The Duty of a Father under Pennsylvania Law to Support His Child in College

Paul R. Beckert Jr.

Follow this and additional works at: https://digitalcommons.law.villanova.edu/vlr

Part of the Family Law Commons

Recommended Citation
Available at: https://digitalcommons.law.villanova.edu/vlr/vol18/iss2/4

This Comment is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Law Review by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.
THE DUTY OF A FATHER UNDER PENNSYLVANIA LAW TO SUPPORT HIS CHILD IN COLLEGE

I. Introduction

Every year more students are attending college. At the same time those with a college education are usually in the highest income brackets. In view of these facts, some people believe that in terms of the ability to compete in today's society, a college education could be termed a practical necessity. Significantly, during this same time period, there has also developed a greater likelihood of families becoming separated. Accordingly, the problem of separation usually involves issues of support and custody which can often create ill-will. One parent may have a closer relationship with the child, dealing with the child on a daily basis, while the other may only make periodic visits. The situation is further exacerbated in the typical case because the father, while normally having the prime duty of support, generally does not have custody; he often may feel that the support obligation is imposed without any corresponding recognition of his rights with regard to the raising of the children. In such a context, the father may often resent and resist any "sacrifices" — such as the expense of sending a child to college — that he might otherwise have made to provide benefits to his children.

1. In 1929, when the Pennsylvania Supreme Court first ruled that a separated father had no duty to support a child in college (see note 38 infra), the ratio of undergraduate resident students enrolled in higher educational institutions to every 100 persons between 18 and 21 years of age was 7.88. By 1963, when the rule was changed (see note 64 and accompanying text infra), the ratio had risen to 33.75. Digest of Educational Statistics 77 (1965). It is estimated that by 1974 the numbers of those enrolled in such programs will nearly double. U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, Projections of Educational Statistics to 1974-75, at 7 (1965).

2. There is a direct relationship between the level of school completed and the average median income. New York Times Almanac 401 (1972).

3. For purposes of this Comment, the term "separation" should be read to include both those separated and those divorced, unless the latter term is also used. In 1940, the divorce rate per 1,000 population was 2.0 per cent; by 1971, it was 3.7 per cent. Bureau of the Census, U.S. DEP'T OF COMMERCE, Statistical Abstract of the United States 63 (1972). The similar statistics for Pennsylvania were a rate of 1.0 per cent in 1944, and 1.9 per cent in 1970. Pennsylvania DEP'T OF COMMERCE, Pennsylvania Abstract 22 (1972). The number of women divorced or separated in relation to those married has risen 17 per cent from 1955 to 1970. New York Times Almanac 494 (1972).

4. See note 9 and accompanying text infra.

5. Although the basic principle of custody proceedings is to act in the best interests of the child, Cochran Appeal, 394 Pa. 162, 145 A.2d 857 (1958), Pennsylvania courts generally follow the "tender years" doctrine that dictates that, all other factors being equal, the mother should be awarded custody of a child of tender years. Commonwealth ex rel. Ackerman v. Ackerman, 204 Pa. Super. 403, 205 A.2d 49 (1964). In fact, the courts have long subscribed to the notion that "[o]ne of the strongest presumptions in our law is that a mother has a prima facie right to her children over any other person." Commonwealth ex rel. Fox v. Fox, 216 Pa. Super. 11, 13, 260 A.2d 470, 471 (1969). Some change in attitude may have recently been signalled by the Pennsylvania Supreme Court in Commonwealth ex rel. Parikh v. Parikh, 449 Pa. 105, 296 A.2d 625 (1972), where the court, in light of all the evidence, awarded the father custody of his three-year-old son.
In view of these two trends and the underlying considerations accompanying them, the scope of this Comment is two-fold. First, it will set forth the current state of the law in Pennsylvania regarding the duty of a separated or divorced father to support his child in college. Second, this Comment will determine whether under current Pennsylvania law the duties imposed on separated fathers are equally applicable to parents living together.

II. THE LAW OF SUPPORT IN PENNSYLVANIA

It is beyond doubt that parents have the duty to support their minor children. Historically, this duty has been imposed to assure that children do not become charges of the state, but Pennsylvania courts have also considered such a requirement as forming part of the natural duty of a parent. Because the father historically was the principal wage earner within the family, the primary duty for support has rested upon him. The fact that the parents may be divorced or separated does not lessen their support obligation vis-à-vis their common children. Moreover, no action of the mother can affect the child’s right to such support.

Upon a separation, the parties separately or jointly may petition the court to enter an order requiring money to be paid for such support. Some of the factors to be considered in determining the amount of such an order include the need of the children, the property and income of the father, and perhaps such additional factors as the father’s earning ability or potential. Some courts have also given consideration to the resources of the mother. It is a settled rule in Pennsylvania that the award must be fair to the interests and needs of both the parents and children rather

15. Commonwealth ex rel. Alexander v. Alexander, 15 Chester Co. Rep. 318 (C.P. Pa. 1967). It is submitted that in light of the women’s equal rights amendment (see Pa. Const. art. 1, § 27), the father’s status as the primary source of support would be modified on a case-by-case basis, since to so treat him as a general rule would seem to violate the letter of the amendment. However, it could be argued that really no change would result since the current laws of support, as written, apply equally to mothers as well as fathers.
than used as an attempt to punish a party by making the order confiscatory.\textsuperscript{16} However, the courts have declared that there is no set percentage limit of income over which a rate will be found confiscatory.\textsuperscript{17}

There are several statutes under which a father's duty of support can be compelled. The Support Law,\textsuperscript{18} although it generally speaks in terms of indigent persons,\textsuperscript{19} specifically provides for support orders in favor of children against fathers who have left without reasonable cause, "leaving them to be cared for or assisted."\textsuperscript{20} The statute authorizes sale of the father's goods, attachment of his salary, and garnishment of other income to insure proper maintenance.\textsuperscript{21} Three other laws speak more specifically in terms of an action for maintenance against a father for support of his wife and/or children. One statute gives a wife the right to bring an action against her husband if he deserts her and their children without cause and neglects or refuses to support them.\textsuperscript{22} The statute permits the sale of his property to provide for such maintenance.\textsuperscript{23} The Civil Procedural Support Law\textsuperscript{24} states the form in which such an action may be commenced civilly and grants remedies, such as, \textit{inter alia}, attachment of wages, salaries, and commissions.\textsuperscript{25} The statute also allows the court to jail a husband for willful failure to obey an order of support, since that action has been deemed to constitute a contempt of court.\textsuperscript{26} One general statute gives the court the power in desertion and non-support actions to commit those who are found guilty of such violations in addition to other available remedies.\textsuperscript{27} Finally there is a statute, quasi-criminal in nature,\textsuperscript{28} in which an action may be brought on behalf of the wife and her children or even solely on behalf of the children in the name of the Commonwealth.\textsuperscript{29} Under this statute, the district attorney prepares the petition.\textsuperscript{30} The court in such an action may imprison and/or fine an offender who does not comply with the provisions of the support order.\textsuperscript{31}

\begin{thebibliography}{99}
\bibitem{17} Commonwealth \textit{ex rel.} Arena v. Arena, 205 Pa. Super. 76, 207 A.2d 925 (1965).
\bibitem{19} Id. § 1973(a) provides in part:
The husband, wife, child . . . father and mother of every indigent person . . . shall, if of sufficient financial ability, care for and maintain, or financially assist, such indigent person at such rate as the court of the county, where such indigent person resides shall order or direct.
\bibitem{20} Id. § 1977.
\bibitem{21} Id.
\bibitem{23} Id. § 132.
\bibitem{25} Id. § 2043.39(c).
\bibitem{26} Id. § 2043.39(b).
\bibitem{29} Id.
\bibitem{30} Id.
\bibitem{31} The court's power as to commitment arises from the assumption that the father's conduct constitutes a contempt of court. Commonwealth v. Peters, 178 Pa. Super. 82, 113 A.2d 327 (1958). This type of statute, although amended several times, has continued the long established policy of the state in proceeding against
\end{thebibliography}
the statute utilized and no matter what form the action may take, the husband may join in the petition and consent to an order, or there may be a hearing after which a court-adjudicated order is entered.

