

EDUCATIONAL SUPPORT ORDERS IN CONNECTICUT

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Effective October 1, 2002, Connecticut law authorizes, for the first time, courts to require divorcing parents to pay for the post-secondary education of their children.

P.A. 02-128 (the “Act”)² signed by Governor Rowland on June 7, provides limited authority for the entry, in new cases, of “educational support orders” requiring a divorcing parent (or parent subject to a support order) to provide support for children to enable the children to obtain accredited undergraduate or vocational instruction.

The authority granted by the Act is narrowly circumscribed, contains few bright-line tests and is likely to be a source of both joy and frustration to many matrimonial practitioners.

History of Post-Majority Support

With limited exceptions,³ Connecticut has never authorized or required the payment of child support past majority. Prior to 1972, when the age of majority was reduced from 21 to 18,⁴ children generally did not reach majority until they were near or past the completion of higher education. For thirty years following the reduction of the age of ma-

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²<http://www.cga.state.ct.us/2002/act/Pa/2002PA-00128-R00HB-05088-PA.htm>.

³CONN. GEN. STAT. § 46b-84(b) permits orders for the support of an unmarried child who is a full-time high school student and resides with a parent until the earlier of completion of twelfth grade or age of nineteen; CONN. GEN. STAT. § 46b-84(c) permits order for the support of a disabled or mentally retarded child to age 21. Voluntary agreements between the parties to a divorce for post-majority support are generally enforceable; see fn. 5, *infra*.

⁴CONN. GEN. STAT. § 1-1d now provides, “Except as otherwise provided by statute . . . the terms ‘minor,’ ‘infant’ and ‘infancy’ shall be deemed to refer to a person under the age of eighteen years and any person eighteen years of age or over shall be an adult for all purposes whatsoever”

jority, Connecticut law limited the post-majority support obligations of payor parents, and the courts strictly construed these limitations.⁵ As a result, Connecticut’s law regarding payment of post-secondary educational expenses for children placed the state’s children at a distinct disadvantage when compared, for example, with children resident in neighboring states such as New York.⁶ More importantly, the Superior Court lacked even the most rudimentary ability to require children of divorcing Connecticut parents to be given the same educational opportunities as their peers in intact families.⁷

After the defeat of several bills in prior years, this time — with broad bipartisan support in both houses and from a variety of interest groups,⁸ and with a few last-minute watering-down compromises — the legislature finally achieved the goal of enacting a basic post-secondary education support bill.

⁵*Arseniadis v. Arseniadis*, 2 Conn. App. 239, 243, 477 A.2d 152 (1984) (“It is now axiomatic that support for a minor child extends to age eighteen years only”); *Albrecht v. Albrecht*, 19 Conn. App. 146, 155, 562 A.2d 528, *cert. denied*, 212 Conn. 813, 565 A.2d 534 (1989) (“Absent . . . a written agreement by the parties, the court does not have jurisdiction to order payment of child support beyond the age of majority and may not enforce such an order.”); *see also*, *Lowe v. Lowe*, 47 Conn. App. 354, 357-58, 704 A.2d 236 (1997).

⁶N. Y. DOM. REL. LAW § 240(1-b)(c)(7), as amended in 1990, provides, in pertinent part, “where the court determines, having regard for the circumstances of the case and of the respective parties and in the best interests of the child, and as justice requires, that the present or future provision of post-secondary, private, special, or enriched education for the child is appropriate, the court may award educational expenses.” Even prior to amendment, common law permitted a court to award post-secondary educational expenses upon a showing of “special circumstances” (generally that the parents possessed the means and that the children would have attended college had the family remained intact). *Romanoff v. Romanoff*, 167 A.D.2d 527, 562 N.Y.S.2d 523 (2d Dep’t 1990); *see*, *Manno v. Manno*, 196 A.D.2d 488, 600 N.Y.S.2d 968 (2d Dep’t 1993).

