No. 123667

IN THE SUPREME COURT OF ILLINOIS

CHARLES D. YAKICH,	)	**Appeal from the Circuit Court of**
Petitioner/Appellee,	)	**DuPage County, Illinois**
	)	**Eighteenth Judicial Circuit**
	)	
and	)	**No. 2015 F 651**
	)	
ROSEMARY A. AULDS,	)	**Honorable Thomas A. Else,**
	)	**Judge Presiding**
Respondent/Appellant.	)	

BRIEF *AMICUS CURIAE* OF THE ILLINOIS CHAPTER OF THE AMERICAN ACADEMY OF MATRIMONIAL LAWYERS

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TABLE OF CONTENTS

Page

POINTS AND AUTHORITIES

POINTS AND AUTHORITIES
(Continued)

Page

INTEREST OF THE *AMICUS*

Amicus curiae The Illinois Chapter of the American Academy of Matrimonial Lawyers (the "Academy") is a national, not-for-profit organization comprised of lawyers who spend a substantial percentage of their time practicing matrimonial law, and who meet certain qualifications. There are more than 1,600 Fellows in 50 states. As representatives of a portion of the legal profession, the Academy takes an active interest in matters affecting the practice of family law in Illinois. The Academy's purpose is to preserve the best interest of the family and of society, and to improve the practice, elevate the standards and advance the cause of matrimonial law. Local and national electronic and print media often contact Academy Fellows for their opinions on breaking family law issues. In recent years, the Academy has appeared as *amicus curiae* in important cases in this Court and the Appellate Court, including: In re Marriage of Best, 228 Ill. 2d 107 (2008) where this Court clarified the procedures for declaratory judgment actions involving prenuptial agreements in dissolution of marriage cases; In re Marriage of O'Brien, 2011 IL 109039, where this Court clarified the standards for obtaining a substitution of judge; Johnston v. Weil, 241 Ill. 2d 169 (2011), where this Court confronted issues regarding mental health evaluations in child custody cases; In re Marriage of Eckersall, 2015 IL 117922, a case before this Court dealing with the appealability of interim child custody orders; In re Marriage of Altman, 2016 IL App (1st) 143076, where the First District Appellate Court held that earned fees cannot be disgorged in pre-judgment dissolution of marriage cases; In re Marriage of Goesel, 2017 IL 122046, where this Court affirmed the Altman holding; and In re Marriage of Kane, 2018 IL App (2d) 180195, a case before the Second District

Appellate Court involving the legal status of a matrimonial litigant's former attorney in an attorney fee dispute. The Academy authorized the filing of this brief.

INTRODUCTION AND RELEVANT PROCEDURAL BACKGROUND

At issue in this Rule 302(a) direct appeal is an issue this Court already decided 40 years ago—whether 750 ILCS 5/513 ("Section 513") violates the Equal Protection Clause by potentially obligating divorced and unmarried parents to pay their children's college educational expenses. This Court found Section 513 did not violate the Equal Protection Clause in Kujawinski v. Kujawinski, 71 Ill. 2d 563 (1978). In this case, the circuit court of DuPage County took it upon itself to determine that Kujawinski is outdated and no longer good law in its declaration that Section 513 violates the Equal Protection Clause. In this way, this case presents to this Court much like Blumenthal v. Brewer, 2016 IL 118781, where the First District Illinois Appellate Court took it upon itself to declare this Court's decision in Hewitt v. Hewitt, 77 Ill. 2d 49 (1979) as authority it no longer had to follow. This Court could not have been clearer in reminding the inferior courts of this state that, "Under the doctrine of *stare decisis*, when this Court has declared the law on any point, *it alone can overrule and modify its previous opinion*, and the lower judicial tribunals are bound by such decision and it is the duty of such lower tribunals to follow such decision in similar cases." Blumenthal, 2016 IL 118781, ¶ 61. (emphasis in original)

In any event, the Academy enters this case in support of the constitutionality of Section 513 because the law bears a rational relationship to a very legitimate state interest—having college educated citizens and attempting to alleviate the potential disadvantages placed upon children of divorced and unmarried parents. The Academy believes the education of this State's children is not only a legitimate state interest, but also

one of the utmost importance. It should be protected by this Court in reaffirming the Kujawinski decision.

This case has an odd procedural history. The parties were never married and entered into a joint parenting agreement. (C111-C117) When their child became college-age, the appellant filed a Section 513 petition on August 6, 2015. (C89-C91) On February 4, 2016, appellee filed his response, not raising the constitutionality of Section 513 as a defense. (C197-C200) After an evidentiary hearing, on July 22, 2016, the circuit court ordered that appellant and appellee each pay 40% of the child's expenses, while obligating the child to pay the remaining 20%. (C238-C239) On August 5, 2016, the appellee filed an unrelated petition for rule to show cause regarding health insurance. (C242-C245) It was not until September 23, 2016, that appellee took the position that Section 513 was unconstitutional. (C327-C329) After various procedural machinations, he filed his operative request to declare the statute unconstitutional on August 1, 2017. (C478-C482) In response, appellant asserted that principles of *res judicata* and forfeiture (i.e. whether appellee's motion was, in effect, an untimely motion to reconsider pursuant to 735 ILCS 5/2-1203) should bar the constitutional claim to go forward, given appellee's undisputed failure to raise the issue at the time of the Section 513 hearing in July 2016. (C537-C541) A hearing was eventually held, where no evidence was taken and only the arguments of counsel considered. (R82-R130) Appellee's counsel argued orally that Section 513 was both unconstitutional facially and as applied. (R143-R144; R166) However, the motion argued "this court should declare Section 513 unconstitutional on its face for unfairly classifying similarly-situated individuals in violation of the Equal Protection Clause." (C528).

In its May 4, 2018 order declaring Section 513 unconstitutional, the circuit court recounted the evidence from July 2016 hearing where it was revealed that the parties' child was interested in studying marine biology, but mistakenly chose a college (Florida Gulf Coast University, which the circuit court took time to characterize as a "party school") that did not offer a degree in that program. (C562) When the appellee learned this, he offered to pay 100% of the child's tuition at a different school that did offer a marine biology program. (C562-C563) That offer was refused. (C563) After taking all of that evidence into consideration, the circuit court entered its college contribution order. (C238-C239)

The circuit court's constitutional conclusions derive from two findings: (1) that "the rational basis standard utilized in Kujawinski presumes that never married or divorced couples are less normal, and less likely to provide post-secondary education for their offspring than couples who are married, or single parents. While this may have been true in 1978, there is no basis for such a conclusion today." (C565); and (2) that "Section 513 does not permit divorced or never married parents the same input and ability to educate their children as is afforded to married or parents. The court finds that there is no rational basis for this difference." (C567)

ARGUMENT

I. Nonconstitutional grounds to decide this case.

The Academy acknowledges that it is "the mandate of this Court that constitutional issues be considered only when the case may not be decided on nonconstitutional grounds." Mulay v. Mulay, 225 Ill. 2d 601, 611 (2007). However, the Academy takes no position on whether the appellee's failure to raise the constitutionality of Section 513 as defense at this family's college contribution hearing in July 2016 acts as *res judicata* bar, or constitutes

forfeiture of his right to pursue what is effectively a collateral attack on his obligation to pay 40% of his daughter's college educational expenses.

II. Section 513 does not violate the Equal Protection Clause.

Familiar principles govern constitutional challenges to statutes. All laws carry a strong presumption of constitutionality and the party challenging same bears a burden of rebutting that presumption. Whether a statute is wise is a different question from whether a statute is constitutional. In re Marriage of Beyer and Parkis, 324 Ill. App. 3d 305, 753 (2001). In construing a statute, the court's goal is to effectuate the legislature's intent. "To this end, a court may consider the reason and necessity for the statute and the evils it was intended to remedy, and will assume the legislature did not intend an absurd or unjust result." Id. at 310.