One court has written that "the purpose of a support order is to secure an allowance for the wife and children which is reasonable and proper for their comfortable support and maintenance, having in view the property, income, and the earning capacity of the husband."\(^2\) The order entered by the court is not final, but merely reflects the existing circumstances at the time of the hearing.\(^3\) Absent appeal, the order is enforceable against the parties, but either party may secure a modification of the order upon a showing of a change of circumstances.\(^4\) However, on such a petition to modify, the burden of proof is on the party who is claiming that the conditions have changed.\(^5\) He must show by competent evidence that there has in fact been a change in circumstances and that such a change is permanent.\(^6\) It should be noted that on appeal from the order of the trial court, it will be modified only on the basis of clear or manifest abuse of discretion.\(^7\)

III. COURT DECISIONS IN COLLEGE SUPPORT
CASES — 1920–1960

The Superior Court of Pennsylvania in 1929 first established the rule that a father may be required to continue supporting his son in public school past the mandatory age for school attendance (16 years),\(^8\) even though the son was physically and mentally able to engage in profitable employment,\(^9\) and there were such employment opportunities available in the community.\(^10\) The court conditioned such a requirement upon the father's financial ability and position in life and the child's ability and prospects.\(^11\)

---

39. Id. at 305.
40. The father produced elaborate testimony from witnesses connected with five separate industries that there were jobs available "at a wage which is sufficient for his own support." Id. at 305-06.
41. Id. at 312-13.
Two years later, however, the superior court refused to extend this reasoning in order to allow support for children attending college. The court concluded that "the Act of 1867 cannot be used to require a father, at least in the circumstances of this defendant, to send to college, or maintain there, two sons almost of age." In Commonwealth ex rel. Binney v. Binney, the court again was faced with the problem of continued support for a 19-year-old son attending college and Judge Rhodes, speaking for the court, established the rule that would stand for two decades:

A court may require, if circumstances warrant, a father to provide for the education of his minor children in the public schools after they have completed the term required by the attendance laws. But it is well known that there are worthy parents in all parts of the country, with means greater than this appellant has, who do not furnish their children with the financial assistance necessary for a college education. We cannot say that each has failed in a legal duty to his child and to the state. To hold that the circumstances of this father require him to furnish his son with a college education would be an unwarranted conclusion. Hence in such a matter he is entitled to a measure of discretion, and must be allowed to exercise his own judgment.

The Pennsylvania Supreme Court, in Wiegand v. Wiegand, limited the application of this rule by upholding and enforcing agreements between parents to provide a college education for their children. Thus the court held that the husband's duty when the separation agreement provided that, inter alia, he would pay for "a four year college course" included all payments of expenses and maintenance of his son at college, including tuition, room and board, books, and fees. The court, however, did conclude that under different circumstances the term "college course" might mean only books and tuition. The court in that case set down the principle that where the agreements were written, they should be judged by the general rules of contract construction.

43. Id. at 138, 156 A. at 573. The Act of 1867 was a forerunner to the existing statute. See Pa. Stat. tit. 18, § 4733 (1963).
44. 146 Pa. Super. 374, 22 A.2d 598 (1941).
45. Id. at 380, 22 A.2d at 601. It should be noted that underlying the court's distinction may have been the difference between high school education -- which was publicly-supported and in which the state had made a commitment for the benefit of all -- and college -- which was primarily a private matter of great individual expense. The change in the rule occurred about the time that many low cost state colleges and community colleges were established, which development greatly lowered the cost of education and established a substantial government commitment to low-cost higher education.
46. 349 Pa. 517, 37 A.2d 492 (1944).
47. Id. at 521–22, 37 A.2d at 495.
48. Id. at 522, 37 A.2d at 495.
49. The rules include such considerations as the most natural meaning of the words and a construction that would most clearly reflect the circumstances at the time of the agreement and the objectives manifested therein, as well as the general principle that, in cases of doubt, such language should be construed against the party preparing it, especially where he is incurring the obligation. Id. See Commonwealth ex rel. Grossman v. Grossman, 188 Pa. Super. 236, 146 A.2d 315 (1958).
The Superior Court of Pennsylvania extended the rule beyond the written contractual agreement in *Wiegand* to cover oral statements and unilateral actions which showed the intent to send children to college. Thus in *Commonwealth ex rel. Stomel v. Stomel*, 50 an agreement was evidenced by the father's statement in the lower court that he agreed to support his younger son when such son, at the time of the statement, had enrolled in, but had not yet begun college. The superior court upheld the finding of the lower court that under such circumstances the father had agreed not only to continue weekly support but to pay tuition. The court in *Commonwealth v. Martin* 52 held that "[t]he insurance trust agreement is confirmatory of defendant's agreement to provide a college education for his daughter." 53 There was in that case, however, a clear agreement which the wife testified had been entered into at the time of the divorce and which indicated that the husband would provide the daughters with a "secondary education, beyond high school;" the insurance trust agreement was used as evidence to show the existence of such a promise and defendant's initial step to perform under it. 54 The most extreme case in the superior court was *Commonwealth ex rel. Howell v. Howell*, 55 in which an agreement was inferred solely from the act of taking out an educational endowment policy although there was no agreement with anyone accompanying this unilateral act. 56 Moreover, there was strong evidence that the defendant could not reasonably afford to shoulder such a financial burden as college tuition. 57

By the time of *Martin*, a split had developed within the superior court as to the viability of the *Binney* rule. Although ancillary to the basis for its decision, the *Martin* majority again stated the general rule in terms of the language of *Binney*. 58 A concurring opinion by three judges, however, took issue with "the universal application . . . [of this] Court made rule which was formulated years ago when attendance at college was viewed as a luxury." 59 The opinion took note of the great increase in college enrollment since the inception of this rule and concluded:

51. The court concluded that "the father at the time he made the agreement in open court to support his son knew that he [the son] had graduated from high school and that he was enrolled at Temple University. We believe that it was within the contemplation of the parties that the father should pay for this son's tuition at college." Id. at 575, 119 A.2d at 599.
52. Id.
54. Id. at 359, 175 A.2d at 140.
55. Id.
57. Defendant took out an educational endowment policy with the intent to use it for his daughter's college education, but he had sole rights in that policy. Id. at 397, 181 A.2d at 904.
58. Id. at 403, 181 A.2d at 906 (Ervin, J., dissenting). The father in this case offered to prove an annual income less than $3,500. The three dissenters argued, apart from the question of whether there was an agreement, that there was not sufficient financial ability to allow such an order to be entered. *But see* note 109 and accompanying text infra.
59. 196 Pa. Super. at 359, 175 A.2d at 139.
60. Id. at 360, 175 A.2d at 140.
When a father has sufficient estate or income to enable him to send his children to college without undue hardship upon him, I think an order of support against him in favor of a minor child successfully carrying on his studies in college should be approved by this Court, even “in the absence of an express contract.”

Prior to the uncertainty caused by Howell and Martin, there had been clear unanimity among the county courts as to the propriety of dismissing claims for continued support. However, in the wake of the clear split in the superior court and its willingness to construe a most tentative act into a basis for a legal commitment, courts below also began to relax their standards. Therefore, pressure was exerted upon the superior court, both from within and from below, and the rule set down in Binney was soon to give way.

