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Graduate School Support: One Last Dip Into The Proverbial Parental Pocketbook

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Graduate School Support: One Last Dip Into The Proverbial Parental Pocketbook

The parents of a young child dissolve their marriage. The mother is awarded custody of the child and the father is ordered to make support payments until the child is emancipated or graduates from college, whichever occurs first. Many years later, the child graduates from college and is accepted into a graduate school program. The mother moves to amend the divorce decree to compel the father to make further support payments. In most states, the father would not have to support the child past the age of majority.¹ In others, his duty to support ends when the child graduates from college.² In still other jurisdictions, the father's duty of support is based upon dependency,³ thus opening the possibility that the father may have to support the child through graduate school.⁴

¹ Veron, *Parental Support of Post-Majority Children in College: Changes and Challenges*, 17 J. FAM. L. 645, 651 (1979). Some child support statutes accomplish this by limiting the parental duty of support to "minor" children. See, e.g., OHIO REV. CODE ANN. § 3103.03 (Page 1980); cf. TEX. FAM. CODE ANN. tit. 2, § 14.05 (Vernon 1975) (duty to support ends when child reaches age 18). But cf. UTAH CODE ANN. § 15-2-1 (Supp. 1980) (age of majority 18, but divorce court may order child support until child reaches age 21). Other states judicially limit the duty of support to the minority of the child. See, e.g., *Godec v. Godec*, 346 So. 2d 459, 460 (Ala. Civ. App. 1977).

² See IOWA CODE ANN. § 598.1 (West Supp. 1980) ("Such obligation may include support for a child who is between the ages of eighteen and twenty-two years who is . . . in good faith, a full-time student in a college, university, or area school; or has been accepted for admission to college, university, or area school."); cf. *Lord v. Lord*, 96 Misc. 2d 434, 409 N.Y.S.2d 46 (Sup. Ct. 1978) (noting existence of exceptional circumstances would justify support order for child over age of 21); *Risinger v. Risinger*, 273 S.C. 36, 253 S.E.2d 652 (1979) (finding college to be "exceptional circumstance" giving court authority to order non-custodial parent to support his child through four years of college).

³ See, e.g., *Kujawinski v. Kujawinski*, 71 Ill. 2d 563, 376 N.E.2d 1382 (1978); *Childers v. Childers*, 89 Wash. 2d 592, 575 P.2d 201 (1978) (construing The Dissolution of Marriage Act of 1973, ch. 157, §§ 10, 17, 1973 Wash. Laws 1st Ex. Sess. 1215 (codified at WASH. REV. CODE ANN. §§ 26.09.100, .170 (Supp. 1981))); cf. *Hoover v. Voigtman*, 103 N.J. Super. 535, 539, 248 A.2d 136, 138 (Juv. and Dom. Rel. Ct. 1968) ("Consistent with such [social] advances is the realization that age alone is not the determinative factor in evaluating an obligation to support.").

As most graduate school students are over the age of majority, the scope of this note is limited to jurisdictions which do not, either by statute or through case law, arbitrarily limit the duty of support by the age of the child.

⁴ See *In re Marriage of Edelstein*, 82 Ill. App. 3d 574, 403 N.E.2d 323 (1980). This case involved an appeal from dissolution of marriage judgment in which the custodial parent, the wife, was ordered by the court to pay the child's educational expenses out of the \$1,000 child support she received from the noncustodial father each month. The appellate court disagreed, however, and ordered the father to pay the child's educational expenses in addition to the regular child support. With respect to the child's post-high school education, the court declared that "the cost of his college and professional education, should be paid by

While a substantial body of law has been developed for awarding child support payments for undergraduate students,⁵ few cases address the issue of support payments for graduate students.⁶ The concept of graduate school⁷ support "focuses on the recurring question of the outer limits of the support obligation for a child who has attained majority."⁸ While the child support obligation should cease with a child's college education in most cases, this note argues that in some circumstances the award of graduate school support is both justified and required in order to minimize the prejudice to the child caused by the divorce. First, the tests developed in the college support⁹ cases will be examined and the public policies underlying them will be discussed. The note will then argue that the graduate school support issue should be analyzed from the same public policy perspective as the college support cases and will conclude that similar tests should be applied in graduate school cases. Such a proposal should eliminate any uncertainty on the part of the courts as to when, if ever, it is appropriate to require the noncustodial parent to provide graduate school support, thereby ensuring that the policies giving rise to the tests are appropriately furthered.

[the father]. . . This result, we believe, is in keeping with the provisions of section 513 of the Illinois Marriage and Marriage Dissolution Act." *Id.* at 577, 403 N.E.2d at 326 (emphasis added).

Since this case did not involve a direct dispute regarding the propriety of graduate school support, it may be that the court was simply being loose in its language when it referred to "college and professional education." It seems more likely, however, given the obvious differences between a college and professional education, that the court intended the father to pay for Scott's education beyond a bachelor's degree. Furthermore, the court indicated that professional school support is allowed under the Illinois Marriage and Marriage Dissolution Act which provides:

[T]he Court may also make such provision for the education and maintenance of the child or children, whether of minor or majority age, out of the property of either or both of its parents as equity may require, whether application is made therefor before or after such child has, or children have, attained majority age.

ILL. ANN. STAT. ch. 40, § 513 (Smith-Hurd 1980).

⁵ For a collection of these cases, see Annot., 99 A.L.R.3d 322 (1980).

⁶ See *Ross v. Ross*, 167 N.J. Super. 441, 400 A.2d 1233 (Ch. Div. 1979); *Greenburg v. Greenburg*, 27 A.D.2d 952, 279 N.Y.S.2d 363 (1967); *Colantoni v. Colantoni*, 220 Pa. Super. Ct. 46, 281 A.2d 662 (1971).

⁷ For the purposes of this note, graduate school is defined as any higher level of education beyond a bachelor's degree, including law school, medical school and other "professional" schools. College is defined as any education beyond high school which leads to either an associate or bachelor's degree.

⁸ *Ross v. Ross*, 167 N.J. Super. 441, 442, 400 A.2d 1233, 1234 (Ch. Div. 1979).

⁹ For purposes of this note, college support will be defined as any parental support received by the child while in college. This includes a support award that does not specifically include the child's college expenses, but is merely a continuation of the support provided by the noncustodial parent before the child entered college.

COLLEGE SUPPORT

Probable Expectations of the Parent and Child

Over the last seventy years a body of law has evolved which requires the noncustodial parent¹⁰ to provide support for his children in college.¹¹ Although this obligation is part of the general child support obligation,¹² it is unique in that it is an obligation which will almost always continue even beyond the time the child reaches the age of majority,¹³ traditionally the age at which the child begins to be viewed as self-sufficient.¹⁴ The ability of the child to support himself, however, is not the primary concern in college support cases since almost any college student could be self-supporting if he would leave college and obtain employment.¹⁵ Some courts, when confronted with the college support issue, instead focus on the prejudice to the child which may have resulted from the divorce.¹⁶ One method by which they attempt to minimize such prejudice is to examine the probable expectations of the child and his parents prior to the

¹⁰ In a divorce situation, the noncustodial parent, *i.e.*, the parent who is not awarded custody of the children of his or her dissolved marriage, typically is required to provide financial support to the custodial parent for the expenses of raising the children. *See generally* H. CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 490-91 (1968). Controversy results when the noncustodial parent believes the support to be too high or simply refuses to pay it. In such a situation, the court may intervene as the parties have already submitted their domestic problems to it for resolution. *See Harris v. Harris*, 585 P.2d 435, 436 (Utah 1978). An interesting question arises, however, when the dispute is not between the divorced parents but between the child and the custodial parent. Absent a denial of necessities to the child by the custodial parent, *see* note 51 *infra*, courts are generally reluctant to interfere with parents' decisions on how to raise their children. *See, e.g., Roe v. Doe*, 29 N.Y.2d 188, 272 N.E.2d 567, 324 N.Y.S.2d 71 (1971) (denying claim by 20 year-old against her father for reasonable support after he had cut off her support and ordered her to return home from college). Disputes of this nature or disputes between children and parents in intact families, however, are beyond the scope of this note.

¹¹ *See generally*, Inker & McGrath, *College Education of Minors*, 6 J. FAM. L. 230 (1966); Veron, *supra* note 1; Washburn, *Post-Majority Support: Oh Dad, Poor Dad*, 44 TEMP. L.Q. 319 (1971); Comment, *The Duty of a Father Under Pennsylvania Law to Support His Child in College*, 18 VILL. L. REV. 243 (1972).

¹² *See* H. CLARK, *supra* note 10, at 497-98. The duty to educate has long been placed on parents. *See* 1 W. BLACKSTONE, *COMMENTARIES* *450-51; T. REEVE, *THE LAW OF BARON AND FEMME* 418-20 (3d ed. 1867).

¹³ The age of majority in most states is 18. Veron, *supra* note 1, at 646.