In 1978, this Court decided Kujawinski v. Kujawinski, 71 Ill. 2d 563 (1978), holding that Section 513 did not deny equal protection to divorced parents vis-à-vis non-divorced parents. The "well-established" constitutional test this Court applied was whether any differentiations between similarly situated people that the legislature made by way of Section 513 "bears a reasonable relationship to a legitimate legislative purpose." Id. at 579. This Court found that, "a divorce, by its nature, has a major economic and personal impact on the lives of those involved." Id. at 809. It was noted that one of the express purposes of the Illinois Marriage and Dissolution of Marriage Act is to mitigate potential harm to spouses and their children caused by divorce. Id. at 580. This Court held that Section 513 was reasonably related to the legitimate legislative purpose to minimize any economic and educational disadvantages to children of divorced parents. This Court recognized that, "Unfortunately, it is not the isolated exception that noncustodial divorced parents, because

of such additional expenses or because of a loss of concern for children who are no longer in their immediate care and custody, or out of animosity directed at the custodial spouse, cannot be relied upon to voluntarily support the children of the earlier marriage to the extent they would have had they not divorced." Id**.** at 580. Accordingly, Section 513 did not violate the Equal Protection Clause under rational basis review. Id. at 582.

Courts are obligated to affirm the validity of statutes if possible and to construe statutes so as to avoid doubts as to their validity. Kaufman, Litwin and Feinstein v. Edgar, 301 Ill. App. 3d 826, 830 (1998). The Equal Protection Clause only prohibits the government from drawing distinctions between different categories of people on the basis of criteria that is wholly unrelated to the legislation's purpose. In re Destiny P., 2017 IL 120796, ¶ 14. Appellee conceded that the applicable test as to his constitutional claims is the rational basis test, the same test applied in Kujawinski. (C521)

In this case, the circuit court concluded that, "the social changes that have occurred since 1978 make the rational basis cited in Kujawinski no longer tenable. Further, there is no apparent rationale [sic] basis for the statute other than that cited in Kujawinski." (C566) The court found Section 513 unconstitutional *as applied* but then further stated, "This Court further finds that Section 513 cannot reasonably be construed in a manner that would preserve its validity in this case." (C568) The latter suggests a finding of facial unconstitutionality, which bears an even higher burden. Napleton v. Village of Hinsdale, 229 Ill. 2d 296, 306 (2008) (the fact that the enactment could be found unconstitutional under some set of circumstances does not establish its facial invalidity). "A statute is facially invalid only if no set of circumstances exists under which the statute would be valid." Oswald v. Hamer, 2018 IL 122203, ¶ 40.

Whatever the circuit court was doing, its conclusions are wrong. Kujawinski did not "presume" that divorced or unmarried parents are "less normal" and therefore "less likely to provide post-secondary education" for their children. (C565) The circuit court here frames the constitutional question in this case as since married parents might not send their children to college, and divorced or remarried parents might refuse to do so, imposing Section 513 liability is an equal protection violation. The Academy believes that is not the question here. Under the rational basis test, the question is does those facts somehow diminish the state's interest in having college-educated citizens and to protect the potential harm to families brought about by dissolution and parentage cases. Kujawinski, 71 Ill.2d at 580. The Academy believes the answer to that question was an emphatic "No" in 1978 and remains an emphatic "No" in 2018.

The circuit court also found that Section 513 does not permit divorced and unmarried parents to have the "same input and ability to educate their children as is afforded to married or parents." (C567) In this regard, the court seemed to accept appellee's speculation that, had he been married to the appellant and living as a family unit, his desire for his child to attend the school he wanted her to attend (and which he would pay for) "would have the full force of his economic largesse" and, if his child wanted to attend a different school, "she would do so on her own." (C567) The flaw in this thinking is that Section 513 permits all sides to have "input" into these decisions—the statute says expenses may be ordered "as equity may require" and is a discretionary decision by the circuit court, not a mandatory obligation. In other words, appellee's issues with his daughter's life choices are heard by the judge in making the decision about Section 513 liability, by the express terms of the statute. In fact, all of the appellee's objections to his

daughter's school plans were considered at the July 2016 hearing, and the court still obligated him to pay 40%. (C562-C563)

In the circuit court's order, it relied on case law from other jurisdictions.[1] The court cited Pennsylvania law, noting that in 1995 its Supreme Court directly addressed the constitutionality of their college expense statute in Curtis v. Kline, 666 A.2d 265 (Pa. 1995), invalidating it on equal protection grounds. (C 566)[2] During oral argument in the circuit court on the appellee's motion, the Court stated, "One other thing I would point out to you is that, you know, I understand your argument; however, Illinois is one of the very few states left that has this particular statute [Section 513], and all other states that I've been able to find where a constitutional challenge was made to similar statutes, the courts in those states found that the statute was unconstitutional." (R 158)

Out of state cases are not binding when there is direct precedent in this state. Bank of America v. WS Management, Inc., 2015 IL App (1st) 132551, ¶ 121. Even if it were, the circuit court ignored decisions from other states on this issue that reached the opposite result of the Pennsylvania Supreme Court in Curtis. These include decisions from the following states:

• **South Carolina**. In 2012 the Supreme Court of South Carolina decided McLeod v. Starnes, 723 S.E.2d 198 (S.C. 2012). It was there noted that the Court had previously held the statute unconstitutional in Webb v. Sowell, 692 S.E.2d 543. The Supreme Court of South Carolina held that Webb reversed the burden imposed on parties operating under

[1] For this Court's convenience, copies of all out of state cases referenced in this brief are included in the appendix.

[2] There was a strong dissent filed in Curtis, which stated, "it cannot successfully be argued that the state has no legitimate interest in furthering the education of its citizens." 666 A.2d at 273 (Montemuro, J., dissenting).

rational basis review for equal protection challenges, and so it should be overruled. It was explained, "While it is certainly true that not all married couples send their children to college, that does not detract from the State's interest in having college-educated citizens and attempting to alleviate the potential disadvantages placed upon children of divorced parents. Although the decision to send a child to college may be a personal one, it is not one we wish to foreclose to a child simply because his parents are divorced. It is of no moment that not every married parent sends his children to college or that not every divorced parent refuses to do so. The tenants of rational basis review under equal protection do not require such exacting precision in the decision to create a classification and its effect." 723 S.E.2d at 204-205. Kujawinski was cited. Id. at 205.

• **Iowa**. In In re Marriage of Vrban, 293 N.W.2d 198 (Ia. 1980), the Supreme Court of Iowa observed the increasing importance which society places on education. "The state has recognized this trend and has responded by maintaining three state universities (as well as other educational programs) at public expense. . . . clearly higher education is a matter of legitimate state interest." Id**.** at 202.

• **New Hampshire**. In LeClair v. LeClair, 624 A.2d 1350, 1357, *superseded by statute on other grounds* (N.H. 1993), the New Hampshire Supreme Court, citing the Iowa decision in Vrban, held that the legislature of that state recognized the increasing importance of college education for its citizens. Id. at 1357. The Court also observed that the judicial protection of children of divorced families was warranted despite judicial involvement not being necessary in intact families. Id. The Court noted that unique problems exist in a home that is split by divorce. Id. In addition, a trial court's power to

provide for college expenses is not mandatory but the court is awarded discretion to award college expenses for adult children. Id.

• **Washington**. In Childers v. Childers, 575 P.2d 201 (Wash. 1978), the Supreme Court of Washington stated, "That it is the public policy of the state that a college education should be had, if possible, by all its citizens, is made manifest by the fact that the state of Washington maintains so many institutions of higher learning at public expense. It cannot be doubted that the minor who is unable to secure a college education is generally handicapped in pursuing most of the trades or professions of life, for most of those with whom he is required to compete will be possessed of that greater skill and ability which comes from such an education." Id. at 206.