IV. RULE OF COMMONWEALTH EX REL.

Ulmer v. Sommerville

In Sommerville, the father sought to reduce by one-half a support order for two daughters because the oldest had graduated from high school and was going to be attending college in the fall with her tuition being paid from a trust fund established for that purpose by her granduncle. There was no agreement to continue education by the father who, apart from the support order, supported only himself. The trial court, however, had found that in light of the concurrences in Martin and the opinions in Howell, contractual obligation was not the only basis for a continued support order and believed, under the circumstances, that the order should

61. Id.
62. Commonwealth v. Kinek, 24 Pa. D. & C.2d 467 (C.P. 1961); Commonwealth v. Blumberg, 77 Montg. Co. L.R. 265 (C.P., Pa. 1961); Commonwealth v. Girard, 57 Schuylkill L.R. 13 (C.P. Pa. 1960); Commonwealth v. Cisney, 6 Cumb. L.J. 95 (C.P. Pa. 1956). In Commonwealth v. Carthew, 16 Cambria Co. R. 17 (C.P. Pa. 1951), however, the court noted that “[i]n a case where a father is possessed of large means and where his position in life is such as to require it, he might be legally liable to provide a college education for his minor children, but this would be the exceptional and not the usual case.” Id. at 19. The court, in fact, adhered to the general rule in this case.
63. For example, in a slightly different context, a lower court disputed the essential premise behind the old rule when it declared that “[a] college education can be and should be, in these times, classified as necessary and a necessity.” Fusco Estate, 16 Pa. D. & C.2d 129, 132 (Orphans’ Ct. 1958). In Commonwealth v. Byerly, 21 Pa. D. & C.2d 92 (C.P. 1960), the court used a procedural device to avoid the rule of no support. There the father sought to vacate the order on the ground that his son was then attending college. The court, in refusing to vacate, stated that the burden is on the one seeking to modify and under these facts the father “has failed to carry that burden by failing to prove . . . that the son is in fact earning a supporting wage in gainful employment or that he is both capable of doing so and that employment at a supporting wage is actually available to him in his community.” Id. at 94.
65. Id. at 642, 190 A.2d at 183.
66. Id. at 643, 190 A.2d at 184.
67. Id.
be continued.68 The superior court reversed69 but, in doing so, adopted in large measure the rule the lower court believed had been intimated by the opinions in Martin and Howell. For the first time the court decided that under certain circumstances the father may have a duty to support a child who is attending college. Those circumstances were two-fold: (1) “the child should be able and willing to successfully pursue his course of studies;”70 and (2) “the father should have sufficient estate, earning capacity or income to enable him to pay the order without undue hardship.”71 The court distinguished between the duty of a parent to provide food and shelter and the circumstances under which a duty to provide a college education would be imposed, since the parent in the former case, as a matter of natural law, should so act without regard to personal sacrifice.72 The court cautioned that this distinction did not mean that the duty to provide a college education would only be imposed when it necessitated no personal sacrifices, since such a cost would be a sacrifice to most parents.73

In Commonwealth ex rel. Decker v. Decker,74 the Pennsylvania Superior Court first applied the Sommerville rule to require an order for support of a child in college.75 However, it was not until 1971 that the Pennsylvania Supreme Court, in Emrick v. Emrick,76 had an opportunity to review the rule set down in Sommerville, at which time the court specifically approved the rule.77 Therefore, whatever doubt that might have previously existed was no longer valid as to the appropriateness of the standard.78

68. Commonwealth ex rel. Ulmer v. Sommerville, 12 Bucks Co. L.R. 590 (C.P. Pa. 1962). The court attempted to gauge the sentiment of the superior court. It believed there would be a majority for overturning the old rule based on the three justices concurring in Martin (see notes 60-61 and accompanying text supra) and a comment by Judge Ervin in Howell that in the proper case, perhaps, the rule should be changed. 12 Bucks Co. L.R. at 593-94. In fact, the decision to change was unanimous.

69. The court found that on the facts the duty would not exist, since to continue the order would leave the father with only $60 a week on which to support himself, while the daughter would, from all sources, average $70 a week in income. 200 Pa. Super. at 645, 190 A.2d at 184-85. “From these calculations, it appears to us that this is not a case where a father should be required by law to support a child attending college.” Id. at 645, 190 A.2d at 185.

70. Id. at 643-44, 190 A.2d at 184.
71. Id. at 644, 190 A.2d at 184.
72. Id.
73. The court acknowledged:
   We are not suggesting that a father should be required to support a child in college only when the father’s income or estate is such that he could do so without making any personal sacrifices. Most parents who send a child to college sacrifice to do so.

Id.
75. Id. at 160-61, 163, 203 A.2d at 346-47.
77. Id. at 430-31, 284 A.2d at 683.
78. See Washburn, Post-Majority Support: Oh Dad, Poor Dad, 44 Temple L.Q. 319, 323 (1971), wherein the author commented that some of the difficulty with the Pennsylvania law in this area had been due to “the lack of a definite decision on the issue by the state’s highest court.”
V. THE CURRENT STATUS OF THE LAW

A. Factors Considered

Sommerville stressed only two factors — the necessity for a sufficient estate so that the additional expense would not be an undue hardship on the father\(^7\) and the ability of the child to do college-level work.\(^8\) However, subsequent decisions have raised considerations in addition to the factors emphasized in Sommerville.\(^9\)

1. Undue Hardship

No mathematical rule can be formulated to determine how extensive the hardship upon a father must be before it will excuse him from supporting a child in college. It must be a matter of judgment in a field where the judgments of sincere and advised men differ materially.\(^10\)

Because no precise formula can be established, and because the result in each case could depend upon facts peculiar to it, broad conclusions as to undue hardship are not easy to make, which in part accounts for the large amount of litigation in this area. However, within certain parameters, some judgments may be made which would seem applicable absent some peculiar conditions or facts.\(^11\)

---

80. Id. at 644, 190 A.2d at 184.
81. The court in Sommerville added that "[t]o determine whether the order is justified, an important consideration is the estate, the earning capacity and the income of the defendant. This, however, is not the sole criterion. There are other circumstances to be considered." Id. at 644-45, 190 A.2d at 184. The Sommerville court also considered the mother's income, the child's income, and other sources of income. Similarly, in one of the superior court's most recent decisions, Commonwealth ex rel. Hanerkam v. Hanerkam, 221 Pa. Super. 182, 289 A.2d 742 (1972), the court stated:

We reiterate once again our strong approval of the policy which requires a father to continue to support a child who has the ability and incentive to pursue a college education even when the contribution involves some personal sacrifice on the part of the father. The potential availability to students of loans, grants or self-help by part-time or summer employment does not negate the duty of the parent but does merit cognizance thereof when a serious question of undue hardship is presented. Id. at 186, 289 A.2d at 745.
82. 200 Pa. Super. at 644, 190 A.2d at 184.
83. It could be argued that to understand fully the concept of undue hardship, both the income of the defendant and the amount of the order must be considered together. However, in some cases the court has found that any payment would constitute an undue hardship. See, e.g., Commonwealth ex rel. Rothrock v. Rothrock, 34 Pa. D. & C.2d 621 (C.P. 1964), aff'd per curiam, 205 Pa. Super. 32, 206 A.2d 397 (1965). In several other cases, even though the order had been reduced from that previously paid or had remained at the same level, an undue hardship has been found. See, e.g., Commonwealth ex rel. Yannacone v. Yannacone, 214 Pa. Super. 244, 251 A.2d 694 (1969) (although order reduced, it nevertheless constituted an undue hardship); Commonwealth ex rel. Rice v. Rice, 206 Pa. Super. 393, 13 A.2d 179 (1965) (initial amount subsequently found to be undue hardship). It could be argued that in many circumstances an order could be set so low as to avoid the issue of undue hardship. One lower court has used that technique, but unless support is available from another source, such a procedure seems to be of little assistance to the student. See note 95 infra. In two cases, Commonwealth ex rel. Grossi v. Grossi, 218 Pa. Super. 64, 272 A.2d 239 (1970), and Common-
Generally, it could safely be assumed that a father could claim undue hardship in an action for college support if he had a net income of under $100 a week. Likewise, it also seems clear that if the father had a net income of over $10,000 a year, or about $200 a week, courts, absent strange circumstances, would seem reluctant to find undue hardship in a continued support order.