¹⁴ Where a child, because of a physical or mental disability, is unable to support himself, his parents will often be required to support him past the age of majority. H. CLARK, *supra* note 10, at 495; *see, e.g., McCarthy v. McCarthy*, 301 Minn. 270, 222 N.W.2d 331 (1974). *But see Reynolds v. Reynolds*, 274 Ala. 477, 149 So. 2d 770 (1961).

¹⁵ *Werner v. Werner*, 7 N.J. Super. 229, 231, 72 A.2d 894, 895 (1950) ("Were it not for their desire for an education, it is safe to assume that [the children] would be self-supporting.").

¹⁶ *Childers v. Childers*, 89 Wash. 2d 592, 604, 575 P.2d 201, 208 (1978) (noting that some disadvantages to children caused by divorce are "irremediable").

divorce with respect to his college education.¹⁷ If, prior to the divorce, the parents and child expected that the former would pay for college, these courts reason that a divorce should not alter that expectation to the prejudice of the child.¹⁸

In order to determine the probable expectations of the parents and child, courts often examine whether there was a plan, made by the parents prior to the divorce, to support the child in college.¹⁹ In *Hutchinson v. Hutchinson*,²⁰ where the noncustodial father had purchased life insurance policies with the intention of using them to finance his son's college education, the court found sufficient evidence of such a plan to make an award of college support.²¹ Essentially, the existence of a plan demonstrates that the parents had already determined that their funds were adequate and that the child had the requisite interest and scholastic ability to benefit from college,²² thus eliminating the need for a detailed judicial examination of such factors to ascertain whether an expectation existed within the family to send the child to college.²³

There are instances, however, where there is little or no evidence of a

¹⁷ See, e.g., *Allison v. Allison*, 188 Kan. 593, 363 P.2d 795 (1961); *Khalaf v. Khalaf*, 58 N.J. 63, 275 A.2d 132 (1971); *O'Shea v. Brennan*, 88 Misc. 2d 233, 387 N.Y.S.2d 212 (Sup. Ct. 1976); *Stoner v. Weiss*, 96 Okla. 285, 222 P. 547 (1924); *Hutchinson v. Hutchinson*, 263 Pa. Super. Ct. 299, 397 A.2d 1218 (1979).

¹⁸ The maintenance of the child's lifestyle as it was before the divorce is a major goal of child support. *Puckett v. Puckett*, 76 Wash. 2d 703, 706, 458 P.2d 556, 557-58 (1969). For further discussion, see notes 30-31 & accompanying text *infra*.

¹⁹ *Allison v. Allison*, 188 Kan. 593, 601, 363 P.2d 795, 802 (1961); see *Gerk v. Gerk*, 259 Iowa 293, 144 N.W.2d 104 (1966) (father's willingness to provide for child's education before divorce one factor considered by court); *Anderson v. Anderson*, 437 S.W.2d 704 (Mo. Ct. App. 1969) (father knew of daughter's plans to attend college and discussed it with her); *cf. Sunderwirth v. Williams*, 553 S.W.2d 889, 894 (Mo. Ct. App. 1977) (considering any indication on part of father of willingness to provide college education); *Commonwealth ex rel. Howell v. Howell*, 198 Pa. Super. Ct. 396, 181 A.2d 903 (1962) (finding implied agreement to educate from fact that father purchased educational endowment policy during marriage).

²⁰ 263 Pa. Super. Ct. 299, 397 A.2d 1218 (1979).

²¹ *Id.* at 302, 397 A.2d at 1219. The court also noted that the father had used these policies to finance the college educations of his two daughters. *Id.* at 302 n.1, 397 A.2d at 1219 n.1. *But see* *Domenici v. Domenici*, 5 FAM. L. REP. (BNA) 2397 (Cal. Ct. App. 1979). Here the court noted that there was evidence which indicated that if the parties had remained together, they would not have paid for the college education of the children. *Id.*

²² For a discussion of these two factors and others, see notes 25-31 & accompanying text *infra*.

²³ The courts assume that decisions made by the parents during their marriage were in the child's best interests. In *Maitzen v. Maitzen*, 24 Ill. App. 2d 32, 163 N.E.2d 840 (1959), the court observed: "In a normal household, parents . . . direct their children as to when and how they should work or study. That is on the assumption of a normal family relationship, where parental love and moral obligation dictate what is best for the children." *Id.* at 38, 163 N.E.2d at 843; *accord*, *Stoner v. Weiss*, 96 Okla. 285, 222 P. 547 (1924). Thus a decision made by a family while still intact to send a child to college should be weighed heavily by the court, assuming there have been no great changes in the financial position of the parties from the time the decision was made until the time the support is sought. See *Sunderwirth v. Williams*, 553 S.W.2d 889, 894 (Mo. Ct. App. 1977).

preconceived plan.²⁴ In these situations, the judicial inquiry necessarily involves a more subjective and normally more difficult determination of whether the noncustodial parent would have supported the child in college but for the divorce. Courts, in such cases, must search for such an intent through an analysis of various factors.

Judges generally consider several factors²⁵ when examining the college support expectations within a family. For example, one factor involves a determination by the court of whether that parent is financially capable of assisting the child in obtaining a college degree.²⁶ Generally, unless such assistance will cause undue hardship, the noncustodial parent will be found financially able to provide the support.²⁷ Another

²⁴ See, e.g., *Maitzen v. Maitzen*, 24 Ill. App. 2d 32, 163 N.E.2d 840 (1959); *Commonwealth ex rel. Larsen v. Larsen*, 211 Pa. Super. Ct. 30, 234 A.2d 18 (1967). In both of these cases, the divorce occurred when the child was very young. See also *In re Marriage of Eusterman*, 41 Or. App. 717, 598 P.2d 1274 (1979). The Eusterman court demonstrated how these situations can be handled by a modification of the decree when the child approaches college age. *Id.* at 727-28, 598 P.2d at 1281.

²⁵ Some of the factors analyzed by the courts are "the social status of the father; the educational background of the parents; the previous educational opportunities afforded the children; the age of the child; . . . scholarships and other academic achievements; the number of children in the family; the income of the custodial mother; and the amount of the child's own savings." Note, *The College Support Doctrine: Expanded Protection for the Offspring of Broken Homes*, 1969 WASH. U.L.Q. 425, 427-28 (footnotes omitted). Other factors are whether the child can attend college without the support, *Risinger v. Risinger*, 273 S.C. 36, 39, 253 S.E.2d 652, 653 (1979), and the future resources of the parents, *Childers v. Childers*, 89 Wash. 2d 592, 598, 575 P.2d 201, 205 (1978). The wide range of factors considered by the court is exemplified in *Lord v. Lord*, 96 Misc. 2d 434, 409 N.Y.S.2d 46 (Sup. Ct. 1978), where one of the factors considered was: "The children have never been denied anything, no matter how extravagant, as long as their parents have had ample resources." *Id.* at 439, 409 N.Y.S.2d at 49. Note also that the statutory guidance often includes the words "relevant factors." E.g., CAL. CIV. CODE § 4801(a) (West Supp. 1981); ILL. ANN. STAT. ch. 40, § 515 (Smith-Hurd 1980); IND. CODE § 31-1-11.5-12 (Supp. 1980); WASH. REV. CODE § 26.09.100 (Supp. 1981).

²⁶ See, e.g., *Singer v. Singer*, 70 Ill. App. 3d 472, 388 N.E.2d 1051 (1979); *Delong v. Delong*, 161 Ind. App. 275, 315 N.E.2d 412 (1974); *Commonwealth ex rel. Smith v. Smith*, 217 Pa. Super. Ct. 1, 268 A.2d 161 (1970). See also Comment, *supra* note 11, at 251-56.

²⁷ See, e.g., *Commonwealth ex rel. Bacon v. Bacon*, 221 Pa. Super. Ct. 296, 292 A.2d 426 (1972) (noncustodial father ill and retired, support payment of \$15 per week undue hardship where he was paying \$35 per week for other high school age son); *Commonwealth ex rel. Grossi v. Grossi*, 218 Pa. Super. Ct. 64, 272 A.2d 239 (1970); *Golay v. Golay*, 35 Wash. 2d 122, 210 P.2d 1022 (1949); *Trembly v. Whiston*, ___ W. Va. ___, 220 S.E.2d 690 (1975) (father not required to provide minor children with college education where his financial condition made such expenditure unreasonable). *But see* *Dorman v. Dorman*, 251 Ind. 272, 241 N.E.2d 50 (1968). *Dorman* demonstrates the difficulty in defining undue hardship. The noncustodial father was ordered to pay \$40 per week for the support of two daughters in college while his net income was only \$75 per week.