• **Oregon**. In In re Marriage of McGinley, 19 P.3d 954, review denied, 27 P.3d 1045 (Or. App. 2001), the Court of Appeals of Oregon identified the interest served by the statute as the state's interest in having a well-educated populace. "Indeed, the economic disadvantages suffered by children of divorced parents are well documented. Charles F. Willison, But Daddy, Why Can't I Go to College? The Frightening De-Kline of Support for Children's Post-Secondary Education, 37 B.C. L. Rev. at 1115-1120 (1996). ORS 107.108 reflects the legislature's effort to ameliorate that disadvantage, and nothing in the Pennsylvania Supreme Court's decision in Kline convinces us that that effort is irrational." Id. at 961.

The Illinois legislature, aware of what has taken place since Kujawinski, substantially revised Section 513 in 2015, 2016, and 2017 (P.A. 99-143 eff. July 27, 2015; P.A. 99-90 eff. January 1, 2016; P.A. 99-642 eff. July 2016; P.A. 99-763 eff. January 1, 2017). The legislature kept intact the ability of a court, *in its discretion and as equity*

requires, to obligate a parent to contribute to college expenses. In re Marriage of Treacy, 204 Ill. App. 3d 282, 290 (1990). Section 513 does not mandate the imposition of educational expenses in every case. But the public policy of the Illinois Marriage and Dissolution of Marriage Act remains the same; to protect families from the harm brought about by dissolution of marriage. 750 ILCS 5/102 (4). This Court in Blumenthal recognized the many legislative amendments to various family law statutes over the last several decades, and held that this evidenced that the legislature will readily alter family-related statutes where it believes public policy requires it. Blumenthal, 2016 IL 118781 at ¶¶ 75-76. Such changes are within the province of the legislature. Id.

Married parents and unmarried or divorcing parents have a key distinction; the latter are applying to the courts of this state for relief both with respect to their own rights and their children. Appellee wishes the state to intervene where it is convenient for him but not to go far enough to protect his children. Unmarried parents who choose to use the courts for redress are treated exactly the same as divorcing parents, since Section 513 applies to parentage cases in Rawles v. Hartman, 172 Ill. App. 3d 931, 934 (1988). This Court can also note the obvious—that college is much more expensive now than it was at the time Kujawinski was decided, a consideration the legislature recently accounted for by imposing caps to Section 513 liability by looking to the costs of an education at the University of Illinois. 750 ILCS 513(d)(1)-(2).

There is no evidence supporting the circuit court's position. In fact, no evidence was offered to the court at all, there was only a legal, oral argument. The court effectively reached its sociological conclusions all on its own, sans any expert testimony. If circuit courts do not have the power to impose college obligations upon divorced or unmarried

parents in Illinois, many more such children may not be afforded the right of a college education. Section 513 was constitutional in 1978, and remains constitutional today. The circuit court should be reversed.

PRAYER

WHEREFORE, *Amicus* prays that this Honorable Court reverse or vacate the May 4, 2018 order and declare that 750 ILCS 5/513 is constitutional, and for such other, further and different relief as this Court in its equity deems just and proper.

Respectfully submitted,

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CERTIFICATION OF BRIEF

I certify that this *amicus brief* conforms to the requirements of Supreme Court Rules 341(a) and (b). The length of this *amicus brief*, excluding the cover page, table of contents, points and authorities, appendix, and this certification, is 12 pages.

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APPENDIX

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TABLE OF CONTENTS TO APPENDIX

Page

Curtis v. Kline, 542 Pa. 249 (1995)
666 A.2d 265

KeyCite Yellow Flag - Negative Treatment
Declined to Follow by In re Marriage of McGinley, Or.App., February 28, 2001

542 Pa. 249
Supreme Court of Pennsylvania.

Bonita Kline CURTIS
v.
Philip H. KLINE.
Appeal of COMMONWEALTH of Pennsylvania, DEPARTMENT OF PUBLIC WELFARE.

Argued Sept. 21, 1995.
Decided Oct. 10, 1995.

Synopsis

Former husband petitioned to terminate his support obligation to his adult children on the ground that statute requiring separated, divorced, or unmarried parents to provide postsecondary education support to their adult children was unconstitutional. The Court of Common Pleas, Chester County, Domestic Relations Section, No. 1012 N. 1984, James P. MacElree, II, J., granted petition. Department of Public Welfare intervened and appealed. The Supreme Court, No. 6 Eastern Dist. Appeal Docket 1994, Zappala, J., held that statute requiring separated, divorced, or unmarried parents to provide postsecondary education support to their adult children violated the equal protection clause of the Fourteenth Amendment.

Affirmed.

Montemuro, J., dissented and filed an opinion in which Cappy, J., joined.

West Headnotes (16)

[1] **Constitutional Law**
Similarly situated persons;like circumstances

Essence of constitutional principle of equal protection under the law is that like persons in like circumstances will be treated similarly. U.S.C.A. Const.Amend. 14.

18 Cases that cite this headnote

[2] **Constitutional Law**
Perfect, exact, or complete equality or uniformity

Equal protection clause of the Fourteenth Amendment does not require that all persons under all circumstances enjoy identical protection under the law. U.S.C.A. Const.Amend. 14.

5 Cases that cite this headnote

[3] **Constitutional Law**
Discrimination and Classification

Constitutional Law
Similarly situated persons;like circumstances

Right to equal protection under the law does not absolutely prohibit the Commonwealth from classifying individuals for the purpose of receiving different treatment and does not require equal treatment of people having different needs. U.S.C.A. Const.Amend. 14.

32 Cases that cite this headnote

[4] **Constitutional Law**
Statutes and other written regulations and rules

Equal protection prohibition against treating people differently under the law does not preclude the Commonwealth from resorting to legislative classifications, provided that those classifications are reasonable rather than arbitrary and bear a reasonable relationship to the object of the legislation. U.S.C.A. Const.Amend. 14.

21 Cases that cite this headnote

[5] **Constitutional Law**

Statutes and other written regulations and rules

To satisfy the equal protection clause of the Fourteenth Amendment, a legislative classification must rest upon some ground of difference which justifies the classification and has a fair and substantial relationship to the object of the legislation. U.S.C.A. Const.Amend. 14.

13 Cases that cite this headnote

[6] **Constitutional Law**

Statutes and other written regulations and rules

Judicial review of whether legislative classification violates equal protection clause must determine whether any classification is founded on a real and genuine distinction rather than an artificial one. U.S.C.A. Const.Amend. 14.

1 Cases that cite this headnote

[7] **Constitutional Law**

Statutes and other written regulations and rules

A legislative classification, though discriminatory, is not arbitrary or in violation of the equal protection clause if any state of facts reasonably can be conceived to sustain that classification. U.S.C.A. Const.Amend. 14.

4 Cases that cite this headnote

[8] **Constitutional Law**

Statutes and other written regulations and rules

In reviewing a legislative classification to determine whether it violates the equal protection clause, reviewing court is free to hypothesize reasons the legislature might have had for the classification. U.S.C.A. Const.Amend. 14.

4 Cases that cite this headnote

[9] **Constitutional Law**

Statutes and other written regulations and rules

If a court determines that a legislative classification is genuine, it cannot declare classification void as violating the equal protection clause even if it might question the soundness or wisdom of the distinction. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[10] **Constitutional Law**

Discrimination and Classification

Classifications subject to review under principles of equal protection are classifications which implicate a suspect class or a fundamental right, classifications implicating an important though not fundamental right or a sensitive classification, and classifications which involve none of these. U.S.C.A. Const.Amend. 14.

9 Cases that cite this headnote

[11] **Constitutional Law**

Strict scrutiny and compelling interest in general

Under the equal protection clause, if a statutory classification in question falls into a category which implicates a suspect class or a fundamental right, the statute is strictly construed in light of a compelling governmental purpose. U.S.C.A. Const.Amend. 14.

5 Cases that cite this headnote

[12] **Constitutional Law**

Heightened Levels of Scrutiny

Under the equal protection clause, if a statutory classification implicates an

important though not fundamental right or a sensitive classification, a heightened standard of scrutiny is applied to an important governmental purpose. U.S.C.A. Const.Amend. 14.