In the middle area, judgments are difficult, seemingly inconsistent at times, and therefore, perhaps applicable only on almost identical facts. The superior court has found undue hardship where the father earned $100 a week gross income and had considerable assets, but has found no undue hardship where the father earned $125 a week. The superior court has also determined that undue hardship existed where the father earned $170 a week net income, but not where he earned $165 a week. As these cases suggest, the results often hinge on matters peculiar to the individual defendants, such as other assets they may have, other debts they may owe, their age, their health, or other responsibilities they may have.
Sometimes it could be argued that an order could be made so low as to create no undue hardship, but that technique has not been widely employed.95

As can be seen, no definite pattern emerges from these cases. Two of the seemingly most inconsistent results can be justified on the basis that in both the court found an agreement — one written, one implied — to do that which the court ordered. In Commonwealth ex rel. Grossi v. Grossi,96 the father was a 53-year-old stonemason with a net weekly income of $170, but the court found undue hardship would result if the order was continued. However, in that case the parties had specifically agreed to end support upon graduation from high school. The court stated:

If we take into consideration any indication of desire and willingness and contract to contribute to a college education then certainly we must take into consideration the contract in this case where the father clearly indicated that he did not desire or agree to college support.97

However, that analysis alone cannot be determinative because it is settled law that parents cannot bargain away the right of their child to receive necessary support,98 even though such an agreement may be binding on the parents inter sese.99 In any proceedings relating to child support, a court is not bound by any agreement as it effects the rights of the child.100 Therefore, in Grossi, the mother's agreement could not have in and of itself precluded support, but certainly could be considered as a factor, and

96. 218 A.2d 18 (1967), in which the advanced age of the father, clearly able to continue support, led the court to reduce greatly the amount of the order.
95. In Commonwealth v. Lowe, 51 Pa. D. & C.2d 667 (C.P.), aff'd per curiam, 218 Pa. Super. 863, 279 A.2d 329 (1971), the court found no undue hardship where the order was less than one-fifteenth of the defendant's net monthly income. It is submitted that such an approach is not extremely helpful; if the issue of undue hardship is raised, the father's income must, of necessity, be of modest proportions, and this to require only a small percentage of that salary to be paid so as to obviate any undue hardship creates another problem — the support order does little to aid in financing the child's education — and therefore the real purpose of the proceeding is lost. For example, in Lowe the order amounted to $30 monthly. While such an amount is better than no support at all, it is a poor judicial technique since it allows the court to avoid the difficult question of determining at what point the duty to support a significant amount of the child's higher education costs actually arises.
97. Id. at 66-67, 272 A.2d at 241.
100. In Commonwealth ex rel. Voltz v. Voltz, 168 Pa. Super. 51, 76 A.2d 464 (1950), the court implied that even if not unreasonable, a court could still modify the terms of a separation agreement as far as the rights of the child were concerned, in view of its overriding obligation to protect dependent children. However, as a general matter, most courts seem unwilling to modify such agreements if reasonable. Commonwealth v. Campbell, 128 Pa. Super. 72, 193 A.2d 119 (1937).
perhaps all other considerations being equal, the determinative factor. The result in Commonwealth ex rel. Smith v. Smith can be justified on the basis that even though the father apparently is in a poorer position than others who have not been required to assume this continued burden, since he has agreed to do so, however inadvertently, the duty will be imposed on him unless it would cause a personal sacrifice. In the only case on point, the Pennsylvania Supreme Court may, in fact, have read “agreement” cases more expansively. The court delineated two methods of imposing this duty on a father — one under the Sommerville rule and one by method of an agreement between the parties. It concluded that “the Superior Court has indicated that the above statement of the law [the requirements for imposing an order under Sommerville] does not apply where there is an agreement between the parties.” Therefore, it could be argued that if an agreement could be found which, in terms of the definition of “agreement” used by the superior court, covers a broad area, then there need be no discussion as to whether the agreed order would be a hardship.

If Smith could be explained on such a basis, then the most difficult area of court concern would be in the $130–$165 a week range, and almost by necessity such cases would have to be resolved on their own peculiar facts. In other words, it could be argued that generally in the area above $165 or below $130, some other significant factor must exist or the result could reasonably be foreseen. However, within the $130–$165 range, difficult questions would have to be decided largely on the basis of facts

101. Besides the father's age (see note 92 and accompanying text supra), another factor may have been the father's limited education. Moreover, the court could have reasoned, for example, that in the original agreement the father may have agreed to a higher amount under his assumption that all such payments would end upon graduation from high school.

102. It is always proper to consider the existence of a separation agreement as an indication of what the parties thought to be reasonable. Hecht v. Hecht, 189 Pa. Super. 276, 150 A.2d 139 (1959).


104. The existence of the father's agreement was based upon his testimony that he "wanted\[ed\] them [his children] to have an education," id. at 4, 268 A.2d at 163, and upon his statement that "I promised them all I would send them to college." Id. at 3, 268 A.2d at 163. The superior court found that these statements showed more than a "mere expression of desire" and therefore enough upon which to find an agreement.

105. In Smith the father did not originally make a claim of undue hardship, although he appealed in part on that basis. The superior court found no undue hardship, but largely considered the question in terms of the enforcement of a promise. Id. at 5, 268 A.2d at 163–64.


107. Id. at 430–31, 284 A.2d at 683.

108. Id. at 431, 284 A.2d at 683.

109. Id.


111. This position has been reinforced by the result reached in the case of Commonwealth ex rel. Schmidt v. Schmidt, 223 Pa. Super. 20, 296 A.2d 855 (1972), wherein the court affirmed the duty of a father, earning a net weekly income of $168, to provide support for a child attending school.
peculiar to each case, and therefore, no general rule or presumption could be advanced. Nevertheless, the court would still be free to obviate the need for such a judgment, if an "agreement" in some form could be found.

2. **Amount of Support**

After the determination that the father has sufficient income and estate to pay, the most important question is how much he must pay. The court, of course, must balance the reasonable needs of the child seeking support against the amount available from the income of the father after deduction of his necessary expenses.

To this date, no support order not based on agreement\(^{112}\) has required the father to pay the entire expense of college. The courts often have defined a reasonable contribution by the father in relation to the sources of income for support apart from the father — such as contributions by the mother,\(^ {113}\) scholarships and loans,\(^ {114}\) summer employment by the child, and jobs at school.\(^ {115}\) Instructive is the method used by the court in *Commonwealth v. Bodine*\(^ {116}\) The son was to enter Purdue University at a cost, including books, board, and tuition, of $4,070.\(^ {117}\) The son had a scholarship of $800 per year, would earn $270 per year grading papers, borrowed $1,000 from the school, and had a job paying $65 a week during the summer,\(^ {118}\) leaving approximately a $1,350 deficit. The father had an income of $11,700, was under an order to pay another son $1,300 a year, and was in arrears $1,447. He was ordered to pay $900 for the support of his son at Purdue.\(^ {119}\) The remainder of the annual cost presumably was to be provided by further loans or by assistance from his mother who earned $60 a week and received $50 a month in rent.\(^ {120}\)

The closest the courts have come to assessing the father the full cost of the college expenses was in *Commonwealth ex rel. Smith v. Smith*,\(^ {121}\) wherein the father was ordered to pay $25 weekly, or $1,300 annually, for support of his son at college. The tuition and board amounted to $1,500.\(^ {122}\)

---


\(^ {117}\) *Id.* at 33.

\(^ {118}\) *Id.* at 34.

\(^ {119}\) *Id.* at 34-35.