Usually the courts will consider the finances of members of the broken family other than the noncustodial parent. See ILL. ANN. STAT. ch. 40, § 513(a), (c) (Smith-Hurd 1980). This statute requires consideration of the financial resources of both parties and the child. Cf. IND. CODE § 31-1-11.5-12(1), (4) (Supp. 1980) (financial resources of both custodial and noncustodial parents considered). Compare *Dorman v. Dorman*, 251 Ind. 272, 241 N.E.2d 50 (1968) (children's summer earnings were considered), with *Gerk v. Gerk*, 259 Iowa 293, 144 N.W.2d 104 (1966) (child's substantial savings did not end noncustodial father's duty of support).

factor is the scholastic ability of the child.²⁸ Where it appears that the child lacks the ability required to benefit from college, the courts will not order college support.²⁹ In considering still another factor—the family's standard of living prior to the divorce—the courts examine the lifestyle of the family and determine whether a college education was a part of that lifestyle.³⁰ Indeed, the lifestyle of a very wealthy family may influence the court to order the noncustodial parent to send the child to an expensive, private college.³¹

Regardless of the manner by which courts determine whether the parents would have sent their children to college had the family remained intact, they are still furthering the same basic policy of minimizing the prejudice to the child resulting from the divorce.³² The disadvantages in-

²⁸ See, e.g., *Dorman v. Dorman*, 251 Ind. 272, 279, 241 N.E.2d 50, 53 (1968); *Risinger v. Risinger*, 273 S.C. 36, 39, 253 S.E.2d 652, 653 (1979); *Childers v. Childers*, 89 Wash. 2d 592, 598, 575 P.2d 201, 205 (1978). However, the standard applied by the courts is not a strict one. See, e.g., *Ogle v. Ogle*, 275 Ala. 583, 156 So. 2d 345 (1963) (matriculation in University of Alabama as engineering student deemed sufficient evidence of child's scholastic ability); *Greiman v. Friedman*, 90 Ill. App. 3d 941, 414 N.E.2d 77 (1980) (children's poor academic records in college did not absolve father of duty to pay college expenses); IOWA CODE ANN. § 598.1 (West Supp. 1980) (acceptance of the child by a college may give rise to college support obligation). *But see DeSantis v. DeSantis*, 53 Pa. D. & C. 2d 747 (1971). The *DeSantis* court found the child's ability to succeed in college questionable and refused to order her father to support her while she attended a small, expensive and obscure college. However, the basis for the denial of the support was that the daughter's decision to attend this school was unreasonable given the means of the father and her scholastic ability. Thus, the court left open the alternative that should the child enroll in local, public, inexpensive institution, it would again consider ordering her father to contribute to her college education. For a further discussion of this issue, see *Inker & McGrath, supra* note 11, at 240-42.

²⁹ *DeSantis v. DeSantis*, 53 Pa. D. & C. 2d 747 (1971). See also *Sunderwirth v. Williams*, 553 S.W.2d 889 (Mo. Ct. App. 1977). In *Sunderwirth*, the appellate court refused to enforce an order directing the father to provide a college education to his children because there was no showing that the children were capable of college work. *Id.* at 894.

³⁰ See, e.g., *Lord v. Lord*, 96 Misc. 2d 434, 409 N.Y.S.2d 46 (Sup. Ct. 1978). In considering whether exceptional circumstances existed under N.Y. DOM. REL. LAW § 240 (McKinney 1977), to justify a support order past the age of 21, the court considered the following factors which relate to the lifestyle of the parties:

7. The children have been raised among other children and socialized in a setting where it would be unusual for them not to go to college.
8. The children have never been denied anything, no matter how extravagant, as long as the parents have had ample resources. . . .
9. In their cultural, social and economic background, a college degree is a prerequisite for suitable employment in the competition for present day living.

96 Misc. 2d at 439, 409 N.Y.S.2d at 49 (citations omitted).

³¹ See *Kaplan v. Kaplan*, 57 A.D.2d 828, 394 N.Y.S.2d 439 (1977); cf. *Rohn v. Thuma*, ___ Ind. App. ___, 408 N.E.2d 578 (1980) (agreement to provide "a four-year undergraduate college education" can be construed to include a private college).

³² See *Kujawinski v. Kujawinski*, 71 Ill. 2d 563, 580, 376 N.E.2d 1382, 1390 (1978); *Stoner v. Weiss*, 96 Okla. 285, 287, 222 P. 547, 549 (1924); *Childers v. Childers*, 89 Wash. 2d 592, 604, 575 P.2d 201, 208 (1978). A child in a broken home is often referred to as a victim. See, e.g., *Gaddis v. Gaddis*, 20 Ill. App. 3d 267, 273, 314 N.E.2d 627, 632 (1974); *O'Shea v. Brennan*, 88

cumbent upon a child of divorced parents are evidenced by the tendency of the noncustodial parent to develop a life apart from the child of the dissolved marriage, often leading him to abandon the parental responsibilities he owes to that child: "[I]t is not the isolated exception that noncustodial parents . . . cannot be relied upon to voluntarily support the children of the earlier marriage to extent they would have had they not divorced."³³

The courts, of course, realize that divorce places children in a difficult situation.³⁴ While they can do little to alleviate the emotional hardship created by the noncustodial parent's abandonment of his traditional role,³⁵ they can and do attempt to "minimize any economic and educational disadvantages to the children of divorced parents."³⁶ The examination of the probable expectations of the parents and child prior to the divorce minimizes those disadvantages, attempting to place the child in the same financial position that he occupied prior to the divorce.³⁷

Society's Interest in Education

The child is often an innocent victim in a divorce.³⁸ Consequently, a major concern of the court is to ensure that the child will not be denied any benefits, educational or otherwise, that the parents would have provided but for the divorce. Yet that is not the court's only concern. It has long been recognized that society has an independent interest in the

Misc. 2d 233, 235-36, 387 N.Y.S.2d 212, 214-15 (Sup. Ct. 1976) (sole purpose of exercise of parens patriae jurisdiction is to protect child).

³³ Kujawinski v. Kujawinski, 71 Ill. 2d 563, 579, 376 N.E.2d 1382, 1389-90 (1978) (animosity toward custodial spouse cited as one cause of noncustodial parent's refusal to support); *accord*, Maitzen v. Maitzen, 24 Ill. App. 2d 32, 38, 163 N.E.2d 840, 843 (1959); *In re* Marriage of Vrban, 293 N.W.2d 198, 202 (Iowa 1980) (citing Childers v. Childers, 89 Wash. 2d 592, 604, 575 P.2d 201, 208 (1978)); *cf.* Nebel v. Nebel, 99 N.J. Super. 256, 263, 239 A.2d 266, 270 (1968) (noncustodial father claimed to be financially unable to pay college expenses of child; court said he did not lack money, he only lacked fatherly concern for maintenance of his son). *See also* Franklin Life Ins. Co. v. Kitchens, 249 Cal. App. 2d 623, 631, 57 Cal. Rptr. 652, 657 (1967).

³⁴ *See, e.g.*, Childers v. Childers, 89 Wash. 2d 592, 604, 575 P.2d 201, 208 (1978).

³⁵ *See* Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 STAN. L. REV. 623, 638 n.75 (1976). *But see* O'Shea v. Brennan, 88 Misc. 2d 233, 387 N.Y.S.2d 212 (Sup. Ct. 1976). In *O'Shea*, the court asserted that the child had a right to "day-by-day love, care, discipline and protection of the parent having custody." *Id.* at 236, 387 N.Y.S.2d at 215.

³⁶ Kujawinski v. Kujawinski, 71 Ill. 2d 563, 580, 376 N.E.2d 1382, 1390 (1978).

³⁷ *See* Singer v. Singer, 70 Ill. App. 3d 472, 388 N.E.2d 1051 (1979). The court noted that "[n]either has petitioner referred us to any . . . evidence indicating that further contributions on respondent's part were necessary in order to bring the girls into the same financial position with respect to their college educations as they would have enjoyed had their parents remained married." *Id.* at 475, 388 N.E.2d at 1054.

³⁸ Gaddis v. Gaddis, 20 Ill. App. 3d 267, 273, 314 N.E.2d 627, 632 (1974); O'Shea v. Brennan, 88 Misc. 2d 233, 235, 387 N.Y.S.2d 212, 214-15 (Sup. Ct. 1976).

education of children,³⁹ an interest evidenced by the existence of compulsory education laws as long ago as 1861.⁴⁰ The complex nature of today's society suggests that the public interest in education extends far beyond requiring a high school education,⁴¹ especially where the child possesses the scholastic ability required to benefit from college.⁴² The examination of the probable expectations of the parents and child

³⁹ See *International Textbook Co. v. Connally*, 206 N.Y. 188, 195, 99 N.E. 722, 725 (1912) ("A common school education . . . is essential to the transaction of business and the adequate discharge of civil and political duties."); *Grant v. Grant*, 60 Ohio App. 2d 277, 396 N.E.2d 1037 (1977). The court in *Grant* enforced an agreement, incorporated into the divorce decree, that the ex-husband would provide a college education to his children. Even though the performance of this agreement would require the father to support the children past the age of majority, the court noted the public policy reasons behind its enforcement: More than an estimated eleven million high school students will go on to accredited colleges The parents of these potential college students have a legitimate interest in providing a college education for them. It is sound public policy of the state of Ohio to encourage, rather than discourage, such interest.