5 Cases that cite this headnote

[13] **Constitutional Law**
Statutes and other written regulations and rules

Under the equal protection clause, if a statutory classification scheme does not implicate a suspect class or a fundamental right, nor implicate an important right or a sensitive classification, the classification is upheld if there is any rational basis for it. U.S.C.A. Const.Amend. 14.

15 Cases that cite this headnote

[14] **Constitutional Law**
Families and children

Statute requiring separated, divorced, or unmarried parents to provide postsecondary education support to adult child did not implicate a suspect class nor infringe upon a fundamental right, nor an important though not fundamental right, and, thus, would be upheld if there existed any rational basis for the classification. U.S.C.A. Const.Amend. 14; 23 Pa.C.S.A. § 4327(a).

24 Cases that cite this headnote

[15] **Constitutional Law**
Statutes and other written regulations and rules

Under rational basis test for upholding a statutory classification under the equal protection clause, court must first determine whether challenged statute seeks to promote any legitimate state interest or public value, and, if so, court must next determine whether classification adopted in the legislation is reasonably related to accomplishing that articulated state interest or interests. U.S.C.A. Const.Amend. 14.

18 Cases that cite this headnote

[16] **Child Support**
Validity

Child Support
Post-secondary education

Constitutional Law
Families and children

Statute requiring separated, divorced, or unmarried parent, but not married parents, to provide postsecondary education support to their adult children violated equal protection clause of the Fourteenth Amendment; absent an entitlement to postsecondary education, or generally applicable requirement that parents assist their adult children in obtaining education, state had no rational basis to compel parents from nonintact families, but not intact families, to provide for postsecondary educational support for their children. U.S.C.A. Const.Amend. 14; 23 Pa.C.S.A. § 4327(a).

23 Cases that cite this headnote

West Codenotes

Held Unconstitutional
23 Pa.C.S.A. § 4327(a)

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Before NIX, C.J., and FLAHERTY, ZAPPALA, CAPPY, CASTILLE and MONTEMURO, JJ.

OPINION

ZAPPALA, Justice.

In *Blue v. Blue,* 532 Pa. 521, 616 A.2d 628 (1992), we declined to recognize a duty requiring a parent to provide college educational support because no such legal duty had been imposed by the General Assembly or developed by our case law. As a result of our *Blue* decision, the legislature promulgated Act 62 of 1993. Section 3 of the Act states:

> **(a) General rule.**— ... a court may order either or both parents who are separated, divorced, unmarried or otherwise subject to an existing support obligation to provide equitably for educational costs of their child whether an application for this support is made before or after the child has reached 18 years of age.

23 Pa.C.S. § 4327(a).

The issue now before us is whether the Act violates the equal protection clause of the Fourteenth Amendment of the ***254** United States Constitution.[1] The Court of Common Pleas of Chester County held that it did, resulting in this direct appeal.[2]

The relevant facts are not in dispute. Appellee is the father of Jason, Amber and Rebecca. On July 12, 1991, an order of court for support was entered on behalf of Appellee's children. On March 2, 1993, Appellee filed a petition to terminate his support obligation as to Amber, a student at Kutztown University, and Jason, a student at West Chester University. After Act 62 was promulgated, Appellee was granted leave to include a constitutional challenge to the Act as a basis for seeking relief from post-secondary educational support.

In accordance with Pa.R.Civ.P. 235, the Attorney General was notified of the constitutional challenge to Act 62, but declined to participate in the litigation. On January 11, 1994, the trial court granted Appellee's petition to terminate support for Amber and Jason, concluding that Act 62 violated the equal protection clause of the Fourteenth Amendment of the United States Constitution. After Appellee's petition to modify his post-secondary education support obligation was disposed of, the Department of Public Welfare (DPW) sought and was granted leave to intervene. DPW then filed a notice of appeal to this Court.

The equal protection clause of the Fourteenth Amendment of the United States Constitution in pertinent part provides:

> No State shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

[1] [2] [3] [4] [5] The essence of the constitutional principle of equal protection under the law is that like persons in like circumstances will be treated similarly. *Laudenberger v. Port Authority of Allegheny County,* 496 Pa. 52, 436 A.2d 147 (1981). ***255** However, it does not require that all persons under all circumstances enjoy identical protection under the law. *James v. SEPTA,* 505 Pa. 137, 477 A.2d 1302 (1984). The right to equal protection under the law does not absolutely prohibit the Commonwealth from classifying individuals for the purpose of receiving different treatment, *Robson v. Penn Hills School District,* 63 Pa.Cmwlth. 250, 437 A.2d 1273 (1981), and does not require equal treatment of people having different needs. *Houtz v. Commonwealth, Department of Public Welfare,* ****268** 42 Pa.Cmwlth. 406, 401 A.2d 388 (1979). The prohibition against treating people differently under the law does not preclude the Commonwealth from resorting to legislative classifications, *Heisler v. Thomas Colliery Co.,* 260 U.S. 245, 43 S.Ct. 83, 67 L.Ed. 237 (1922), provided that those classifications are reasonable rather than arbitrary and bear a reasonable relationship to the object of the legislation. *Commonwealth v. Parker White Metal Co.,* 512 Pa. 74, 515 A.2d 1358 (1986). In other words, a classification must rest upon some ground of difference

which justifies the classification and has a fair and substantial relationship to the object of the legislation. *Id.*

[6] [7] [8] [9] Judicial review must determine whether any classification is founded on a real and genuine distinction rather than an artificial one. *Equitable Credit and Discount Company v. Geier,* 342 Pa. 445, 21 A.2d 53 (1941). A classification, though discriminatory, is not arbitrary or in violation of the equal protection clause if any state of facts reasonably can be conceived to sustain that classification. *Federal Communications Commission v. Beach Communications, Inc.,* 508 U.S. 307, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993); *Dandridge v. Williams,* 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970). In undertaking its analysis, the reviewing court is free to hypothesize reasons the legislature might have had for the classification. *Federal Communications Commission v. Beach Communications, Inc.; Martin v. Unemployment Comp. Bd. of Review,* 502 Pa. 282, 466 A.2d 107 (1983). If the court determines that the classifications are genuine, it cannot declare the classification void even if it might question the ***256** soundness or wisdom of the distinction. *Equitable Credit and Discount Company v. Geier.* [3]

[10] [11] [12] [13] We are also mindful of the different types of classifications and the standards according to which they are weighed:

> The types of classifications are: (1) classifications which implicate a "suspect" class or a fundamental right; (2) classifications implicating an "important" though not fundamental right or a "sensitive" classification; and (3) classifications which involve none of these. *Id.* Should the statutory classification in question fall into the first category, the statute is strictly construed in light of a "compelling" governmental purpose; if the classification falls into the second category, a heightened standard of scrutiny is applied to an "important" governmental purpose; and if the statutory scheme falls into the third category, the statute is upheld if there is any rational basis for the classification.

Smith v. City of Philadelphia, 512 Pa. 129 at 138, 516 A.2d 306 at 311 (1986) (citation omitted).

[14] In this instance, we are satisfied that Act 62 neither implicates a suspect class nor infringes upon a fundamental right. Neither the United States Constitution nor the Pennsylvania Constitution provides an individual right to post-secondary education. The Pennsylvania Constitution provides only that, "The General Assembly shall provide for the maintenance and support of a thorough and efficient system of public education to serve the needs of the Commonwealth." Article III, Section 14. Through the Public School Code of 1949, Act of March 10, 1949, P.L. 30, as amended, 24 P.S. § 1–101 et seq., the General Assembly has established a statutory right to participate in public education and has established compulsory attendance requirements that in no case extend to post-secondary education. See 24 P.S. § 13–1301 and § 13–1326—13–1330. ***257** Apart from Act 62, there appears to be no expression of policy regarding an individual's "entitlement" to participate in post-secondary education.

Likewise, the classification does not implicate an important though not fundamental right. [4] Consequently, Act 62 must be upheld ****269** if there exists any rational basis for the prescribed classification. It is in this context that we review the Act's creation of a duty, and more significantly a legal mechanism for enforcement of that duty, limited to situations of separated, divorced, or unmarried parents and their children.