\(^ {120}\) *Id.* at 33. The court took a similar approach in *Commonwealth v. Lowe*, 51 Pa. D. & C.2d 667 (C.P.), aff'd per curiam, 218 Pa. Super. 863, 279 A.2d 329 (1971). The *Lowe* court considered that the daughter's summer job and a state scholarship would leave an approximate balance of $1000, based on expenses of $2266 a year. Since the court ordered only $360 a year in support from the father, who made about $145 a week and had remarried, apparently the rest would come from loans or from assistance by the mother who made $6300 a year.


\(^ {122}\) *Id.* at 5, 268 A.2d at 164.
and the father, out of an income of $6,620, also paid $12 a week to his wife. However, as has been noted, the *Smith* case could be read as an agreement case rather than as one applying the *Sommerville* rule.\(^{123}\)

In one case, *Commonwealth ex rel. Larsen v. Larsen*,\(^{124}\) the superior court approved of an approach, which, in effect, forced the plaintiff to justify the cost of an expensive school in order to impose that burden on the father. In *Larsen*, the lower court had found that there was no great advantage to the son's choice in terms of his needs, and therefore, the order would be based on the cost of a comparable state-supported school.\(^{125}\) However, it could be argued that that decision in part resulted from the fact that the son's decision had been made totally without his father's knowledge. Therefore, the apparent inequity to the son in having to finance a $3,600 education on $1,335 in support can be considered essentially his responsibility since he chose a school without any concern or regard for his father's desires or financial situation.

It would seem that, absent fact situations such as in *Smith*, where an agreement was found, or in *Larsen*, where there existed a unilateral decision to attend a more expensive school with little justification, most courts will determine the amount of contribution by considering the reasonable expenses of the child, all available sources of income, and the ability of the father to make a contribution toward the difference.

3. **Aptitude for College-Level Work**

In *Sommerville*, the court stated that "before the father should be required by court order to support a child in college, the child should be able and willing to successfully pursue his course of studies."\(^{126}\) No court has yet dealt with the problem of whether the child in question was willing to pursue such education, perhaps on the obvious assumption that the litigation with its attendant time and expense is prima facie evidence of such willingness.\(^{127}\) Likewise the issue of the child's ability to pursue successfully college studies has not been widely litigated. At present, only two cases have considered the question, and only in one was it part of the reason for a denial of continued support.

In *Commonwealth ex rel. De Santis v. De Santis*,\(^{128}\) the court found that, on the evidence adduced, defendant's daughter had not demonstrated

---

123. See note 104 *supra*.
125. *Id.* at 36, 234 A.2d at 21.
127. *Commonwealth v. Weidner*, 30 Lehigh L.J. 184 (C.P. Pa. 1963), was decided on a pre-*Sommerville* standard, but the court noted: The exercise of this defendant's judgment not to contribute to Gary's education is understandable in the light of his testimony that his son had failed to demonstrate a real interest in college work and that his attitude could not be characterized as benignant. The defendant's evaluation of his son was in no way challenged by the prosecutrix.
that she had the ability to do college-level work. She had a combined college board score of 740, and graduated 130 in a high school class of 240.\textsuperscript{129} The court concluded that it was not clear that such a record showed the requisite ability.\textsuperscript{130} However, in Commonwealth v. Bedosky,\textsuperscript{131} the issue of the child's ability\textsuperscript{132} was perhaps anticipated and, as a result, obviated by her attendance in a summer college session prior to what would have been her normal freshman year, during which time she compiled grades sufficient to demonstrate her ability to do college-level work.\textsuperscript{133} Thus the court had no difficulty in finding the requisite ability where such an issue might have been presented absent the attendance at the summer session.

Although such cases — both at the county level — are not of a nature that would seem to establish general standards by which this factor could be judged in the future, they at least show that, where relevant, the court will demand testimony to indicate that the requisite ability is present.

4. \textbf{Type of School}

Assuming that the father has a duty to continue support during college, the question of the type of school the child attends may be very important to all parties. In Commonwealth ex rel. Larsen v. Larsen,\textsuperscript{134} the superior court was faced with a not atypical problem. The son wished to attend a private school at which annual expenses were about $3,600,\textsuperscript{135} but the father contended "that according to his personal investigations the son could obtain an adequate, if not superior, education at Pennsylvania State University for a cost of only $1,275.00 per year."\textsuperscript{136} The trial court set the amount of support at a monthly rate that would equal the cost of attending the state school,\textsuperscript{137} and with modification the superior court affirmed\textsuperscript{138} utilizing the following rationale:

The question for our consideration is the extent to which a father is obliged ... to support a child attending an expensive private college when an adequate but less expensive education is available elsewhere.

\begin{itemize}
  \item \textsuperscript{129} \textit{Id.} at 749. It was the court's opinion that in light of this record "Karen De Santis would have difficulty in gaining admittance to most colleges . . . ." \textit{Id.} at 748. Such an opinion may explain the court's skepticism as to the quality of the college that admitted her.
  \item \textsuperscript{130} The court further concluded:
    \begin{quote}
    We believe that it is questionable whether Karen De Santis is educationally qualified to go on to college and major in the field of psychology. Her college boards do not indicate that, nor does her class standing indicate that this field is open to her.
    \end{quote}
  \item \textsuperscript{131} \textit{Id.} at 751.
  \item \textsuperscript{132} Defendant's daughter had graduated in the top 40 per cent of her high school class, but had combined college board scores of only 870. \textit{Id.} at 30.
  \item \textsuperscript{133} The court found that during the summer session the child had earned all B's and C's. \textit{Id.} at 30.
  \item \textsuperscript{134} 211 Pa. Super. 30, 234 A.2d 18 (1967).
  \item \textsuperscript{135} \textit{Id.} at 32, 234 A.2d at 19.
  \item \textsuperscript{136} \textit{Id.}
  \item \textsuperscript{137} \textit{Id.}
  \item \textsuperscript{138} The superior court required an additional $60 per year to be added to the order since state schools had recently announced a tuition increase. The court felt it could exercise such power to satisfy the obvious intent of the trial court. \textit{Id.} at 37, 234 A.2d at 21. See Gaspero v. Gentile, 160 Pa. Super. 276, 30 A.2d 754 (1947).
\end{itemize}
We are reluctant to formulate a rule which would, in all cases, prevent a child from attending the college of his choice simply because it is more expensive than the state-supported university. On the other hand, we do not believe that the child should have absolute discretion in selecting a college, and thereby unilaterally increasing the father’s support obligation. The determination of whether such an additional burden should be imposed on the father is a matter for the trial court.

Thus, in a case of this nature, the court must first ascertain what advantages are offered by the more expensive college in relation to the child’s individual needs, aptitude, ability, and the child’s anticipated vocation. It must then weigh these advantages against the increased hardship that would be imposed on the father to determine whether the additional expense is reasonable under the circumstances.\(^\text{139}\)

The court felt that since the decision was unilateral on the part of the son,\(^\text{140}\) the differences between the schools\(^\text{141}\) were not sufficient to impose the added financial burden on the defendant in view of all the circumstances.\(^\text{142}\)

In Commonwealth ex rel. Smith v. Smith,\(^\text{143}\) the father’s appeal was in part based upon the fact that he had no voice in the selection of his daughter’s college.\(^\text{144}\) The superior court upheld the order,\(^\text{145}\) but commended the action of the lower court in offering the father a role in the making of future decisions.\(^\text{146}\)

Three lower courts have faced similar problems. In Paul v. Von Bargen, Jr.,\(^\text{147}\) the court, relying on Larsen, required the defendant to pay