Id. at 281, 396 N.E.2d at 1040. See also 1 W. BLACKSTONE, *supra* note 12, at *450-51; Washburn, *supra* note 11, at 325-26.

⁴⁰ See Carlile, *Compulsory Attendance Laws in the United States; Historical Background*, 4 EDUC. L. AD. 35 (1936).

The societal interest in fostering higher learning is evidenced by the many publicly supported colleges and universities in the country. Of the 11,784,900 students enrolled in 1975 in institutions of higher learning, 8,834,500 were enrolled in such universities. U.S. BUREAU OF THE CENSUS, DEPT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1979 § 5, Table 267 (100th ed.). That such a large proportion of students attend public colleges and universities has often been alluded to by the courts in college support cases. See, e.g., *Calogeras v. Calogeras*, 82 Ohio L. Abst. 438, 447, 163 N.E.2d 713, 720 (Juv. Ct. 1959); *Esteb v. Esteb*, 138 Wash. 174, 183, 244 P. 264, 267 (1926). This interest is further evidenced by the existence of many federal and state programs which provide financial assistance to college students. For a general description of the federal financial assistance programs available to college students, see U.S. DEPT OF HEALTH, EDUCATION AND WELFARE, OFFICE OF EDUCATION, STUDENT CONSUMERS GUIDE, SIX FEDERAL FINANCIAL AID PROGRAMS, 1979-80.

⁴¹ See *Pass v. Pass*, 238 Miss. 449, 118 So. 2d 769 (1960). In *Pass*, the court explained the reasons why a higher education is important in today's society:

[I]f . . . the citizens of tomorrow are to take their rightful place in a complex order of society and government, and discharge the duties of citizenship as well as meet with success the responsibilities devolving upon them in their relations with their fellow man, the church, the state and nation, it must be recognized that their parents owe them a duty to the extent of their financial capacity to provide for them the training and education It is a duty which the parent not only owes to his child, but to the state as well We can see no good reason why this duty should not extend to a college education.

Id. at 458, 118 So. 2d at 773; *accord*, *Calogeras v. Calogeros*, 82 Ohio L. Abst. 438, 446-47, 163 N.E.2d 713, 719-20 (Juv. Ct. 1959); *Finn v. Finn*, 312 So. 2d 726, 731 (Fla. 1975). *But see* Friedman, *Higher Schooling in America*, PUB. INTEREST, Spring, 1968, at 108. Friedman questions whether higher education actually produces such intangible benefits as good citizenship and community leadership. *Id.* at 110-11.

⁴² In *Esteb v. Esteb*, 138 Wash. 174, 244 P. 264 (1926), the noncustodial father argued that a high school education was enough to enable his daughter to be capable of self-support. The court noted, however, that the child showed exceptional promise in the teaching profession and had no aptitude for the type of work for which high school had prepared her. Thus, without a college education, the child would be unable to nurture her talents. See *Anderson v. Anderson*, 437 S.W.2d 704 (Mo. Ct. App. 1979).

prior to the divorce furthers the public interest in education by ensuring that those children who would have attended college had their parents remained together will not be prevented from doing so because of their parents' divorce. Where a noncustodial parent refuses to offer college support to his child, the child may be forced either to seek financial assistance from whatever source that is available⁴³ or to forego advanced studies altogether.⁴⁴ In a society which generally expects parents to contribute to the costs of educating their children to the extent that they are financially able,⁴⁵ a child should not be forced to "rely on the bounty of others"⁴⁶ where the noncustodial parent has the means to provide college support. Reliance on outside aid in such a situation would reduce the amount of financial aid available to students whose parents truly cannot afford to assist them in attaining a college education.

The Average Family Factor

By determining whether a college education was something the parents could have been expected to provide to the child had they remained married, the court ensures that divorced parents will provide the child with the same college support they would have provided if the family had remained intact. Some courts, when making this determination, consider an additional factor—the "average family factor."⁴⁷ This factor involves an examination of what the court perceives to be the

⁴³ See *Khalaf v. Khalaf*, 58 N.J. 63, 71, 275 A.2d 132, 136 (1972) (student loans would be required if noncustodial parent refused to support).

⁴⁴ See *Tribe v. Tribe*, 59 Utah 112, 119, 202 P. 213, 215 (1921) (when father refused to make support payments, son forced to quit college to pay debts incurred in obtaining his education).

⁴⁵ HARVARD STUDENT AGENCIES, INC. MAKING IT: A GUIDE TO STUDENT FINANCES 23 (A. Johnson ed. 1973); see Educational Testing Service, GAPS FAS (1980). See also *Indianapolis Star*, Feb. 19, 1981, at 1, col. 4 (cuts in federal spending on higher education will force parents of students to pay greater share of educational costs).

⁴⁶ *Maitzen v. Maitzen*, 24 Ill. App. 2d 32, 42, 163 N.E.2d 840, 845 (1959); see *Commonwealth ex rel. Hanerkam v. Hanerkam*, 221 Pa. Super. Ct. 182, 186, 289 A.2d 742, 744-45 (1972) (unless undue hardship present, availability of loans, grants and part-time work does not negate duty of father to support his child in college).

⁴⁷ This factor, although not given any particular label in the cases, will be referred to as the "average family factor" throughout the remainder of this note. The use of the term "average" in that label is somewhat of a misnomer, as the courts do not use any statistical methods to arrive at what they believe is the average family. Instead, the courts assume that either most parents generally are or are not supporting their children in college. This assumption is generally not supported by the court with citations to any evidence. See, e.g., *Risinger v. Risinger*, 273 S.C. 36, 38, 253 S.E.2d 652, 653 (1979); *Esteb v. Esteb*, 138 Wash. 174, 183, 244 P. 264, 267 (1926). Some more recent cases do, however, cite studies which support their assumptions. See *In re Marriage of Vrban*, 293 N.W.2d 198, 202 (Iowa 1980). In any event, the term average, when used in this sense, only reflects the court's perception of what people generally are doing.

level of college support provided by average, intact, similarly situated families.⁴⁸ If the court determines that most similarly situated families provide college support to their children, then the court may award the college support. Perhaps the most useful function of the average family factor is to guide the court in determining whether the parents would have provided educational support to their child if they had remained married when the evidence of their prior intent is not clear.⁴⁹ The court could then rationalize an award of college support by noting that the child is merely receiving the same kind of support that children in the average family receive.

Of course, if the average family factor is to militate in favor of an award of college support, courts must determine that a college education is normally provided to children of an average family. Courts have not always made such a determination, however. While not dealing directly with the average family factor, one early case, *Middlebury v. Chandler*,⁵⁰ did examine the role of higher education in the life of the average person. In *Middlebury*, the issue was whether a college education was a "necessary" for which an infant could bind himself by contract.⁵¹ The court reasoned that the meaning of the term "necessary"

⁴⁸ See, e.g., *Ogle v. Ogle*, 275 Ala. 483, 487, 156 So. 2d 345, 349 (1963) (quoting *Esteb v. Esteb*, 138 Wash. 174, 183, 244 P. 264, 267 (1924)); *Kujawinski v. Kujawinski*, 71 Ill. 2d 563, 580, 376 N.E.2d 1382, 1390 (1978); *Maitzen v. Maitzen*, 24 Ill. App. 2d 32, 38, 163 N.E.2d 840, 843 (1959); *Allison v. Allison*, 188 Kan. 593, 601-02, 363 P.2d 795, 802 (1961); *Risinger v. Risinger*, 273 S.C. 36, 38, 253 S.E.2d 652, 653 (1979); *Childers v. Childers*, 89 Wash. 2d 592, 601-02, 575 P.2d 201, 207 (1978). See also *In re Marriage of Vrban*, 293 N.W.2d 198 (Iowa 1980). In *Vrban*, the noncustodial father challenged the constitutionality of IOWA CODE ANN. § 598.1(2) (West Supp. 1980), on equal protection grounds. This section provides, *inter alia*, that the child support obligation may include the obligation to support a child properly enrolled in college until that child is 22 years old. The father argued that "the statute creates an unreasonable classification by treating adult children of divorced parents differently from adult children of married parents. While divorced parents may be required to support their adult children . . . there is no similar obligation for those parents who remain married." *Id.* at 201. The court, in holding the classification to be reasonable, said it was the conclusion of the legislature that married parents support their children who are attending college and that the statute was a reasonable means of resolving a problem unique to broken homes. *Id.* at 202. In this instance, it was the legislature, not the court, who compared the college support provided by married parents with college support provided by divorced parents. See generally *Washburn*, *supra* note 11, at 327-28.