[15] In applying the rational basis test, we have adopted a two-step analysis. *See Plowman v. Commonwealth, Dpt. of Transportation,* 535 Pa. 314, 635 A.2d 124 (1993). First, we must determine whether the challenged statute seeks to promote any legitimate state interest or public value. If so, we must next determine whether the classification adopted in the legislation is reasonably related to accomplishing that articulated state interest or interests.

[16] The preamble to Act 62 sets forth the legislature's intention "to codify the decision of the Superior Court in the case of Ulmer v. Sommerville, ... and the subsequent line of cases interpreting Ulmer prior to the decision of the Pennsylvania Supreme Court in Blue v. Blue...." (Citations omitted). It also states:

> Further, the General Assembly finds that it has a rational and legitimate governmental interest in requiring some parental financial assistance for a higher education for children of parents who are separated, divorced, unmarried or otherwise subject to an existing support obligation.

This latter statement begs the question of whether the legislature actually has a legitimate interest in treating children of separated, divorced, or unmarried parents differently than ***258** children of married parents with respect to the costs of post-secondary education.

Appellant argues that with the passage of Act 62 the legislature may have chosen to treat the children of married families and divorced/unmarried families differently, not as a preference towards the latter, but out of deference to the Commonwealth's strong interest in protecting the intact marital family unit from governmental interference. Alternatively, Appellant argues that the legislature may have determined that children in non-intact or non-marital families require educational advantages to overcome disadvantages attendant to the lack of an intact marital family. The critical consideration is whether either of these bases or any other conceivable basis for distinction in treatment is reasonable.

Act 62 classifies young adults according to the marital status of their parents, establishing for one group an action to obtain a benefit enforceable by court order that is not available to the other group. The relevant category under consideration is children in need of funds for a post-secondary education. The Act divides these persons, similarly situated with respect to their need for assistance, into groups according to the marital status of their parents, i.e., children of divorced/separated/never-married parents and children of intact families.

It will not do to argue that this classification is rationally related to the legitimate governmental purpose of obviating difficulties encountered by those in non-intact families who want parental financial assistance for post-secondary education, because such a statement of the governmental purpose assumes the validity of the classification. Recognizing that within the category of young adults in need of financial help to attend college there are some having a parent or parents unwilling to provide such help, the question remains whether the authority of the state may be selectively applied to empower only those from non-intact families to compel such help. We hold that it may not. In the absence of an entitlement on the part of any individual to post-secondary education, or a generally applicable requirement that parents assist their ***259** adult children in obtaining such an education,[5] we perceive no rational basis for the state government to ****270** provide only certain adult citizens with legal means to overcome the difficulties they encounter in pursuing that end.

It is not inconceivable that in today's society a divorced parent, e.g., a father, could have two children, one born of a first marriage and not residing with him and the other born of a second marriage and still residing with him. Under Act 62, such a father could be required to provide post-secondary educational support for the first child but not the second, even to the extent that the second child would be required to forego a college education. Further, a child over the age of 18, of a woman whose husband had died would have no action against the mother to recover costs of a post-secondary education, but a child over the age of 18, of a woman who never married, who married and divorced, or even who was only separated from her husband when he died would be able to maintain such an action. These are but two examples demonstrating the arbitrariness of the classification adopted in Act 62.

In *LeClair v. LeClair,* 137 N.H. 213, 624 A.2d 1350 (1993), the New Hampshire Supreme Court was faced with the issue of the constitutionality of a state statute regarding post-secondary educational support. Initially, it must be noted that the Court decided this appeal based upon the

New Hampshire constitution even though the appellant contended that the statute denied him equal protection under both the federal and state constitution.

The underlying premise upon which the New Hampshire Supreme Court undertook its constitutional analysis of the post-secondary educational support scheme was that the legislation created two classifications: married parents and divorced parents. The object of the legislation was to protect children of divorced parents from being unjustly deprived of opportunities they would otherwise have had if their parents ***260** had not divorced. The statute was promulgated to ensure that children of divorced families are not deprived of educational opportunities solely because their families are no longer intact. The result is a heightened judicial involvement in the financial and personal lives of divorced families with children that is not necessary with intact families with children. The New Hampshire Supreme Court concluded that because of the unique problems of divorced families, the legislature could rationally conclude that absent judicial involvement, children of divorced families may be less likely than children of intact families to receive post-secondary educational support from both parents.

With all due respect to our sister state, we must reject the New Hampshire Supreme Court's analysis in *LeClair*. The discriminatory classification adopted by our legislature is not focused on the parents but rather the children. The question is whether similarly situated young adults, i.e. those in need of financial assistance, may be treated differently. [6]

Ultimately, we can conceive of no rational reason why those similarly situated with respect to needing funds for college education, should be treated unequally. Accordingly, we agree with the common pleas court and conclude that Act 62 is unconstitutional.

The Order is affirmed.

MONTEMURO, J., * files a Dissenting Opinion in which Mr. Justice Cappy joins.

MONTEMURO, Justice, dissenting.
I must dissent.

As the Majority correctly points out, the rational basis test to determine whether a statute is constitutional requires, first, a determination of whether the challenged legislation seeks to promote any legitimate state interest. It must then be decided whether the statute bears a reasonable relationship to the ***261** intended objective. *Commonwealth v. Parker White Metal Company,* 512 Pa. 74, 515 A.2d 1358 (1986). However, "the Constitution does not require situations 'which are different in fact or opinion to be treated in law as though they were the same.' " ****271** *Wells v. Civil Service Commission,* 423 Pa. 602, 604, 225 A.2d 554, 555 (1967) *cert. denied,* 386 U.S. 1035, 87 S.Ct. 1487, 18 L.Ed.2d 598 (quoting *Goesaert v. Cleary,* 335 U.S. 464, 69 S.Ct. 198, 93 L.Ed. 163 (1948)). Indeed, a statute will not be ruled constitutionally invalid under this test "unless it is 'patently arbitrary' and bears no rational relationship to a legitimate government interest." *Frontiero v. Richardson,* 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973). The Majority challenges not merely the means of execution, but the legitimacy of the government interest which the statute is expressly designed to promote.

Act 62 is directed at furthering the education of the citizens of this Commonwealth. It operates on the assumption that divorce necessarily involves a disadvantage to the children of broken families, and is intended to assure that children who are thus disadvantaged by the divorce or separation of their parents are not deprived of the opportunity to acquire post secondary school education. In effect, it attempts to maintain the children of divorce in the same position they would have been in had their parents' marriage remained intact. The Act is not intended to, nor does it, place a premium on the rights of children of divorce while devaluing the same rights for children from intact marriage. It merely recognizes that, in general, divorce has a deleterious effect upon children, which should, insofar as is possible, be redressed. Thus while constitutional principles permit this intended result, a "difference in fact or opinion" recognized by the Legislature as within its purview, the Majority has declared that, at least for college age children, the

distinction between the children of broken families and those of intact families simply does not exist.

In rejecting the authenticity of the premise underlying the statute, the Majority also challenges the validity of the legislative interest. It contends that the expressed intention of the ***262** statute "will not do" because the Legislature actually has no legitimate interest in treating children of broken marriages differently than children of intact marriages. The Majority theorizes that since the children of intact families may be no less in need of funds for purposes of higher education, they are situated similarly to children of divorced or separated parents, and any distinction between them is inconsequential.

