since it more accurately reflects the decision concerning educational support that a married parent might make. The goal of post-minority support is not to make wholesale awards of college tuition, but to replicate as closely as possible the decisions an intact family would make.[173]

The problem of post-minority support does not lend itself to a simple answer. Courts and legislatures are appropriately reluctant to intrude in a decision that is traditionally left to the family. Yet broken families do not always work the way they should. Situations arise where equity demands intervention. Children are innocent parties in a divorce, and it is the duty of the court granting the divorce to minimize injury to them.

IV. A CLOSER LOOK AT ONE JURISDICTION: A STUDY OF NEW MEXICO LAW

The discussion thus far has centered on jurisdictional and policy considerations and the national patterns that have emerged as a result. States which give courts discretion to compel post-minority support have generated the bulk of case law. What should be considered is the state of the law in the states that are not making headlines. A closer look at the development of the law of one jurisdiction which does not permit courts to award post-minority support will provide a sharper focus on the policies that lead jurisdictions to reach a particular result. The analysis which follows focuses on one such state, New Mexico.

A New Mexico statute provides in pertinent part:

> The district court shall have exclusive jurisdiction of all matters pertaining to the guardianship, care, custody, maintenance and education of the children, and with reference to the property decreed or funds created for their maintenance and education, so long as they, or any of them remain minors.[174]

172. 382 So. 2d 474 (Miss. 1980). *But see* Hight v. Hight, 5 Ill. App. 3d 991, 284 N.E.2d 679 (1972) where the court rejected a father's claim that he should have been excused from contributing to his daughter's educational expenses because he had not been consulted in advance. The court reasoned that such prior consultation would have been of little value in view of the absence of contact between the father and his daughter.

173. *See*, generally, Crawford, Graduate School Support: One Last Dip Into the Proverbial Parental Pocketbook, 56 IND. L. J. 541 (1981).

174. N.M. STAT. ANN. § 40-4-7(c) (1978).

Although statutes that omit the term "minor" can be liberally construed, the language in New Mexico's statute seems to compel an end to jurisdiction when the child reaches adulthood. New Mexico courts have so construed the statute.[175]

The earliest New Mexico case interpreting an earlier version of this statute[176] is *In re Coe's Estate*.[177] The plaintiff in *Coe* was a former wife who had been awarded custody of the children.[178] She sought to receive continuing child support from her deceased former husband's estate.[179] Although all of the children were over the age of majority, she maintained that the only way liability for child support could be terminated was by a modification of the decree. She argued that the payments were still accruing (because there had been no modification).[180] The court rejected her argument and held that the statute created a jurisdictional limitation barring recovery of post-minority support:

> A proceeding for [support] does not invoke the equity powers of the court but is controlled by statute. The court is only authorized to exercise such power as the statute expressly gives, and such as is necessary to make its orders and decrees effective.[181]

Because the legislature had not authorized post-minority support, the court was without power to do so. The decision was then in accord with the rulings of most jurisdictions.[182]

The issue did not arise again until 1978 when *Spingola v. Spingola*[183] was decided. In the interim, New Mexico had reduced its age of majority to eighteen. *Spingola* involved an upward modification of child support based on the increased needs of the Spingola's three children—ages six, ten, and thirteen—and the fact that Dr. Spingola's income had substantially increased.[184] The trial court's denial of an increase was reversed and the case was remanded with instructions to the trial court to consider ten criteria in determining the child support obligations of the parents. On remand, the trial court conducted a new hearing and entered a new

175. *See, e.g.*, Christiansen v. Christiansen, 100 N.M. 102, 666 P.2d 781 (1983); Psomas v. Psomas, 99 N.M. 606, 661 P.2d 884 (1983); Spingola v. Spingola, 93 N.M. 598, 603 P.2d 708 (1979).

176. N.M. STAT. ANN. § 25-706 (1941). The language of that statute was very similar to the present version.

177. 56 N.M. 578, 247 P.2d 162 (1952).

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.* at 581, 247 P.2d at 164, (citing Marleau v. Marleau, 95 Ohio St. 162, 115 N.E. 1009 (1917)).

182. *In re* Coe's Estate, 56 N.M. at 580-81, 247 P.2d at 164.

183. 91 N.M. 737, 580 P.2d 958 (1978).