⁴⁹ See note 24 & accompanying text *supra*.

⁵⁰ 16 Vt. 683 (1844).

⁵¹ *Id.* at 685. The old common law rule was that contracts made by infants were voidable at the option of the infant. 2 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 223 (3d ed. J. Jaeger 1959). Certain categories of contracts which were beneficial to the infant, however, were valid. One of these categories was a contract for necessities. J. CALAMARI & J. PERRILLO, THE LAW OF CONTRACTS § 8-8 (2d ed. 1977). Obviously, items which are required for the physical survival of the infant are necessities. *Id.* Whether a college education is a necessary depends upon the circumstances and the infant's status in life. *Id.* The doctrine of necessities in domestic relations law in many ways parallels the contract law doctrine of necessities. In domestic relations law, the husband is liable for necessities purchased by his wife or children when he refuses to provide them. H. CLARK, *supra* note 10, at 189-92.

was relative, "having reference . . . to what may be called the conventional necessities of others in the same walk of life as the infant."⁵² Although it conceded that college has its benefits, the court concluded that college was not a "conventional necessity"⁵³ of "men in general"⁵⁴ since "the mass of our citizens pass through life without [it]."⁵⁵ It is true that the average person did not have a college education at the time *Middlebury* was decided.⁵⁶ The real significance of the decision, however, is its reference to the educational level of "men in general" as a means of determining whether college was a necessary. Consequently, the status of college as a necessary would change as more persons attend college.

It was quite a while after *Middlebury*, however, before any court perceived an increase in the number of persons attending college. In *Esteb v. Esteb*,⁵⁷ the court observed that there had been significant changes in the accessibility of higher education to the average person since the time of *Middlebury*:

An opportunity at that early date for a common school education was small, for a high school education less, and for a college education was almost impossible to the *average family* Where the college graduate of that day was the exception, today such a person may almost be said to be the rule. . . .⁵⁸

Not only did the *Esteb* court refer to the average person, but it also referred to the "average family," making it one of the first courts to apply the average family factor. By the latter reference the court seemed to imply that at the time of *Middlebury* it was impossible for the average family to send their children to college. Although not explicitly

As in the contract law dealing with the power of an infant to contract for necessities, the definition of necessities in domestic relations law is relative to the economic position of the family. *Id.* Thus, it is easy to see why *Middlebury's* discussion of college as a necessary has been cited by college support cases which were not concerned with the power of infants to contract. See, e.g., *Morris v. Morris*, 92 Ind. App. 65, 68, 171 N.E. 386, 387 (1930); *Jackman v. Short*, 165 Ore. 626, 640, 109 P.2d 860, 866 (1941); cf. *Inker & McGrath*, *supra* note 11, at 231-32 (criticizing use of *Middlebury* in college support cases).

⁵² 16 Vt. at 686.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* (emphasis added).

⁵⁶ There were a total of 9,371 bachelors' or first professional degrees conferred in 1870, some 26 years after *Middlebury*. U.S. BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES 385 (Bicentennial ed. 1975). This was out of a total population of 38,558,371. *Id.* at 15. By comparison, there were 827,234 such degrees conferred in 1970, *id.* at 385, out of a total population of 203,211,926. *Id.* at 15.

⁵⁷ 138 Wash. 174, 244 P. 264 (1926). This oft-cited case is considered a landmark in the field of educational support. Veron, *supra* note 1, at 662.

⁵⁸ 138 Wash. at 182, 244 P. at 267 (emphasis added). For other early cases dealing with education beyond high school as a necessary, see *Refer v. Refer*, 102 Mont. 121, 56 P.2d 750 (1936); *Payette v. Payette*, 85 N.H. 297, 157 A. 531 (1931); *Tribe v. Tribe*, 59 Utah 112, 202 P. 213 (1921).

declared by the court, the converse of that implication, arising from the court's references to the large number of college graduates and public colleges and the public policy of furthering higher education,⁵⁹ is that it *was* possible for the average family of the 1920's to send its children to college.

A different emphasis, however, was given by other courts of the *Esteb* era when confronted with the college support issue. One court,⁶⁰ in considering the college support provided by the average family explained:

It is well known that there are *worthy parents in all parts of the country*, with sufficient means to do so, who do not send their children to college . . . *Many parents* may conclude that it is best for their children's education that they earn [their own] money for their higher education.⁶¹

The court was undoubtedly correct in its conclusion that some parents feel that their children should pay for their own education. Nonetheless, while some married parents may genuinely feel that self-support strengthens the character of the child, this argument could too easily be used as an excuse or rationalization for a refusal of college support in a divorce setting. Moreover, this argument ignores the fact that most parents do provide some college support to their children,⁶² and should not be accepted by courts absent a strong showing by the resisting parent that he held this educational philosophy prior to the inception of the marital strife.

In recent college support cases, the courts have continued to consider the average family factor. The Kansas Supreme Court in *Allison v. Allison*⁶³ took judicial notice of the changes in the social and economic environment which rendered a college education much more valuable than in the past.⁶⁴ A college education had become so highly valued that

⁵⁹ 138 Wash. at 182-83, 244 P. at 267.

⁶⁰ *Morris v. Morris*, 92 Ind. App. 65, 171 N.E. 386 (1930).

⁶¹ *Id.* at 69, 171 N.E. at 387 (emphasis added); *accord*, *Commonwealth ex rel. Binney v. Binney*, 146 Pa. Super. Ct. 374, 380, 22 A.2d 598, 601 (1941).

⁶² See R. FREEMAN, *CRISIS IN COLLEGE FINANCE?* 100 (1965); S. HARRIS, *A STATISTICAL PORTRAIT OF HIGHER EDUCATION* 100, 114-23 (1972); text accompanying note 85 *infra*.

⁶³ 188 Kan. 593, 363 P.2d 795 (1961).

⁶⁴ *Id.* at 601, 363 P.2d at 802; *accord*, *In re Marriage of Vrban*, 293 N.W.2d 198, 202 (Iowa 1980); *Commonwealth ex rel. Yannacone v. Yannacone*, 214 Pa. Super. Ct. 244, 247 n.1, 251 A.2d 694, 696 n.1 (1969) (Hoffman, J., dissenting). Judge Hoffman notes "the crucial importance of a college education in today's society" and "that a college degree is a vitally important prerequisite to a successful commercial career." *Id.*

In recent years, however, it has been asserted that a college degree is no longer as economically valuable as it once was. See, e.g., R. FREEMAN, *THE OVEREDUCATED AMERICAN* 10-31 (1976). The depressed labor market for college graduates and a decrease in their real salaries were cited as some of the causes. *Id.* But see Campbell & Curtis, *Graduate Education and Private Rates of Return: A Review of Theory and Empiricising*, 13 *ECON. INQUIRY* 99 (1975) (rejecting rate of return as a method of evaluating graduate education).

"[w]here the parents' economic circumstances are adequate it is *commonplace* to send their children to college."⁶⁵ The average family factor was also considered in *Risinger v. Risinger*,⁶⁶ where the South Carolina Supreme Court decided that the need for an education would justify a support award under a child support statute.⁶⁷ The court noted that many students, by their attendance at college, have diminished their ability to support themselves without assistance and stated that "*most parents* feel an obligation to help, and do help the child."⁶⁸ In both these cases the courts again considered the support provided by families they believed to be average in an effort to determine whether college support should be awarded.

It should be stressed, however, that the consideration of the average family factor should only supplement, not replace, the court's careful consideration of the individual circumstances of each particular family. There are certain factors which must always be considered, particularly the financial capacity of the noncustodial parent.⁶⁹ Obviously, if the court finds that a parent lacks the financial capacity to provide college support, then the average family factor is irrelevant.⁷⁰

⁶⁵ 188 Kan. at 601, 363 P.2d at 802 (emphasis added).

⁶⁶ 273 S.C. 36, 253 S.E.2d 652 (1979).

⁶⁷ The section of the statute construed by the court provides:
[T]he court shall have jurisdiction:

. . . .
(4) To make all orders for support run until the further order of the Court, except that orders for support of a child shall run until the child is twenty-one years of age, or until the child is sooner married or becomes self-supporting; or, where there are physical or mental disabilities of the child or other exceptional circumstances that warrant it, in the discretion of the Court, during any period and beyond the child's minority as such physical or mental disabilities may continue.

Act of May 22, 1968, No. 1195, § 24(b)(4), 1968 S.C. Acts 2718 (current version at S.C. CODE § 14-21-810(a)(4) (Supp. 1980)). The court noted that the factors which constituted exceptional circumstances in this case were the scholastic ability of the child, the indications that she would benefit from college, the financial ability of the noncustodial parent and that the child could not go to college without the assistance of that parent. 273 S.C. at 39, 253 S.E.2d at 653-54. The court was careful not to limit "exceptional circumstances" to these factors only, emphasizing that family court judges must have the power to consider other pertinent factors. *Id.*, 253 S.E.2d at 653. This is typical of the discretion left in the hands of the trial court when considering college support. See note 25 & accompanying text *supra*.