It would be difficult to argue successfully that the payment of child support is, in general, an obligation freely acknowledged and willingly undertaken by non-custodial parents. The extraordinary amount of time, attention and money devoted by courts, government agencies and legislatures to fashioning and enforcing support orders is testament to the unfortunate fact that the opposite is true. [1] Moreover, the impact of parental non-compliance with support orders on children in need of basic necessities is obvious, hence the stated purpose of the Support Guidelines is to provide for children's reasonable needs which might, and frequently do, absent enforcement of established orders, otherwise go unmet. [2]

It has also been widely acknowledged that among the negative effects of divorce on children are those which concern higher education. *See e.g.,* Smyer and Cooney, Family Relations Across Adulthood: Implications for Alimony and Child Support Decisions, American Bar Association National Symposium on Alimony and Child Support (Apr. 24–25, 1987); Wallerstein and Corbin, "Father Child Relationships After Divorce; Child Support and Educational Opportunity, 20 FAM.L.Q. 109 (1986). Courts faced with cases similar to the one at bar have also noted, over and over again, that in divorce, the normative rules of behavior may no longer apply. *Ex Parte* ***263** *Bayliss,* 550 So.2d 986 (Ala.1989); ****272** *Kujawinski v. Kujawinski,* 71 Ill.2d 563, 17 Ill.Dec. 801, 376 N.E.2d 1382 (1978); *Neudecker v. Neudecker,* 577 N.E.2d 960 (Ind.1991); *Vrban v. Vrban,* 293 N.W.2d 198 (Iowa 1980). Whether because they lose concern for their children's welfare, or out of animosity toward the custodial parent, non-custodial parents frequently become reluctant to provide financial support for any purpose, but are particularly determined to avoid the costs of a college education. *Childers v. Childers,* 89 Wash.2d 592, 575 P.2d 201 (1978). Then the custodial parent, who typically has less money than the non-custodial parent, most often becomes the de facto bearer of most, if not all, of the burden of educational expenses, even where the non-custodial parent possesses both resources and background which would inure to the child's benefit were the parents still married. L. Weitzman, *The Divorce Revolution* 278 (1985). Such parents, are, in addition, even less inclined to assist with the educational expenses of daughters than of sons. Smyer and Cooney, *supra,* and Wallerstein, *supra. See also,* S.F. Goldfarb, "A Model for Fair Allocation of Child Support," 21 FAMILY L.Q. (Fall 1987).

The courts addressing the issue have uniformly decided that equal protection is not offended by an attempt to equalize the disparate situation faced by children of divorce. Only the means are different. Those facing challenges to a statutory provision have all found that the differences between married and divorced parents establishes the necessity to discriminate between the classes, e.g., *Childers; Vrban.* Others, in examining judge-made law found an extended dependency justified court intervention. They all, however, delegated to the court the authority to determine the propriety of an award.

In *LeClair v. LeClair,* 137 N.H. 213, 624 A.2d 1350 (1993), the New Hampshire Supreme Court recognized and addressed the very concerns toward which Act 62 is directed—the disadvantage wrought on children by divorce of their parents, and the necessity for court intervention to protect them from the consequences of this disadvantage. The New Hampshire statute, RSA 458:20, codified decisions in which the New Hampshire ***264** Supreme Court had recognized the jurisdiction of the superior court to order divorced parents, consistent with their means, to contribute toward the educational expenses of their college age children. [3] Challengers of the statute bore the burden of showing that the court had committed an abuse of discretion, and that the order was "improper and unfair." *Id.* at 221, 624 A.2d at 1355. The

equal protection argument focused on the parents, finding them similarly situated with respect to the issue. However, the Majority here states that because the focus of Act 62 is the treatment of children, the marital status of their parents is irrelevant.[4]

This argument is specious,[5] since *any* child support legislation necessarily involves the marital status of the parents. Intact families do not suffer intervention by the courts unless their children are abused or neglected. Recognition of the need for legislative or judicial action to require support for children of broken families is irrefutable, as the continuing governmental efforts to improve collection of support attest. It is unrealistic to conclude, as the Majority does, that merely ****273** because children are in need of funds for college rather than subsistence, the effect of their parents marital status has ***265** magically altered, and that enforcement of an obligation is no longer necessary.

What must be remembered, and what the Majority fails to explore, is that Act 62 does not make mandatory the directive to pay child support for college. Section 4327(e)[6] lists standards to assist the court in determining whether or not support is appropriate. Unless these criteria are, in the estimation of the court, met by the parties, no liability exists.

The problem lies with the nature of the liability, which is, quite simply, a moral duty, circumstantially prescribed. Under Act 62, it is owed only by parents who are subject to an existing support obligation, that is, they have acknowledged either voluntarily through contract, or involuntarily through the necessity of court order that a financial responsibility to pay for their children's upkeep exists. The court has thus already become involved to the extent of entering an order, or there exists another legal mechanism, e.g., separation agreement, through which enforcement can be accomplished and contribution monitored. In intact families, absent abuse or neglect, no such initial intervention has occurred, and the court has no forum in which to enforce a duty imposed on these parents. *Compare, Reeves v. Reeves,* 584 N.E.2d 589 (Ind.App.1992). Moreover, limitations have been placed on the ability to control children's education by legislative fiat. ***266** *See, Wisconsin v. Yoder,* 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) (state cannot compel school attendance beyond eighth grade where family's religious beliefs are compromised); *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary,* 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925) (state could not compel public school attendance for all children between the ages of 8 and 16); *Meyer v. Nebraska,* 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923) (state could not prohibit teaching of German language). Thus intervention in the form of a statute requiring parents of an intact marriage to finance their children's college education would indeed infringe upon the constitutional/privacy right of the parties.

While it does not necessarily follow that in all cases children of divorce are deprived of parental support for college, or that the reverse is true and all children of intact families are provided with the necessary encouragement and finances, children whose parents are still married most often continue to receive support past majority.[7] Equal protection does not demand that every permutation be addressed separately, what is sought is equality not uniformity.

It cannot successfully be argued that the state has no legitimate interest in furthering the education of its citizens. The size of the state university system, the multiplicity of community colleges and other educational programs designed to provide low cost post-secondary training, all attest to the state's involvement with the goal of bettering the information and functioning level of the attendees. Clearly the Majority accepts this focus, hence its query as to whether the statute would be acceptable were it only altered to require all parents to contribute to the post-secondary educational expenses of their children. However, as noted above, this kind of government mandated action is ****274** constitutionally untenable when applied to intact families.

Conventional wisdom once dictated that divorced parents will interact with their children in the same manner as they did during the life of the marriage. Experience has dictated ***267** otherwise,[8] viz., the widespread need for enforcement of court ordered support even from parents for whom compliance is not an economic hardship. It is, after all, these parents at whom Act 62 is aimed. Divorce modifies parental behavior in ways which cannot always

be anticipated. To ignore the reality of these differences, and the impact necessarily produced upon the children is shortsighted, as the educational achievements of the next generations are critical to the success of this country in an increasingly competitive world.

The law need not, and should not, change direction to comport with every change in the prevailing social winds. Nor is it designed to redress every psychological and emotional ill which trails in the wake of divorce. However, principles of justice require an unwavering commitment to the protection of the weakest members of our society, our children. Refusal to recognize their weakness breaches the social compact, and violates the basic principles of fairness the law is intended to uphold. Given the consequences of divorce, to deprive children of broken marriages of the economic support which they would normally receive from nuclear families is to deny them equal protection. As the court in *Childers, supra,* noted, the imposition of a burden of support does establish a classification with discriminatory obligations. However, rather than an arbitrary, unreasonable or unjust classification, there is instead a collection of special powers in equity that the courts, regardless of legislation, have long used to protect the children of broken homes. *Id.* at 604, 575 P.2d at 208. The disadvantage exists; it cannot be ignored or wished away.

If the Majority's view prevails, there is no recourse for these children, who will be victimized twice, first by the disruptions, both financial and psychological, of their parents' divorce, and again by the system which is theoretically designed to protect them. Moreover, such a course will not benefit the children of intact marriages in which, because of a ***268** parental disinterest in education or a view that non-support encourages the work ethic, the parents will also refuse to assist their children. The result will be no improvement for anyone.

Once the moral imperative which should motivate parents to fulfill their obligations has dissipated, conscious effort by the state must provide a substitute where it is able to do so. That is what the Legislature wisely has done. By disregarding the rational basis advanced for Act 62, the Majority now transforms this Court into a super-Legislature.

Accordingly, I dissent.

CAPPY, J., joins in this dissenting opinion.