\(^{140}\) Id. at 35-36, 234 A.2d at 21.
\(^{141}\) The son had “apparently” not investigated or applied to any other colleges, although he testified that the main advantages of Washington & Jefferson College were smaller classes and closer student-teacher contact. The court felt such differences did not justify the additional expense. Id.
\(^{142}\) An important factor in Larsen was that although the father had a gross income of $25,000, he was 67 years old, not in the best of health, and ineligible for social security or any other sort of pension. Since the defendant’s continued earning power was questionable, the court felt that “increased payments might well jeopardize his financial security.” Id. at 35-36, 234 A.2d at 21.
\(^{144}\) “The record reveals that he [father] did want his daughter to attend college and that his objection was not that he could not afford a college education but that he did not choose the college she was attending.” Id. at 3, 268 A.2d at 162. It should be noted that this is the only case in which the father’s action was based not on finances but rather on his inability to have a voice in the selection of a proper school for his children. The courts have as yet not resolved this problem. However, in view of the lower court’s language cited approvingly by the superior court (see note 146 infra), perhaps this question would also be resolved by the court after a hearing on all relevant factors. It remains to be seen whether the courts would wish to engage in the actual decision as to the selection of the school, but it is at least conceivable that in a particular case there would be no other alternative.
\(^{145}\) Id. at 5-6, 268 A.2d at 163.
\(^{146}\) The lower court had remarked: “I have a great deal of sympathy with your position. You get a place for her where she will be accepted for next year, and you come back here and something will be done. But, you can’t sit back and object to something that is done and not have an alternative . . . . You come up with a good plan and the Court will listen to you. I guarantee you that.” Id. at 4-5, 268 A.2d at 163 (lower court opinion unreported).
only the past cost of support, which the court found was "sufficient to help obtain a suitable education in a number of Pennsylvania colleges,"\textsuperscript{148} even though the son was currently attending a more expensive out-of-state private college.\textsuperscript{149} The defendant had not been consulted in the choice and stated that, if he had, he would have urged a school that was more "affordable."\textsuperscript{150}

In \textit{Commonwealth v. Bodine},\textsuperscript{151} the father had secured his son's admission to the Air Force Academy, but the son left after one and one-half months to attend Purdue.\textsuperscript{152} The Air Force Academy, unlike Purdue, would have necessitated no payments by the father, who contended he had the right to determine his son's college, and since his son left without permission, he should not be required to contribute money for his college education.\textsuperscript{153} The court found no hardship to the father\textsuperscript{154} on the facts presented by the case and concluded "[t]he Superior Court in Commonwealth ex rel. Smith v. Smith . . . did not excuse the father from aiding his daughter's education when she transferred from a college of his choosing to one of her own, and we see no reason to excuse defendant in this case because his son has chosen Purdue rather than the Air Force Academy as the institution for his college training."\textsuperscript{155}

In \textit{Commonwealth ex rel. De Santis v. De Santis},\textsuperscript{156} the court viewed evidence as to the school chosen by the daughter\textsuperscript{157} as further proof that the court should not require the father to continue to contribute to his daughter's support. The court noted:

The problem that is of the most concern to this court is the fact that this young lady is asking this court to require her father to contribute money so that she may attend a school in Iowa which, at best, is little

\textsuperscript{148} Id. at 732.
\textsuperscript{149} Using the \textit{Larsen} standard, the court found that the "plaintiff has not proffered any advantages Hobart College has which Pennsylvania colleges do not have" and that the cost of Hobart would be $3150 a year. \textit{Id.} at 731–32. Moreover, this case was further complicated by the fact that the defendant had been a $20,000-plus marketing executive who was then unemployed. In this regard, the court concluded that "[t]he burden of arriving at an equitable figure is increased by the nebulous nature of Mr. Von Bargen's future income." \textit{Id.} at 732.
\textsuperscript{150} The plaintiff argued that the defendant was liable for the funds which her present husband had provided for college expenses. The court rejected this contention concluding:

[D]efendant can not be expected to pay in full for college expenses which were incurred with complete disregard for both his preferences and his ability to pay. Plaintiff should have reached some mutual agreement before embarking on such an expensive course of action. The father does not lose his parental right to choose a school for his son which is within his means, merely because he is separated from the mother and son.

\textit{Id.} at 733.
\textsuperscript{151} 51 Pa. D. & C.2d 29 (C.P. 1970).
\textsuperscript{152} \textit{Id.} at 30–31.
\textsuperscript{153} \textit{Id.} at 31.
\textsuperscript{154} The father's income was $11,700 per year, and the court determined that after the order it would be about $9500. \textit{Id.} at 33–34.
\textsuperscript{155} \textit{Id.} at 33.
\textsuperscript{157} It could be argued that this question and the one of Karen's ability were part and parcel of the same matter. Both focus on the child's qualifications and maturity in that she picked a school in Iowa of 300 students with an annual cost of $3900. \textit{Id.} at 747–48.
known and quite expensive. In the meantime, there are available to
Karen De Santis in this immediate area numerous opportunities to
achieve her desire for a college education at an amount which is
considerably less than what she is presently contemplating.\footnote{158}
The court found that the continued support would be an undue hardship\footnote{159} and that the daughter did not have the ability to do college-level work.\footnote{160} This case is apparently distinctive, since it did not require support based upon the decision of the college to be attended.\footnote{161}

Apparently then, a court is free to require support to attend a more
expensive school only when it is shown that some benefit is derived from
tuition there rather than at a state-supported school. While the father
may not require his child to attend a more inexpensive school, courts
generally urge that the father be given a voice in the decision and are
more sympathetic to his position when he has not been consulted. Finally,
the courts also consider the nature of the school,\footnote{162} its cost, and the father's
income in order to determine the appropriate support order.

5. Post-Graduate School

Assuming that under the appropriate circumstances a father may have
the duty to support his children in college, the question remains whether
the duty ends upon graduation from college or continues to include
graduate school. Only in \textit{Colantoni v. Colantoni}\footnote{163} has the superior court
been presented with such a question. Moreover, the decision in \textit{Colantoni}
hardly settles the issue because the facts therein raised several other
problems. In \textit{Colantoni}, a 24-year-old medical student, married and residing
in another state,\footnote{164} sought to enforce the previous lower court order
requiring the father to pay $5,000 for college expenses.\footnote{165} The superior
court in a 5-2 decision\footnote{166} decided that there was no duty on the part of
the father to continue to support his son, but the basis of the decision was primarily grounded in the fact that the "child" was really an emancipated adult, and therefore, absent special circumstances, the duty to support had terminated. Thus the case is not one involving purely the question of whether there is a duty to continue support into post-college education, although in practical effect it may be, since few if any college graduates are under 21, the common law age of emancipation. While the other factors involved here may not be present in other cases, namely marriage and residence out of state, at the very least the emancipated "child" would have to overcome the presumption that he is incapable of his own support to prove that the normal duties of the father should not end. As a practical matter, post-graduate support should, perhaps, be viewed in terms of a father's duty to support a "child" past majority, until such time as the court is actually faced with a prospective graduate student under 21.

6. Majority

It is a generally recognized doctrine that at 21 a child is emancipated, and at that time it is normally assumed support ends. However, judicial decisions have carved out an exception to this rule:

Ordinarily a parent is not required to support his adult child but there is a well recognized exception supported by abundant authority that

modification of the original decree." Id. at 53, 281 A.2d at 666. They contended that the only change since the original decree was the son's marriage, which was not in fact the basis of the father's appeal. The dissent concluded that "[t]he basic issue of whether a parent is obliged to support an adult son in . . . graduate school is a legal question which appellant waived by not filing a timely appeal from the 1968 support decree." Id.

167. The court, per Judge Watkins, framed the issue as follows:

Here we must determine not the support of a minor child in college, but the support of a married adult twenty-four (24) years of age, who has established his residence with his wife in West Virginia. In other words, we must determine not whether it is a good thing for a father who can afford to pay for the education of this adult son, but whether under the support law of Pennsylvania it is a legal obligation to support an adult emancipated son.

Id. at 48, 281 A.2d at 663.

168. In such a case, however, it could easily be argued that the policy underlying Sommerville is not as persuasive when applied to graduate school, since not as many people attend graduate school and the economic necessities of a graduate school degree are not as pervasive.