⁶⁸ 273 S.C. at 38, 253 S.E.2d at 653 (emphasis added). But compare the approach of the *Risinger* court with the approach taken by the Utah Supreme Court in *Ferguson v. Ferguson*, 578 P.2d 1274 (Utah 1978). The court in *Ferguson* acknowledged that parents often give college support to their adult children, but refused to order such support: "*Ordinarily*, a parent will be more than willing to aid and assist an adult child in securing a college education; however, one should not be compelled to do so by a court order, except in some unusual circumstance, not present here." 578 P.2d at 1275 (emphasis added). Here the court referred to the college support provided by other parents, but simply ignored it. *Accord*, *Carlson v. Carlson*, 584 P.2d 864, 865-66 (Utah 1978).

⁶⁹ See notes 26-27 & accompanying text *supra*.

⁷⁰ See *Golay v. Golay*, 35 Wash. 2d 122, 124, 210 P.2d 1022, 1023 (1949) (parental sacrifices to help children attend college common, but noncustodial father not in financial

Once the financial capacity of the noncustodial parent has been established, equitable considerations support the application of the average family factor. In fairness to the parents of intact families who accept their social obligations to educate their children, the average family factor operates to place similar responsibilities on divorced parents. This policy was espoused in another Washington case, *Underwood v. Underwood*:⁷¹ "Untold sacrifices are made by parents who remain steadfast to their marital obligations in order to educate their children. The same responsibility rests on parents who seek and obtain a divorce."⁷² The court thus is attempting to equalize the sacrifices made by divorced and married parents when considering college support issues by requiring the same degree of sacrifice on the part of divorced parents as that made by married parents.⁷³

These questions of fairness and equality arose in *Childers v. Childers*⁷⁴ in a somewhat different context. In *Childers*, the court was concerned with the limits of the noncustodial parent's duty to provide college support to his children. Applying an equal protection analysis, the court struck down the Dissolution of Marriage Act of 1973⁷⁵ because it imposed a greater duty of support on the class of divorced parents than that imposed on the class of married parents, as the latter were

position which would allow such sacrifice). Some noncustodial parents of limited means have been found to have the requisite financial capacity to provide college support. *See, e.g., Dorman v. Dorman*, 251 Ind. 272, 241 N.E.2d 50 (1968) (noncustodial father required to pay \$40 for college support out of \$75 weekly salary). *But see Commonwealth ex rel. Williams v. Williams*, 242 Pa. Super. Ct. 550, 364 A.2d 410 (1976); *Commonwealth ex rel. Schearer v. Schearer*, 208 Pa. Super. Ct. 196, 222 A.2d 620 (1968).

One could view the consideration of the financial ability of the noncustodial parent as subsumed within the average family factor since the application of that factor necessarily entails an examination of families with similar financial resources as the one before the court. *See* note 47 & accompanying text *supra*. That is to say, a court would not expect a noncustodial parent with an annual income of \$20,000 to provide the same support as a parent with an annual income of \$500,000.

⁷¹ 162 Wash. 204, 298 P. 318 (1931).

⁷² *Id.* at 210, 298 P. at 320.

⁷³ The question of how much sacrifice should be required of the noncustodial parent when ordered to provide college support was discussed in *Commonwealth ex rel. Ulmer v. Sommerville*, 200 Pa. Super. Ct. 640, 190 A.2d 182 (1963). The court observed that while it may require a father to make great sacrifices in order to support his young child, it would not require the same degree of sacrifice of the father when ordering him to support his child in college. But it did require some sacrifice: "We are not suggesting that a father should be required to support a child in college only when . . . he could do so without making *any* personal sacrifices. Most parents who send a child to college sacrifice to do so." *Id.* at 644, 190 A.2d at 184. As did the court in *Underwood*, the court in *Ulmer* seemed intent upon imposing a duty of sacrifice on the divorced parent similar to the sacrifice made by married parents when sending their children to college.

⁷⁴ 15 Wash. App. 792, 552 P.2d 83 (1976), *aff'd in part & rev'd in part*, 89 Wash. 2d 592, 575 P.2d 201 (1978).

⁷⁵ Ch. 157, 1973 Wash. Laws 1st Ex. Sess. 1215 (current version at WASH. REV. CODE ANN. § 26.09 (Supp. 1981)).

free to bid a "fiscal farewell" to their children over the age of eighteen while the former may have a continued duty to support such children.⁷⁶ The court held that there was no reasonable basis for such a distinction.⁷⁷ On appeal,⁷⁸ the Washington Supreme Court rejected this reasoning, in part because the operation of the Act in fact created no unequal treatment⁷⁹ since most married parents with the requisite financial capacity provide college support for their children. The court applied the average family factor, observing that "[t]he fact that *most married parents* choose willingly to make financial sacrifices for their children's education, including college and regardless of age, seems to have been disregarded."⁸⁰ The *Childers* court, in attempting to ensure that children of divorced parents receive the same advantages as children of married parents, noted further that "[t]he child of divorced parents should be in no worse position than a child from an [intact] home whose parents could be expected to supply a college education. . . . To terminate support when the parents are divorced creates a special

⁷⁶ 15 Wash. App. at 796, 552 P.2d at 85. The particular section of the Dissolution of Marriage Act of 1973 which gave rise to the equal protection issue dealt with the termination of child support. Unless otherwise agreed in writing or expressly provided in the divorce decree, provisions for the support of a child are terminated by emancipation of the child or by the death of the parent obligated to support the child. WASH. REV. CODE ANN. § 26.09.170 (Supp. 1981). It was maintained by the custodial mother that § 170 provided the trial court with the authority to award child support regardless of the age of the child. 15 Wash. App. at 795, 552 P.2d at 85. Section 170 thereby created two classes; one of married parents and one of divorced parents, as under this reading divorced parents could be forced by the courts to support their children past the age of majority while married parents could not. This being the case, the court examined this section in the light of the privileges and immunities provision of article 1 of the Washington constitution and the equal protection clause of the fourteenth amendment to the United States Constitution. The Washington constitution provides: "No law shall be passed granting any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations." WASH. CONST. art. I, § 12. The equal protection clause of the United States Constitution reads: "No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

The court then tested the classifications under the equal protection test set forth in State *ex rel.* Bacich v. Huse, 187 Wash. 75, 59 P.2d 1101 (1936). This test required that there be a reasonable ground for the distinction of the classes and that the statute treat all persons alike within the created classes. The court found that § 170 failed the first test because when a child reaches the age of 18 there is no longer a reasonable ground to distinguish the two classes. 15 Wash. App. at 796, 552 P.2d at 85; *accord*, Kern v. Kern, 360 So. 2d 482, 485 (Fla. Dist. Ct. App. 1978). *But see In re Marriage of Vrban*, 293 N.W.2d 198 (Iowa 1980); *Harris v. Harris*, 585 P.2d 435, 436 (Utah 1978). *See generally Veron*, *supra* note 1, at 668-83; 54 WASH. L. REV. 459, 465-72 (1979).

⁷⁷ 15 Wash. App. at 796, 552 P.2d at 85.

⁷⁸ *Childers v. Childers*, 89 Wash. 2d 592, 575 P.2d 201 (1978).

⁷⁹ *Id.* at 605, 575 P.2d at 209 ("This 'classification' . . . results in no actual inequality."). The other reason for rejecting the lower court's assertion was that there was a reasonable basis for distinguishing the two classes: the state's interest in the welfare of the children and society as a whole is sufficient. *Id.*

⁸⁰ *Id.* at 601, 575 P.2d at 207 (emphasis added).

disadvantage not shared by children whose parents remain together."⁸¹

The *Childers* court's assertion that the Act does not treat married parents and divorced parents unequally is questionable at best. First, there is no doubt that under the Act a court can require that a divorced parent provide college support to his children while the same court could not impose a similar requirement on married parents.⁸² Second, even if most married parents do provide college support to their children, undoubtedly there are some who do not.⁸³ Nevertheless, this flaw is not fatal to the court's analysis because, as the *Childers* court recognized, such unequal treatment of divorced parents is justified in order to minimize the prejudice to the child caused by the divorce: "The irremediable disadvantages to children whose parents have divorced are great enough. To minimize them, when possible, is certainly a legitimate government interest."⁸⁴

Childers used empirical evidence to support the assertion that parents often provide college support for their children. The court cited three studies concerning the financing of college education from which it concluded that parental support accounted for a "substantial percentage of the cost of a college education."⁸⁵ This data gave force to the court's contention that the failure of the divorced parent to provide college support was a competitive disadvantage to the child.⁸⁶

⁸¹ *Id.* at 602, 575 P.2d at 207-08 (quoting Washburn, *supra* note 11, at 327, 329). See also *Kujawinski v. Kujawinski*, 71 Ill. 2d 563, 376 N.E.2d 1382 (1978); *In re Marriage of Vrban*, 293 N.W.2d 198 (Iowa 1980). In *Kujawinski*, the court rejected a similar equal protection attack on the Illinois Marriage and Dissolution of Marriage Act, Pub. Act 80-922, § 513, 1977 Ill. Laws 2675 (codified at ILL. ANN. STAT. ch. 40, § 513 (Smith-Hurd 1980)), on the grounds that to order divorced parents to educate their children to the same extent as may be reasonably expected of married parents was rationally related to the protection of the child. 71 Ill. 2d at 580, 376 N.E.2d at 1390.