All Citations

542 Pa. 249, 666 A.2d 265

Footnotes

1 The Appellee did not assert that he was denied equal protection under our state constitution. We note, however, that we would apply the same analysis and reach the same result under our state constitution.

2 42 Pa.C.S. § 741.

3 We are also guided by the principle that a strong presumption exists that all legislation promulgated by the General Assembly is constitutional. 1 Pa.C.S. § 1922. See also *Federal Communications Commission v. Beach Communications, Inc.,* supra; *Plowman v. Commonwealth, Dpt. of Transportation,* 535 Pa. 314, 635 A.2d 124 (1993).

4 Appellee admits that in the court below both he and his ex-wife argued that a "rational basis" test should be applied. He now argues that since the trial court addressed the applicability of a "heightened scrutiny" test, that argument should not be considered waived. Since that issue was not raised before the trial court, we decline to address it.

5 Quaere whether the legislature could extend the statutory liability for support of children applicable to all parents, 23 Pa.C.S. § 4321(2), without regard to marital status, 23 Pa.C.S. § 4323(b), to include a duty to pay post-secondary education costs?

6 See also *Childers v. Childers,* 89 Wash.2d 592, 575 P.2d 201 (1978), and *Neudecker v. Neudecker,* 577 N.E.2d 960 (Ind.1991).

* Mr. Justice MONTEMURO is sitting by designation.

1 In fiscal year 1994, Pennsylvania expended over $100,000,000 to collect over $840,000,000 through the Child Support Enforcement Program, using various mechanisms such as wage attachment. Of these collections, more than

$713,000,000 was distributed to non-AFDC families. (Ranking of Region III States Child Support Enforcement, Fiscal Year 1994)

2 Nationally, of the $16.3 billion due under court orders in 1993, about $11.2 was actually paid, with only about half of those awarded support receiving the full amount. (Child Support Enforcement, Eighteenth Annual Report to Congress)

3 The intention of Pennsylvania's Legislature in enacting 23 Pa.C.S.A. § 4327 was precisely the same as that of New Hampshire. Passage of Act 62 was a legislative effort to codify thirty years worth of caselaw which began with the Superior Court decision in *Ulmer v. Sommerville,* 200 Pa.Super. 640, 190 A.2d 182 (1963), and ended with this Court's decision in *Blue v. Blue,* 532 Pa. 521, 616 A.2d 628 (1992). *See,* Historical and Statutory Notes.

4 What these assumptions imply is that regardless of the need involved, food, clothing and medical care, or higher education, children qua children are always on an equal footing since they are always in need of parental financial support. Thus, following the Majority's logic, any legislation which distinguishes between children on the basis of their parents' marital status is constitutionally suspect, e.g., any law requiring support from parents no longer living in an intact marriage, or never having been in such a marriage.

5 As the Amicus points out, there is real question whether Appellee herein possesses standing to contest the supposedly unequal treatment meted out to children by the statute. Moreover, the pleadings filed by Appellee clearly establish himself as the party receiving unequal treatment. (Defendant's Amendment to Petition to Modify, Para. 6.a.i.) Arguably, therefore, the pivot point of the Majority's argument is not properly before this Court.

6 23 Pa.C.S.A. § 4327(e)

(e) Other relevant factors.—After calculating educational costs and deducting grants and scholarships, the court may order either parent or both parents to pay all or part of the remaining educational costs of their child. The court shall consider all relevant factors which appear reasonable, equitable and necessary, including the following:

(1) The financial resources of both parents.

(2) The financial resources of the student.

(3) The receipt of educational loans and other financial assistance by the student.

(4) The ability, willingness and desire of the student to pursue and complete the course of study.

(5) Any wilful estrangement between the parent and student caused by the student after attaining majority.

(6) The ability of the student to contribute to the student's expenses through gainful employment. The student's history of employment is material under this paragraph.

(7) Any other relevant factors.

7 R. Washburn, "Post–Majority Support: Oh Dad Poor Dad," 44 TEMPLE L.Q. 319, 329 n. 55 (1971).

8 One national study reports that 40% of children are not visited by their non-custodial parents. Frank F. Furstenberg, S. Philip Morgan, and Paul D. Allison, "Paternal Participation and Children's Well–Being After Marital Dissolution," AMERICAN SOCIOLOGICAL REVIEW 52 (1987): 695–701.

396 S.C. 647
Supreme Court of South Carolina.

Kristi Glenn McLEOD f/k/
a/ Kristi G. Starnes, Appellant,
v.
Robert Anthony STARNES, Respondent.

No. 27100.
|
Heard Feb. 15, 2011.
|
Decided March 7, 2012.

Synopsis

Background: Mother who had divorced father brought action seeking an award of college expenses for the parties' son incident to child support, an increase in child support for a second son who suffered from autism, and attorney fees and costs, and father counterclaimed seeking to terminate child support for son who had graduated from high school and reached the age of majority, to terminate child support from autistic son upon his graduation from high school, and termination of the requirement that he pay a portion of his yearly bonus as child support. The Family Court, Lexington County, Richard W. Chewning, III, J., dismissed mother's claim for college expenses, reduced the child support obligation for autistic son, and reduced percentage of commission payable from 35% to 10%. Mother appealed.

Holdings: The Supreme Court, Hearn, J., held that:

[1] stare decisis did not preclude reconsideration of the constitutional issue addressed in *Webb*;

[2] father was precluded from arguing the suspect class from *Webb* on appeal;

[3] requiring father to pay, as an incident of child support, for post-secondary education would have been rationally related to the State's interest in ensuring that its youth are educated such that they can become more productive members of society, overruling *Webb v. Sowell,* 387 S.C. 328, 692 S.E.2d 543;

[4] *Risinger* did not violate the Equal Protection Clause because there was a rational basis to support any disparate treatment *Risinger* and its progeny created; and

[5] mother was entitled to an award of attorney fees and costs.

Reversed and remanded.

Beatty, J., filed dissenting opinion in which Pleicones, J., concurred.

West Headnotes (20)

[1] **Courts**
Constitutional questions

Stare decisis did not preclude the Supreme Court's reconsideration of constitutional issue addressed in *Webb*, whether requiring a non-custodian parent to pay college expenses was a violation of equal protection, where the decision in *Webb* rested on unsound constitutional principles when it was reviewed under the lens of strict scrutiny as opposed to rational basis. U.S.C.A. Const.Amend. 14; Code 1976, § 63–3–530(A)(17).

Cases that cite this headnote

[2] **Courts**
Previous Decisions as Controlling or as Precedents

Stare decisis is not an inexorable command: there is no virtue in sinning against light or persisting in palpable error, for nothing is settled until it is settled right; there should be no blind adherence to a precedent which, if it is wrong, should be corrected at the first practical moment.

1 Cases that cite this headnote

[3] **Courts**
Previous Decisions as Controlling or as Precedents

When the court is asked to follow the line marked out by a single precedent case it is not at liberty to place its decision on the rule of stare decisis alone, without regard to the grounds on which the antecedent case was adjudicated; an original case could not possibly gain authority by a mere perfunctory following on the principle of stare decisis.

1 Cases that cite this headnote

[4] **Courts**
Previous Decisions as Controlling or as Precedents

Stare decisis is far more a respect for a body of decisions as opposed to a single case standing alone.

1 Cases that cite this headnote

[5] **Courts**
Previous Decisions as Controlling or as Precedents

Stare decisis should be used to foster stability and certainty in the law, but not to perpetuate error.

Cases that cite this headnote

[6] **Courts**
Constitutional questions

Courts
Construction and operation of statutes

Stare decisis applies with full force with respect to questions of statutory interpretation because the legislature is free to correct the Supreme Court if it misinterprets its words; however, the doctrine is at its weakest with respect to constitutional questions because only the courts or a constitutional amendment can remedy any mistakes made.