184. *Id.* at 740, 580 P.2d at 961.

order which provided for post-minority support for the children's educational expenses.[185] That decision was appealed.[186] The original decree incorporated a stipulated settlement which provided that the parties would share equally the expense of sending their children to college.[187] The trial court modified this provision to provide that Dr. Spingola would bear the entire amount of college expenses. The money was to be put in trust during the children's minority and disbursed after they reached majority. Dr. Spingola agreed to the modification. Ironically, it was Mrs. Spingola who challenged the provision, apparently because it entailed a reduction in current support in contemplation of the future receipt of a substantial amount for college education.[188]

The New Mexico Supreme Court struck down the trial court's decision to shift the full burden of educational support to Dr. Spingola.[189] The effect of the decision voided the initial stipulated agreement that educational support be shared.[190] The court acknowledged that other jurisdictions had upheld post-minority support decrees where the supporting parent has agreed to the provision in a settlement agreement,[191] but decided that the subject matter jurisdiction of the court cannot be extended by agreement of the parties.[192] The court went on to suggest that such an agreement might be enforceable under a contractual theory not explicitly related to a child support decree or agreement.[193] To date, that possibility has not been tested in the New Mexico courts.

The trust fund provision in *Spingola* whereby funds were to be accumulated in a fund to be disbursed to the child for educational expenses after he reaches majority is called an "accumulative decree."[194] It is a mechanism that has been used in other jurisdictions with statutes similar to that in New Mexico.[195] Properly used, it could avoid the jurisdictional barrier presented by the statutory language. The order and the payments are in effect during the minority of the child. The court's jurisdiction

185. *Id.*

186. Spingola v. Spingola, 93 N.M. 598, 603 P.2d 708 (1979).

187. *Id.* at 599, 603 P.2d at 709.

188. *Id.*

189. *Id.* at 710.

190. *Id.*

191. Martin v. Martin, 511 P.2d 1097 (Okla. 1973); Robrock v. Robrock, 167 Ohio St. 479, 150 N.E.2d 421 (1958).

192. *Spingola*, 93 N.M. at 600, 603 P.2d at 710 (citing Overton v. New Mexico State Tax Comm'n, 81 N.M. 28, 462 P.2d 613 (1969)).

193. *Spingola*, 93 N.M. at 600, 603 P.2d at 710.

194. Washburn, *supra* note 1, at 333.

195. *Spingola*, 603 P.2d at 710, cited the following cases in which accumulative decrees were permitted in states with statutes similar to New Mexico's: Stoner v. Weiss, 96 Okla. 285, 222 P. 547 (1924); Underwood v. Underwood, 162 Wash. 204, 298 P. 318 (1931); Maitzen v. Maitzen, 24 Ill. App. 2d 32, 163 N.E.2d 840 (1959).

terminates, as required by statute, with the disbursement of the funds at the end of the child's minority. The *Spingola* court cited examples where such funds had been permitted, then dismissed the possibility as a minority position without explaining why New Mexico's statute precludes this option.[196]

The rationales offered in jurisdictions which do not permit accumulative decrees include the fact that courts ought not to accomplish indirectly a result which they may not do directly.[197] Also, some courts have reasoned that it is inappropriate to establish a trust fund if the child is very young because at an early age the court can determine neither the child's ability and desire to go to college nor the father's ability to send him.[198]

Spingola is an interesting case because it highlights the conflicting policies courts must resolve in such cases. N.M. STAT. ANN. §40-4-11 provides that: "[T]he court . . . shall make a specific determination and finding of the amount of support to be paid by a parent to provide properly for the care, maintenance and *education* of the minor children, considering the financial resources of the parent."[199] [Emphasis added.] *Spingola I* describes the state's intent in providing educational support. "One of the paramount concerns of the courts in child support cases is that a high level of education and training be afforded children. The finest education that the parents can reasonably afford should be the criterion."[200] That goal will not often be achieved when support ends at eighteen.

Three years after *Spingola II* was decided, *Psomas v. Psomas*[201] challenged the concept of automatic emancipation. *Psomas* involved an appeal on the issue of whether the trial court erred in awarding post-minority child support for a child who would still be in high school on his eighteenth birthday.[202]

Mrs. Psomas argued that the statutory "age of majority," set at age eighteen, was to operate only as a presumption of emancipation which could be rebutted by proof of facts to the contrary in particular cases.[203] She claimed that her son might be forced to drop out of high school and seek employment to support himself if support payments stopped. Inasmuch as physical or mental disabilities rebut the presumption of emancipation, so too should this situational dependency. The state Supreme

196. *Spingola*, 93 N.M. at 600, 603 P.2d at 710.

197. *See* Spence v. Spence, 266 A.2d 29 (D.C. App. 1970); Grapin v. Grapin, 450 So. 2d 853, 854 (Fla. 1984); Allison v. Allison, 188 Kan. 593, 363 P.2d 795 (1961).