⁸² See 89 Wash. 2d at 601, 575 P.2d at 207. In *Kern v. Kern*, 360 So. 2d 482, 485 (Fla. Dist. Ct. App. 1978), a Florida court observed that such treatment was unequal. Cf. *White v. White*, 296 So. 2d 619, 623-24 (Fla. Dist. Ct. App. 1974) (no suit by child lies to require married parents to provide college support); *Commonwealth ex rel. Miller v. Rice*, 1 Adams County Legal J. 91, 92 (Pa. 1959) (if court could require divorced parents to provide college support, it could also require married parents to do so).

⁸³ See *White v. White*, 296 So. 2d 619, 623 (Fla. Dist. Ct. App. 1974); *Morris v. Morris*, 92 Ind. App. 65, 69, 171 N.E. 386, 387 (1930); *Commonwealth ex rel. Binney v. Binney*, 146 Pa. Super. Ct. 374, 380, 22 A.2d 598, 601 (1941); text accompanying note 61 *supra*.

⁸⁴ 89 Wash. 2d at 604, 575 P.2d at 208. *Contra* *Kern v. Kern*, 360 So. 2d 482, 485 (Fla. Dist. Ct. App. 1978) ("no reasonable grounds to treat adult children of divorced parents any differently than adult children of married parents").

⁸⁵ 89 Wash. 2d at 601 n.3, 575 P.2d at 207 n.3. The sources cited were: R. FREEMAN, *supra* note 62, at 100, S. HARRIS, *supra* note 62, at 114-23; HARVARD STUDENT AGENCIES, INC., *supra* note 45, at 23. The same sources were cited by the court in *In re Marriage of Vrban*, 293 N.W.2d 198, 202 (Iowa 1980).

⁸⁶ This force was lacking in *Esteb v. Esteb*, 138 Wash. 174, 244 P. 264 (1926). For a discussion of the validity of the *Esteb* court's assumption as to the numbers of the college graduates, see 20 ORE. L. REV. 377, 382 (1941).

Judicial reliance on the average family factor is not a panacea designed to replace much needed discretion in the educational support area.⁸⁷ The utility of the factor is that, through an examination of the support provided by families which the courts view as average, the courts are offered another method by which they can measure the probable expectations the parents would have had had they remained married; in the process, the courts are placing no greater burden on divorced parents than the burden voluntarily assumed by most married parents. Whether this burden is normally assumed voluntarily at the graduate school level, however, is an open question.

GRADUATE SCHOOL SUPPORT

There have been relatively few cases⁸⁸ which have dealt directly with the graduate school support issue. Nevertheless, the increase in graduate degrees as a percentage of the total number of degrees conferred⁸⁹ in combination with the increasing tendency of the courts to ignore arbitrary limitations on the educational support obligation⁹⁰ indicates that this issue may arise more frequently in the future. When these

⁸⁷ See notes 24-31 & accompanying text *supra*. The factor will not even be relevant in states which use the age of the child as an arbitrary limit on college support. See note 1 & accompanying text *supra*.

⁸⁸ One of the earliest decisions involving graduate or professional school was *Streitwolf v. Streitwolf*, 58 N.J. Eq. 570, 43 A. 904 (1899). As the child was only 19 years of age and had no undergraduate degree, the utility of this case in a modern discussion of graduate school support is limited.

Much later, a Pennsylvania court in *In re George Earnshaw*, 6 Ches. Co. Rep. 274 (Pa. 1954), awarded graduate school support in the context of an incompetence proceeding. Here an unemployed, 23 year-old daughter of an adjudged weakminded father had been supported by his estate during her college career, and the court extended the support so that she could pursue a master's degree in library science. *Id.* at 275. The court reasoned that the omission of the word "minor" as a modifier of the word "children" from the Incompetents' Estates Act of 1951, No. 158, § 643, 1951-1952 Pa. Laws 612, was an indication that adult as well as minor children were to be supported under the statute. 6 Ches. Co. Rep. at 275. A similar mode of statutory interpretation has been used by other courts to avoid the jurisdictional problems posed by the age of majority when they order support beyond that age. See *French v. French*, 117 N.H. 696, 699, 378 A.2d 1127, 1129 (1977) (construing Act of June 18, 1975, ch. 426, § 2, 1975 N.H. Laws 459 (codified at N.H. STAT. ANN. § 458.17 (Supp. 1979))); *Childers v. Childers*, 89 Wash. 2d 592, 595-97, 575 P.2d 201, 204-05 (1978) (construing Dissolution of Marriage Act of 1973, ch. 157, §§ 10, 17, 1973 Wash. Laws 1st Ex. Sess. 1215 (codified at WASH. REV. CODE ANN. § 26.09.100, .170 (Supp. 1981))); cf. *Greenberg v. Greenberg*, 27 A.D.2d 952, 279 N.Y.S.2d 363 (1967) (postgraduate work is not an unusual circumstance); *In re Kelly's Estate*, 259 A.D. 1024, 20 N.Y.S.2d 689 (1940), *modified & aff'd*, 285 N.Y. 139, 33 N.E.2d 62 (1941) (college defined as undergraduate only).

⁸⁹ U.S. BUREAU OF THE CENSUS, *supra* note 40, Table 281. Between 1950 and 1977, the number of graduate degrees as a percentage of the total number of degrees conferred rose from 13% to 26.2%. *Id.* The total number of graduate degrees conferred increased over 500%, from about 65,000 in 1950 to over 351,000 in 1977. *Id.*

⁹⁰ See generally *Veron*, *supra* note 1, at 650-669.

cases arise, the courts should examine whether the policies espoused in college support cases are equally applicable to the graduate school support issue.

Avoidance of Prejudice to the Child

Some courts, when confronted with the college support issue, have based their awards of college support on the policy that a divorce should not prevent a child from receiving the same college support he would have received had his parents remained married.⁹¹ If this policy is of central importance, then it should make no difference that the divorce causes the noncustodial parent to refuse to provide college or graduate school support. In either case, an award of support should be given where it is shown that the parents would have paid for the schooling had the parents remained married.⁹² If courts are to further the policy of ensuring that life goes on for the child as if there had been no divorce, they should be more concerned with determining the probable expectations of the parents and child with respect to his education and less concerned with the age of the child and his ability to support himself.

Of course, there are circumstances where the blind furtherance of this policy could lead to absurd results. Certainly parents who indicate a desire, while married, to provide their son with all the education he desires should not be required after divorce to finance their son's attempt to obtain multiple graduate degrees over a thirty year period.⁹³ However, such cases can be accommodated by the court's examining all the relevant factors to determine if it is truly necessary to award the support in order to avoid the prejudice to the child.⁹⁴ Moreover, the average family factor could be used by the court in such a case as rationale for denying the support since parental support at this level is uncommon.⁹⁵

The policy of avoiding prejudice to the child was given heavy emphasis in the most recent of the few decisions involving graduate school support, *Ross v. Ross*.⁹⁶ *Ross* was a post-divorce proceeding in which the custodial mother moved to compel the noncustodial father to continue making child support payments in accord with the terms of the divorce decree.⁹⁷ Under that decree, the father was obligated to support his

⁹¹ See notes 16-16 & accompanying text *supra*.

⁹² *Ross v. Ross*, 167 N.J. Super. 441, 445-48, 400 A.2d 1233, 1235-37 (1979).

⁹³ See *Finn v. Finn*, 312 So. 2d 726, 730 (Fla. 1975) (father argued that he should not have to support his child while the latter "[lounge]d around in college for 10 years").

⁹⁴ See notes 25-31 & accompanying text *supra*.

⁹⁵ See notes 110-15 & accompanying text *infra*.

⁹⁶ 167 N.J. Super. 441, 400 A.2d 1233 (Ch. Div. 1979).