⁷State Representatives Diana Urban and Arthur Feltman, two sponsors of the bill, had argued in support of the Act that children of divorced families were 59% less likely to receive support from parents for college and 23% less likely to attend college at all than children of intact families. *See*, <http://www.housegop.state.ct.us/pressrel/Urban/2002/press043f.htm>.

⁸*Inter alia*, the Family Law Section of the Connecticut Bar Association, National Organization for Women, Connecticut Women’s Education and Legal Fund and American Academy of Matrimonial Lawyers.

Provisions of the Act

- *“Educational Support Orders”*

Under the Act, an “educational support order” is a court order which requires a parent to provide support for one or more children to attend an institution of higher education or a private occupational school for the purpose of attaining a bachelor’s degree, other undergraduate degree, or other appropriate vocational instruction.⁹

- *Children Subject to Educational Support Orders*

An educational support order may be entered with respect to any child under the age of 23. Orders terminate when the child reaches 23, or, if that age is attained during the academic year, at the end of that year.¹⁰

- *The Supported Child’s Duty*

The supported child must (1) enroll in an accredited institution of higher education or private occupational school, (2) actively pursue a course of study commensurate with the child’s vocational goals that constitutes at least half-time study, (3) maintain good academic standing, and (4) make his or her academic records available to both parents during the term of the order. The order shall be suspended after any academic period during which the child fails to comply.¹¹

The child has no private right of action for educational support.¹²

⁹Act § 1(a).

¹⁰Act § 1(b).

¹¹Act § 1(e).

¹²Act § 1(i).

- *When Educational Support Orders May Be Made*

Essentially, orders may be entered in matter where judgment is first entered after October 1, 2002 when the court would otherwise be able to make a child-support award. Thus, an order may be made at the time of a decree of dissolution, legal separation or annulment, or at the time of a support award against an unmarried parent, or *pendente lite* in any such action.¹³

If no educational support order is entered at the time of entry of a decree of dissolution, legal separation or annulment, and the parents have a child under 23, the court is required to inform the parents that no educational support order may be entered thereafter; and the court is then rendered powerless to enter such an order thereafter unless the decree explicitly provides that a motion or petition for an educational support order may later be filed.¹⁴ The court may accept a parent's knowing waiver of the right to seek an educational support order.¹⁵

- *What Amounts Can Be Required To Be Paid*

Orders may include any necessary educational expense, including room, board, dues, tuition, books, fees, registration and application costs, including health insurance.¹⁶ Tuition and other fees required to be paid cannot, except by agreement of the parents, exceed the amount charged by the University of Connecticut.¹⁷

¹³Act § 1(b)(1), -(2).

¹⁴Act §1(b)(1).

¹⁵*Id.*

¹⁶Act § 1(f).

¹⁷*Id.*

The court can order that payments be made (1) to a parent to be forwarded to the college or school, (2) directly to the educational institution, or (3) otherwise.¹⁸

- *How Orders Are Arrived At*

The court is first required to consider the likelihood that the parents would have provided support to the child for higher education if the family were intact and may only enter an educational support order if it is more likely than not that they would have done so.¹⁹ The court must then consider all relevant circumstances. Under the Act, the circumstances the court *must* consider include: (1) the parents' income, assets and other obligations, (2) the child's need for support to attend school, taking into account his own assets and earning capacity; (3) availability of financial aid from other sources, including grants and loans; (4) the reasonableness of the education, considering the child's academic record and the financial resources available; (5) the child's preparation for, aptitude for, and commitment to higher education; and (6) any evidence about the school the child would attend.²⁰

- *Parental Involvement*

Both parents are required to discuss and agree on what school the child will attend (there is no requirement that the child be consulted). If the parents do not agree, the matter "may" be resolved by the court.²¹

¹⁸Act § 1(g).

¹⁹Act § 1(c).

²⁰*Id.*

²¹Act § 1(d).