198. Johnson v. Johnson, 346 Mich. 418, 78 N.W.2d 216 (1956); *see generally* Washburn, *supra* note 1, at 332-34.

199. N.M. STAT. ANN. §40-4-11(A) (1978).

200. *Spingola*, 91 N.M. 737, 744, 580 P.2d 958, 965.

201. 99 N.M. 606, 661 P.2d 884 (1983).

202. *Id.*

203. *Id.* at 607, 661 P.2d at 885.

Court in *Psomas* held that "the need for certainty and uniformity is too great to allow the type of exception requested here," and reversed the trial court's award of post-minority support.[204]

It is interesting to note the element of policy that creeps into *Psomas*. The court could have decided the case on purely jurisdictional grounds, as in *Spingola II*, but it did not. Instead, the court cited the greater importance of uniformity and certainty.[205] The implication from *Psomas* is that if a greater value were placed on post-minority education, the court could create an exception. To date it has not done so.

The most recent New Mexico case dealing with post-minority support for education is *Christiansen v. Christiansen*.[206] In that case the parties, while married, entered into a written agreement which purported to divide their community property.[207] It provided that each parent would give their child $5,000 from the sale of their residence, presumably to be used for college.[208] The trial court declined to admit the agreement into evidence because it was not properly acknowledged, but went on to rule that the parties would be jointly responsible for providing post-minority education for their child.[209] The appellate court overruled the trial court, citing the jurisdictional statute[210] and the language in *Spingola* as determinative of the issue of post-minority support.[211] There was no discussion of policy nor the fact that the noncustodial parent had agreed to pay.[212]

Thus, New Mexico has continued to adhere to its earlier decision that the legislature imposed a jurisdictional limitation upon the power of courts to award post-minority support. In the process, it has rejected the "accumulative trust," the "rebuttable presumption," and the "stipulated agreements should be enforced" arguments for overcoming the limiting language of the statute.

V. CONCLUSION

As illustrated by the New Mexico examples, jurisdictional preclusion is an unsatisfactory resolution of this complex and policy-laden area of domestic relations law. While some states have enacted statutes which affirmatively confer jurisdiction on divorce courts over children after they

204. *Id.* at 608, 661 P.2d at 886.
205. *Id.*
206. 100 N.M. 102, 666 P.2d 781 (1983).
207. *Id.*
208. *Id.*
209. *Id.*
210. *Id.* at 104, 666 P.2d at 783.
211. "Spingola v. Spingola, (citations omitted) does not give the trial court jurisdiction over post-minority education for children." *Id.* at 104, 666 P.2d at 783.
212. *Id.*

reach age eighteen, most have not. Many states rely on statutory interpretation of language that was drafted before the age of majority was reduced. Deciding how the legislature intended to resolve an issue that was largely nonexistent when the law was passed is an exercise in futility.

Some courts use the absence of restrictive language to implement the policies they favor.[213] Other courts create a jurisdictional bar and avoid policy issues altogether.[214] The result necessarily leads to conflicting decisions, often within the same jurisdiction,[215] and unnecessary litigation.

The time has come for legislative action in states that decline to permit post-minority support because of perceived statutory barriers. Uniform legislation in the area of domestic relations has proved quite successful.[216] The statute which follows is an attempt to incorporate the desirable aspects of existing legislation. It includes the explicit language of Illinois' statute[217] in the framework of Washington's Dissolution of Marriage Act,[218] together with a codification of factors that have emerged from national case law.

MODEL STATUTE: THE UNIFORM SUPPORT FOR EDUCATION ACT

A. In a proceeding for dissolution of marriage, legal separation, declaration of invalidity, maintenance, or child support, the court may award sums of money out of the property and income of either or both parties for the education of the child or children, whatever their age, as equity may require, whether application is made therefor before or after such child has, or children have, attained majority age. In making such awards, the court shall consider all relevant factors which shall appear reasonable and necessary, including but not limited to the following:

1. the financial resources of the parents;
2. the standard of living the child would have enjoyed had the marriage not been dissolved;
3. the financial resources of the child;
4. the commitment to, and aptitude of, the child for the requested education; and
5. the child's relationship with his parents, including mutual affection and shared goals as well as responsiveness to parental advice and guidance.

---

213. *See supra* note 17.

214. *See supra* note 22.

215. *See, e.g.*, New York and Pennsylvania; there is no consistent position within these states in regard to post-minority support.

216. Unif. Reciprocal Enforcement of Support Act, 9A U.L.A. 647 (1979); Unif. Custody Jurisdiction Act, 9 U.L.A. 111 (1979).

217. ILL. REV. STAT., ch. 40, para. 513 (1977).

218. WASH. REV. CODE § 26.09.100 (1976).