⁹⁷ *Id.* at 443, 400 A.2d at 1234-35.

daughter "until emancipated."⁹⁸ The primary question before the court was whether the twenty-three year-old daughter, a first-year law student, was emancipated. The court reasoned that, before it could consider that issue, it had to answer the "threshold question" of whether the parents would have supported their daughter in law school but for the divorce.⁹⁹ After finding that such support would have been provided, the court concluded that she was not emancipated in light of the financial capabilities of the parties and the ability and attitude of the daughter. The father was ordered to continue contributing to her support until her graduation from law school.¹⁰⁰

The court stressed that an affirmative answer to the threshold question was "in no way . . . dispositive of the issue,"¹⁰¹ for other relevant factors¹⁰² must also be considered before a final decision could be reached as to whether the support request should be granted. Yet the court failed in its attempt to make two distinct inquiries—one involving the threshold question of what the parents would have done but for the divorce and another involving the analysis of relevant factors—because the court reviewed the other factors in order to determine whether the divorce had actually prejudiced the daughter by causing the father to withhold support he would have given had he remained married.¹⁰³

One of the factors considered by the *Ross* court—"[t]he relationship of the schooling in question . . . to the overall, long-range goals of the child"¹⁰⁴—is particularly salient to the issue of graduate school support. Where the child aspires to a professional career, both college and graduate work will be prerequisites to obtaining that goal. Accordingly, where a child has a long-standing goal of obtaining a professional degree

⁹⁸ *Id.*

⁹⁹ The threshold question was: "Had there not been a separation and divorce, would the parties, while living together, have sent their daughter to law school and financed that schooling?" *Id.* at 445, 400 A.2d at 1235.

¹⁰⁰ *Id.* at 448, 400 A.2d at 1237.

¹⁰¹ *Id.* at 445, 400 A.2d at 1236.

¹⁰² The factors considered by the court were:

1. The amount of support (or school cost) sought.
2. The ability of the noncustodial parent to pay that cost, and its relation to the type of schooling sought.
3. The financial position of the custodial parent.
4. The commitment . . . of the child to the schooling in question.
5. The child's relationship to the noncustodial paying parent.
6. The relationship of the schooling in question to any prior training and, generally, the relationship to the overall, long-range goals of the child.

Id. at 445-46, 400 A.2d at 1236.

¹⁰³ In answering the threshold question, the court considered "the respective incomes of the parties; the fact of only having one child, and the early indicators in this case of Jane's interest in law school," *id.*, 400 A.2d at 1235, all of which are factors the court later discusses. See note 102 *supra*.

¹⁰⁴ 167 N.J. Super. at 446, 400 A.2d at 1236. For a discussion of factors considered in college support cases, see notes 25-31 & accompanying text *supra*.

and has already obtained the required college degree, he should be allowed to continue receiving support through graduate school.¹⁰⁵ Where the goal of the child is known, the court should also consider the propriety of making an award that includes graduate school support at the same time it makes a college support award, or at least it should add a provision to the order allowing for a rehearing when the child nears graduate school.¹⁰⁶

The court in *Ross*, in awarding graduate school support, focused on whether the father would have supported his daughter in law school had he remained married and on the long-standing goals of the child. Where the courts focus on other factors, however, the likelihood that graduate school support will be awarded may diminish. In *Colantoni v. Colantoni*,¹⁰⁷ the court noted that there are many ways a medical student could support himself and denied the requested support. Perhaps if the court had instead concentrated on whether the father, had he remained with his wife, would have supported his son in medical school, the support would have been awarded. The court admitted that the father was financially able to provide the support¹⁰⁸ and a further inquiry may have revealed that the son had a long-standing desire to attend medical school.

The Average Family Factor and Graduate School Support

The courts in graduate school cases have yet to apply the average family factor. Nevertheless, this factor may even be more appropriate in these cases than it is in the cases concerning college support. Since it offers the courts further evidence regarding the graduate school support provided by other intact families, this factor enables courts to place the child in the same financial environment as children of similarly situated families whose parents remain married. In addition, where it is shown that most parents do not provide graduate school support, courts would have less reason to award such support because divorced parents would then be shouldering a burden that is not expected even of married parents. To place such a burden on divorced parents exceeds one of the primary purposes of the average family factor—to ensure that the

¹⁰⁵ This is a very important factor in *Ross*. The court stressed that the child had planned on a legal career since she was in high school and that the only way for her to attain that goal was through attending law school. 167 N.J. Super. at 447-48, 400 A.2d at 1237.

¹⁰⁶ See *In re Marriage of Edelstein*, 82 Ill. App. 3d 574, 577, 403 N.E.2d 323, 326 (1980); *In re Marriage of Eusterman*, 41 Or. App. 717, 598 P.2d 1274 (1979).

¹⁰⁷ 220 Pa. Super. Ct. 46, 281 A.2d 662 (1971). In *Colantoni*, the father discontinued his support payments for his son, a medical student, when the latter married and changed his state of residence. The court did not order the father to resume paying the support, stating that the mother had failed to rebut the presumption that a child is emancipated at age 21. The court also noticed the widespread availability of financial aid to most students.

¹⁰⁸ *Id.* at 49, 281 A.2d at 664.

educational support responsibilities placed on divorced parents will be roughly equivalent to the educational support provided by married parents.¹⁰⁹ A finding that average families do not provide graduate school support, however, should not in and of itself act to deny a request for such support. It should, at the very least, place a heavier burden on the custodial parent to show that graduate school support would have been provided by the parents had they remained married.

Of course, the key inquiry when applying the average family factor in graduate school support cases is whether parents of graduate students normally provide such support. Overall, empirical studies have indicated that parental support of graduate students is minimal.¹¹⁰ Yet this may not be the end of the inquiry as the amount of parental support received by graduate students may be linked to the discipline the child is studying.¹¹¹ While graduate students studying the sciences "switch from dependency on their parents and their own earnings to almost exclusive dependence on fellowships, research assistantships, or teaching assistantships to finance their education,"¹¹² the parents of students studying law, medicine or dentistry were expected by their schools to "continue paying tuition and living expenses" of their children.¹¹³ Since at least some graduate students receive or are at least expected by their schools to receive¹¹⁴ substantial parental support while in graduate school, equitable considerations support the application of the average family factor in such instances.¹¹⁵

¹⁰⁹ See text accompanying notes 71-81 *supra*.

¹¹⁰ S. HARRIS, *supra* note 62, at 204; cf. NAT'L BD. ON GRADUATE EDUCATION, FEDERAL POLICY ALTERNATIVES TOWARD GRADUATE EDUCATION 49 (1949) (aid to graduate students should not be linked to "comparative financial status" of parents); Educational Testing Service, GAPS FAS (1980) (parents of graduate students expected to offer them some financial support).

¹¹¹ V. Walbot, On the Financial Aids Received by Survey Participants During Undergraduate, Graduate, and Postdoctoral Education 7-8 (paper presented in Feb. 1978, for the American Ass'n for the Advancement of Science, ERIC, No. Ed. 155 967).

¹¹² *Id.* at 7.

¹¹³ *Id.* at 8. Perhaps this difference can be attributed to the different times at which college students decide to pursue education beyond a college degree. It has been found that, while many college students who decide to embark on a legal or medical career make that decision by the time they graduate from college, the decision to seek a doctorate is most often made at a point much later in a student's career. A. HEARD, THE LOST YEARS IN GRADUATE EDUCATION 9 (1963). A long-standing goal of attending graduate school is an important factor in graduate school support cases. See notes 104-06 & accompanying text *supra*.

¹¹⁴ The Graduate and Professional School Financial Aid Service (GAPS FAS), a program sponsored by the Graduate and Professional Financial Aid Council to assist graduate and professional schools in processing financial aid applications of their students, expects that parents with the financial capacity to do so should offer financial support to their children who are attending graduate or professional school. Parents of graduate students, however, are not expected to contribute as much as parents of college students. Educational Testing Service, GAPS FAS (1980).

¹¹⁵ See notes 74-85 & accompanying text *supra*.

CONCLUSION

In college support cases, courts have tried to determine whether the parents would have been expected to support their child while he attended college had there been no divorce. In making this determination, courts have examined whether there was any pre-divorce plan to send the child to college, or where no such plan existed, the inquiry extends to a myriad of relevant factors, including the financial capacity of the parents and the scholastic ability of the child. The primary policy furthered by these examinations is to prevent prejudice to the child resulting from the divorce. In accord with this policy is the courts' consideration of the average family factor, where the courts compare the family before them with what is perceived to be average, intact, similarly situated families. By applying this factor, courts are able to offer both a broader protection to the child and to ensure that divorced parents do not shirk the parental responsibilities shouldered by most parents, thereby unfairly shifting the burden of educational costs either to the child or to society in general.

The issues involved in graduate school support cases are not inherently different simply because the child is older. Where it can be shown that the parents would have supported the child in graduate school but for the divorce, the policy of avoiding prejudice to the child caused by the divorce dictates an award of graduate support. An examination of the average family factor, however, reveals that parental support at the graduate school level is much less common than similar support at the college level. This lack of parental support at the graduate school level suggests that a higher burden to show prejudice to the child should be placed on the party requesting graduate school support, for if the divorced parents are similar to other parents, they probably would not have provided such support. Where the burden is met, however, the award should be given.

J. ANDREW CRAWFORD