169. The term "majority" under the current law may not be for all purposes a constant term in light of the recent numerous changes in the law relating to the rights of eighteen year olds. See Act Nos. 121 to 152, Pa. Gen. Assembly, 1972 Sess.; Pa. Bar Ass'n, Legislative Bulletin, June 23, 1972. However, it is submitted that under the current Pennsylvania statute and case law the age of emancipation as twenty-one has not changed. This conclusion is especially supported by the fact that the statutory definition of "minor" still reads "an individual under the age of twenty-one years." Pa. STAT. tit. 46, § 701(65) (1969). Moreover, it would seem that the key concept in this determination may be the concept of emancipation, and presently the court decisions do not presume emancipation until age twenty-one. See text accompanying notes 170-71 infra. See also Gaydes v. Donahy, 301 Pa. 523, 152 A. 549 (1931). If such a conclusion proves unwarranted, the Washburn analysis (see note 78 supra) would become more persuasive in view of the overriding public policy considerations which fostered the latest change in the law regarding minor children and college support.

170. For a discussion of present law and arguments favoring post-majority support, see generally Washburn, supra note 78.
where such child is too feeble physically or mentally to support itself the duty on the parent continues after the child has attained its majority. . . . The presumption undoubtedly is that when the child comes of age, the reciprocal duties between father and child are at an end, but such presumption is overcome where conditions show that either party is incapable of self-support.171

The leading case applying a general duty to support is Commonwealth ex rel. Groff v. Groff,172 in which the court found that a 21-year-old girl was psychologically, and perhaps also physically, unable to retain employment, and therefore the court continued the father's duty to support by means of an appropriate order.178

The superior court has also held that "a father may be required to continue the support of a child who, though sound physically and mentally, is otherwise unemployable."174 However, two cases have upheld support orders for students who had received175 or presumably would receive176 support after reaching majority without mentioning this factor in any way.

In Colantoni v. Colantoni,177 the superior court not only mentioned the fact that the "child" was really an adult, but in part used this fact as a ground for denying support. The court adhered to the Commonwealth ex rel. O'Malley v. O'Malley standard178 and concluded that "'[t]he existence of the presumption of emancipation at age twenty-one places the burden of proof to rebut [sic] it on the adult who must show conditions make it impossible for self-employment.'"179 Where the "child" was a 24-year-old medical student, married and residing out of state, the Colantoni court felt no such burden was in fact carried.180

It could be argued that Colantoni does not settle the issue of post-majority support, for it involved graduate school support, and the earlier cases, which did not even consider the factor of majority in terms of college support, should be considered those that currently state the law. Such an argument may have some theoretical merit for, as has been noted, the policy considerations181 involved in terms of support for college, rather than graduate school, may be enough to distinguish Colantoni in the context of college support. Moreover, in terms of the hardship on the father

173. Id. at 538, 98 A.2d at 451.
176. Commonwealth ex rel. Larsen v. Larsen, 211 Pa. Super. 30, 234 A.2d 18 (1967), wherein the court intimated that support would continue although the child would be over 21 at the time of his graduation.
180. Id.
181. See notes 167-68 supra.
and the expectations of the child, such a result could also be justified, for the child who has begun college under a support order could reasonably have expected such an order to continue until graduation, since it might seem unfair from the child's perspective to require such support for three years and then deny it in the last. Similarly, since many students will graduate just around the time of their twenty-first birthday, the added support will not be an onerous burden on the father. Therefore, without doing fundamental harm to the concept of "child," an exception could properly be carved out for post-majority college support in Pennsylvania without any need for extension into post-graduate levels of education. Finally, of course, where the facts warranted it, the "child" could argue that he would be incapable of employment absent a college education, a ground which finds support in the case law. However, since the cases that allowed such support never mentioned the effect of majority, the law is by no means settled.

7. Marriage

In only one case, Commonwealth v. Barnhart,182 has a court been confronted with the problem of the effect of the marriage of a child on the duty of the father to continue college support.188 That court ruled that the support should end as of the date of the marriage since the act of marriage is an act of emancipation.184 "The rationale . . . is that since the parent is no longer entitled to the services and society of his child after the child's marriage, neither should the parent be obligated to furnish support."185 The analysis of this opinion was largely based on an earlier county case186 which had held that marriage ended all duty of support which a father may have under the law.187

As has been noted, the superior court in Colanton188 also considered the fact of marriage in denying continued support, but did not say that

183. The court in Barnhart acknowledged that "[n]o appellate cases in Pennsylvania have been found on this precise question." Id. at 191.
184. Id. at 192-93.
185. Id. at 191.
187. The court in Moore denied continued support to a 16-year-old boy who had recently married:

Since the law permits the marriage of minors above a certain age, parental rights must necessarily yield to the new obligations and rights arising from the marital relations. In recognition of the superiority of the new status, it is generally held that although marriage may not effect an emancipation of a minor child in the sense of removing its incapacity to contract, and the other disabilities of infancy, it does work a legal emancipation so far as parental rights and obligations are concerned. The married child, whether son or daughter, becomes a member of a new family, and the claims of the former family become subordinate. If a minor son is married, the duty of support which he owes to his wife and possible children takes precedence of his duty to labor for his father, and the father's rights cease. Contrariwise, the parent owes no duty of support to a married son and may lawfully decline to recognize his [the son's] wife or show any interest in her children.

Id. at 8-9.
the act of marriage, in and of itself, could be the determinative factor.\textsuperscript{188} Thus the only real case on point is \textit{Barnhart}, but in view of the reasoning therein and some of the language in \textit{Colantoni},\textsuperscript{190} it would seem the act of marriage, at the very least, would raise the presumption of emancipation,\textsuperscript{191} and like the rule as to majority, would place the burden on the party seeking support to establish the necessary requisites.\textsuperscript{192}

\textbf{B. Summary of the Rule}

Much of the substance of the rule set down in \textit{Somervell} has yet to be fleshed out in large measure. Most of the litigation on the superior court level has concerned the question of what constitutes undue hardship, a question which often must be determined on a case-by-case basis. Several of the other questions that have reached the superior court, such as the effect of reaching majority, the effect of marriage, and the effect of post-graduate study, have either gone largely unconsidered or have been combined with so many other factors that the decisions have not been tremendously instructive as to any one factor.

However, as a practical matter, the rule is only nine years old, and since many of the questions involved are questions of fact alone, the trial court level will be the major source of the law of support, with the superior court simply providing the broad outline. Also, in areas in which the superior court has not yet ruled, many of these county court decisions will be relied upon in other county courts, at least to the extent their reasoning is sound, until the superior court has an opportunity to consider the particular matter as a factor.

\textbf{VI. The "Duty" of a Non-Separated Father}

In 1959, President Judge Sheeley of Adams County,\textsuperscript{193} in defending the pre-\textit{Somervell} rule, wrote:

If a court could compel a father who is separated from his wife and children to maintain his children at college it could compel parents not separated from their children to do likewise. Thus, the courts

\textsuperscript{189} In \textit{Colantoni}, the court appeared more concerned with the son being over the age of majority and his seeking support for graduate school.

\textsuperscript{190} The \textit{Colantoni} dissenters had written "that there is no indication on the record that the son is now capable of providing his own education, that his wife's employment was sufficient to provide the necessary funds or that the wife was an increased financial burden on the son, with the father now being forced to support her as well." \textit{Id.} at 53 n.1, 281 A.2d at 666 n.1. Two judges apparently considered that marriage, in and of itself, is of no import and that there must be an accompanying change in circumstance to warrant a modification of the order. However, since the dissent never specifically reached the merits, any conclusion as to this matter should be left open until a more appropriate case.