- *Modification*

Existing criteria and procedures for modifying child-support orders are made applicable to educational support orders²² (including, presumably, the requirement that the party seeking modification show a substantial change in circumstances²³).

Some Unanswered Questions

The Act contains a limitation frequently found in separation agreements between divorcing parties of modest means: that the payor's obligation cannot be measured by any greater standard than the charges of the University of Connecticut (currently about \$15,000 a year). The effect of this limitation is to remove from the court's discretion the ability to make an appropriate award for the higher expenses of a private institution when the parties can well afford it; it insulates those most able to pay while leaving exposed to judicial caprice the most impecunious. By way of example, an investment banker with \$2,000,000 of earned income cannot be required to pay \$35,000 for his or her child to attend Yale, while a firefighter with \$55,000 of income can be required to pay the full \$15,000 cost for his or her child to attend the University of Connecticut. One practical effect of this limitation is that higher-income litigants will continue to be required to horse-trade for educational support expenses that are realistically related to their lifestyles, as they do now. The calculus of this bargain is that supported spouses often must relinquish a portion of their equitable distribution or alimony in order to assure a first-

²²Act § 1(h).

²³CONN. GEN. STAT. § 46b-86.

class college education for their children that payors can easily afford — and certainly would have provided had the family remained intact. This result is, in a word, wrong.

A second noteworthy feature of the Act is that the Court must include an educational support provision in the judgment of dissolution or be forever barred from doing so, unless the judgment contains language expressly permitting a later application. (The Act does not specify under what circumstances such permissive language should be included in a judgment, nor does it offer any guidance as to how one opposing the inclusion of such permissive language might go about doing so.) At least one predictable consequence of the permissive-language provision in the Act is that every litigated divorce judgment that does not require current educational support will include boilerplate language providing for the right of the parties to seek an educational support order later. Absent such a “reopener” clause, the statute would require the court to inquire and speculate — even for a very young child — regarding the child’s future need for college expenses, the child’s resources, the reasonableness of educational plans, preparation, aptitude and commitment, and evidence of what school he or she will attend. These appear to be not merely optional but required judicial inquiries,²⁴ and some four-year-olds might be offering very interesting testimony regarding their future educational plans. Supported spouses will wish to make sure they adduce evidence of each required factor — however inapplicable to the circumstances — in order to avoid creating an opportunity for appeal.

²⁴The Act, in inartful language, requires the court to “consider all relevant circumstances,” including six specifically enumerated factors. Act § 1(c). It is not clear whether these six factors are thus always “relevant” or only “relevant” when the court deems them so. The former should be presumed in the absence of appellate guidance.

For constitutional reasons, the Act is not retroactive and applies only to initial judgments made after the effective date, October 1, 2002. Thus, two economically identically situated children from different families may find that their entitlement to educational support varies solely as a result of the accident of the dates of their respective parents' divorce judgments. Supported spouses with pending actions after June 7 will have an incentive to engage in dilatory tactics in order to make certain that their matters are not concluded before October 1.

Finally, the needs of some children for post-majority educational support will go entirely unmet under the Act because the child cannot enroll in an accredited "higher education" institution or "private occupational school."²⁵ Adversely affected by this language, among others, will be developmentally challenged youths who require additional post-majority education to complete high school or otherwise to become functional but who are enrolled in non-qualifying (frequently very expensive) schools and who have already reached the age of 21.²⁶

The Act is striking in the degree to which it limits judicial discretion in making and modifying educational support awards and in micro-managing the factors to be applied by the judiciary and when. Connecticut family judges have not shown themselves to be unworthy of discretion — quite the contrary — and these strictures apparently reflect the realities of the compromise legislative process.

²⁵Act § 1(a).

²⁶CONN. GEN. STAT. § 46b-84(c).

The Act was long sought by the organized matrimonial bar and, in the vast majority of new cases, should open new opportunities for children of middle-class families. In other cases, the Act will be problematic. Judicial experience with the Act will dictate the need for amendments, and some will almost certainly be forthcoming.

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