\textsuperscript{192} See text accompanying note 179 supra.

and not the parents would determine who should and who should not have a college education and the type of education to be afforded. We have not yet arrived at this state of paternalism.\textsuperscript{104}

Since this opinion was rendered, the rule as to separated fathers has changed. However, as yet no court has been faced with the question of whether the same duty may be imposed upon the father who is living with his family. Assuming a court was presented with the situation in which a child, clearly able and willing to enter and be successful in college, and a defendant father, clearly able to support the child in college without undue hardship, would that court, under the current law, be justified in imposing an order for support upon the father? While a certain symmetry would seem to require such a result, so that children from unbroken homes are not, in effect, products of reverse discrimination under the law, it is submitted that no such conclusion is in fact warranted. Rather, it would seem that abiding by both the spirit and intent of the support law such a request should be denied.

As a general matter, the courts of the Commonwealth have adopted a decidedly hands-off attitude, largely on policy grounds, with regard to family disputes when the families are not actually separated. For example, in a suit by a wife living with her husband for an allowance apart from food, shelter, clothing, and medical attention, the Supreme Court of Pennsylvania denied the request essentially on policy grounds:

The arm of the court is not empowered to reach into the home and to determine the manner in which the earnings of a husband shall be expended where he has neither deserted his wife without cause nor neglected to support her and their children. In the absence of evidence legally sufficient to support a finding of either essentials the court is without power to enter an order upon the husband directing the payment to the wife of any amount. The statute was never intended to constitute a court a sounding board for domestic financial disagreements, nor a board of arbitration to determine the extent to which a husband is required to recognize the budget suggested by the wife or her demands for control over the purse strings.\textsuperscript{105}

As otherwise stated, the rule essentially is that “[t]he law does not contemplate that the courts should attempt to solve the financial difficulties of a husband and wife who are living together.”\textsuperscript{106} This strong policy within the state favoring the resolution of family matters within the family setting has one exception — where the father refuses to supply his family with food, clothing, shelter, medical attention, or other necessities of life. In such a case the father may not defend on the grounds that he is living

\textsuperscript{104} Id. at 92.

\textsuperscript{105} Commonwealth v. George, 358 Pa. 118, 123, 56 A.2d 228, 231 (1948).

with his family, and the court will, in this situation, make an appropriate order.

It would seem that unless college education would fall within a "necessity," the exception would not apply, and by virtue of the general policy, the court would choose not to interfere in the dispute. In Commonwealth ex rel. Turner v. Turner, the court viewed the exception as applying only to food, clothing, and medical needs. In Sommerville, the court made a point of distinguishing between the duty to provide such necessities and the duty to provide a college education:

The duty of a parent to provide a college education for a child is not as exacting a requirement as the duty to provide food, clothing and shelter for a child of tender years unable to support himself. It is a natural law that a parent should spare no personal sacrifice to feed and protect his offspring. Therefore, beyond the barest necessities, a father should be required to sacrifice personal comfort in order to provide the necessities of a child too young to support himself. The same exacting requirement should not be demanded of a father to provide a college education for a child able to support himself.

The court seems to have decided that the duty to provide support for a college education does not rise to the same level as the duty to provide a child with the necessities of life, and therefore, inescapably, a college education is not a necessity in the legal sense. Clearly then, if not a necessity, such a claim would not arise under the exception established in Turner, and presumably the general policy of noninterference in the decisions of a non-separated family would be applied.

There may be two types of circumstances, however, when the exception would operate. In the case of a physically disabled child, a court could conclude that, absent a college education or some sort of further training, the child is not and could not be self-supporting, thereby making the duty of support during college rise to the level of a necessity. Secondly, it is submitted that under the general rules of support law, in cases involving

198. Id.
199. Id. at 503, 161 A.2d at 923. The father in Turner was paying the rent, which is normally considered the other necessity.
201. Judge Hoffman has consistently taken the position that a college education should be considered a necessity. However, he has been largely alone in this position. See Commonwealth ex rel. Brown v. Weidner, 208 Pa. Super. 114, 220 A.2d 382 (1966) (Hoffman, J., dissenting).
202. The Sommerville distinction of the duty of college support from the duty to provide necessities, in terms of "a child able to support himself," could be read as support for this position. 200 Pa. Super. at 644, 190 A.2d at 184 (dicta). Moreover, as a practical matter, since the court could continue to require support for a child unable to support himself, Commonwealth ex rel. Groff v. Groff, 173 Pa. Super. 535, 98 A.2d 449 (1953), the specifics of the support order, whether it be for college or general support, may not be that important. In fact, if college support offers a potential cessation of future payments, the father may prefer that the support be used for college purposes.
wealthy parents with a tradition and background of higher education, a child could enforce the duty to support him at college. It has long been a rule of domestic relations that the separated husband owes a duty to support his wife and children in general conformity with their means and stations in life. Thus courts have upheld payment for domestic servants or expensive clothes as within the duty of support when such would be considered necessities of families within that social station. The same reasoning might be extended to very wealthy parents living together where a college education was accepted as a necessity within that social station, but presumably, such an inference would not readily be drawn absent extraordinary proof.

Aside from these peculiar possible exceptions, it would seem that the general rule of noninterference would be viewed as applicable, resulting in the anomalous situation of the child from a separated home being in a better position than the child from a non-separated home. However, that attitude ignores the practical realities of the situation. Once separated, the husband may naturally feel less responsible for his children, and the payments he is required by law to make may seem to him to be a burden, especially if he has remarried, or if he rarely sees his children. Because of these reasons, many fathers strenuously resist the continued support for college education. Theoretically, and as a practical matter, the Commonwealth becomes involved as an interested party, seeking to arrive at a proper measure of support. Decisions that normally would be left to the family, such as proper allocation of resources and necessary expenses, become a matter of state and judicial concern. The rule in Sommerville can be viewed, therefore, as an attempt by the court to impose a "duty" on the father that he probably would have assumed had he continued to occupy the traditional role of the father in the family. However, when he actually is in that role, the court can logically conclude that one of the interested parties has decided how best to proceed in view of all of the interests to be considered. To allow the court to "second guess" that judgment at the request of another party would be both unwise and unwarranted in view of the policy considerations involved.

Moreover, the judiciary may fear that initial intrusions into family decisions would inspire a flood of litigation and would make judges the first appeal of any family decision. Such a result would produce the "state of paternalism" feared by some jurists.

204. Id.
206. An Oregon court has justified such a result by saying that "a child of divorced parents is in greater need of the help that a college education can give than one living in a home where marital harmony abides." Jackman v. Short, 165 Ore. 626, 656, 109 P.2d 860, 872 (1941).
207. See, e.g., Commonwealth ex rel. Larsen v. Larsen, 211 Pa. Super. 30, 35, 334 A.2d 18, 20 (1967), wherein the father had "been separated from his former wife since one month before James' birth in 1947, and [had] had almost no contact with his son since that time."
VII. Conclusion

The cases which have considered the duty of a separated father to support his children in college, although emanating from all levels of the judiciary of the Commonwealth, have been limited in number and far from definitive. Many of the areas within this duty of support continue to be relatively "virgin" in terms of case law above the trial court level, and obviously the law in these areas is far from settled. Nonetheless, the decisions which have been rendered offer some guidance and, from their very paucity, indicate the subject has not been foreclosed.

It is pertinent to note that this area of the law is in a state of movement. It is submitted that the courts have attempted to conceptualize those circumstances under which the non-separated father would have normally assumed the additional burden of college support and have thereby sought to impose the identical duty upon separated fathers. Therefore, much of the future movement in this law will be a continued attempt to standardize these considerations as to children from separated families and those from intact families.

Concerning the child from a non-separated family who seeks to impose a similar duty upon his father as the courts have imposed on the father in a separated family, and in view of the different policy considerations and the court's reluctance to enter into family financial questions, it is posited that the similar burden would not be imposed upon a father living with his family. Such a responsibility would be assessed only if the court could conclude that a college education is to be considered a legal necessity in the same way as food, shelter, clothing, and medical care have been considered legal necessities. Thus far, the superior court has clearly distinguished the one from the other and, in the absence of a change of viewpoint, it is concluded that policy considerations would prevent the court from imposing a similar duty upon a non-separated father.

Paul R. Beckert, Jr.