Cases that cite this headnote

[7] **Constitutional Law**
Similarly situated persons;like circumstances

The sine qua non of an equal protection claim is a showing that similarly situated persons received disparate treatment. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[8] **Constitutional Law**
Rational Basis Standard; Reasonableness

Absent an allegation that the classification resulting in different treatment is suspect, a classification will survive an equal protection challenge so long as it rests on some rational basis. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[9] **Constitutional Law**
Equal protection

Under the rational basis test, a classification is presumed reasonable and will remain valid unless and until the party making an equal protection challenge proves beyond a reasonable doubt that there is no admissible hypothesis upon which it can be justified. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[10] **Constitutional Law**
Rational Basis Standard; Reasonableness

Upon review of an equal protection challenge, if the Supreme Court can discern any rational basis to support the suspect

classification, regardless of whether that basis was the original motivation for it, the classification will withstand constitutional scrutiny; the classification also does not need to completely achieve its purpose to withstand constitutional scrutiny. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[11] **Constitutional Law**
Judicial Authority and Duty in General

The mere fact that a constitutional question is involved does not permit the Supreme Court to address issues not properly before it.

Cases that cite this headnote

[12] **Child Support**
Presentation and reservation of grounds of review

Father, in opposing mother's equal protection challenge based on a suspect class, was precluded from arguing *Webb*'s class on appeal, parents subject to a child support order at the time of emancipation rather than those not subject to one, rather than mother's proposed class, divorced versus non-divorced parents, where father argued mother's proposed classification before the family court. U.S.C.A. Const.Amend. 14.

1 Cases that cite this headnote

[13] **Child Support**
Post-secondary education

Requiring father to pay, as an incident of child support, for post-secondary education under the appropriate and limited circumstances outlined by *Risinger* would have been rationally related to the State's interest in ensuring that its youth are educated such that they can become more productive members of society; overruling *Webb v. Sowell,* 387 S.C. 328, 692 S.E.2d 543. Code 1976, § 63–3–530.

2 Cases that cite this headnote

[14] **Child Support**
Jurisdiction

The subject matter jurisdiction of the family court in a child support matter is limited to what is expressly or by necessary implication conferred by statute.

Cases that cite this headnote

[15] **Statutes**
Prior or existing law in general

The Legislature is presumed to be aware of the Supreme Court's interpretation of its statutes.

2 Cases that cite this headnote

[16] **Child Support**
Post-secondary education

Constitutional Law
Child custody, visitation, and support

Risinger, which held that a family court was statutorily permitted to award college expenses incident to child support if certain criteria were met, did not violate the Equal Protection Clause because there was a rational basis to support any disparate treatment *Risinger* and its progeny created, to ensure children of divorce had the benefit of the college education they would have received had their parents remained together. U.S.C.A. Const.Amend. 14; Code 1976, § 63–3–530.

1 Cases that cite this headnote

[17] **Child Support**
Private school

While the cost of a child's education is a relevant consideration with regard to a child support award in light of the factors identified in *Risinger* and subsequent cases, attendance at a private school does not foreclose an award of expenses; instead, the tuition amount is

to be factored in with the child's attainment of scholarships, grants, and loans as well as the parents' ability to pay when determining whether to make such an award and in what amount. Code 1976, § 63–3–530.

Cases that cite this headnote

[18] **Child Support**
Time of taking effect;retrospective modification

The family court has the discretion to award retroactive child support from the filing date of the action upon a proper showing of a change in the child's needs or the supporting parent's ability to pay; an increase or decrease may be ordered upon a showing of a change of condition at the time the modification is ordered.

Cases that cite this headnote

[19] **Child Support**
Attorney fees

Mother was entitled to an award of attorney fees and costs, in addition to child support, and son's college expenses as an incident to child support, where her attorney fees and costs amounted to at least half of her income, while father's fees and costs were far less than one-third of his income, and because the litigation was necessary primarily because of father's conduct in neglecting to pay the full ordered amount of his annual bonus due to his children.

Cases that cite this headnote

[20] **Child Support**
Attorney fees

In determining whether to award attorney's fees in a child support matter, the court should consider each party's ability to pay his or her own fee; the beneficial results obtained by the attorney; the parties' respective financial conditions; and the effect of the fee on each party's standard of living.

Cases that cite this headnote

Attorneys and Law Firms

****201** Jean Perrin Derrick, of Lexington, for Appellant.

J. Mark Taylor, of Moore, Taylor & Thomas, of West Columbia and Katherine Carruth Goode, of Winnsboro, for Respondent.

Opinion

Justice HEARN.

***651** Less than two years ago, this Court decided *Webb v. Sowell,* 387 S.C. 328, 692 S.E.2d 543 (2010), which held that ordering a non-custodial parent to pay college expenses violates equal protection, thus overruling thirty years of precedent flowing from *Risinger v. Risinger,* 273 S.C. 36, 253 S.E.2d 652 (1979). We granted permission in this case to argue against precedent pursuant to Rule 217, SCACR, so that we could revisit our holding in *Webb.* Today, we hold that *Webb* was wrongly decided and remand this matter for reconsideration in light of the law as it existed prior to *Webb.*

***652 FACTUAL/PROCEDURAL BACKGROUND**

Kristi McLeod (Mother) and Robert Starnes (Father) divorced in 1993 following five years of marriage. Mother received custody of their two minor children, and Father was required to pay child support in the amount of $212 per week, which was later reduced to $175 per week by agreement, in addition to thirty-five percent of his annual bonus. At the time, Father earned approximately $29,000 per year plus a $2,500 bonus. However, his salary steadily increased to over $120,000 per year and his bonus to nearly $30,000 by 2007. In 2008, his salary was almost $250,000. During the same time period, Mother's income increased and fluctuated from less than $12,000 per year to a peak of approximately $40,000 per year. Despite the rather sizable increases in Father's income, Mother never sought

modification of his child support obligation because, as Father admitted, she had no way of knowing about them.

In August 2006, the parties' older child, Collin, reached the age of majority and enrolled as a student at Newberry College.[1] To help take advantage of this opportunity, he sought all scholarships, loans, and grants that he could. Father wholly supported Collin's decision to attend Newberry. Indeed, Father wrote an e-mail in March 2006 agreeing to repay all of Collin's student loans upon graduation. He even co-signed a promissory note for Collin's student loans. Furthermore, in an August 2006 letter, Father agreed to pick up "odd expenses from [Collin]'s education" and told Collin to call him whenever he "needs a little help." Interestingly, Father took it upon himself in that same letter to unilaterally decrease his weekly child support from $175 to $100. Mother later acquiesced in this reduction, apparently in consideration of Father's assurances that he would support Collin while he was in college. However, Father did not uphold his end of the bargain, nor did he regularly pay the percentage of his bonus as required.

Mother brought the instant action in March 2007 seeking an award of college expenses, **202 an increase in child support for *653 Jamie, and attorney's fees and costs. Father counterclaimed, asking that the court terminate: (1) his child support for Collin because he had attained the age of majority and graduated from high school; (2) his support for Jamie upon graduation from high school; (3) and the requirement that he pay a percentage of his annual bonus as child support. He also denied that he should be required to pay any college expenses for Collin. A temporary order was filed in June 2007 that set child support for Jamie at $235 per week, ordered Father to contribute $400 per month towards Collin's college expenses, and left intact the thirty-five percent of Father's annual bonus payable as support.

The final hearing was not conducted until March and July 2009. The court dismissed Mother's claim for college expenses on the ground that it violated the Equal Protection Clause of the United States Constitution.[2] Furthermore, the court found that Jamie's mental and physical disabilities required a continuation of child support beyond the age of majority and as long as the child's disabilities exist. However, the court reduced Father's obligation for Jamie after recalculating the base obligation using different figures than those used in the temporary order. Furthermore, the court reduced the percentage payable from his annual bonus from thirty-five to ten.[3] The court accordingly found Father had overpaid child support for the two years the temporary order was in effect and reduced his monthly payments by fifteen percent until the overpayment was discharged. Finally, the court required both parties to pay their own attorney's fees and costs.

ISSUES PRESENTED

Mother raises three issues on appeal:

I. Did the family court err in not awarding college expenses?

*654 II. Did the family court err in lowering the current support for the younger child and awarding Father a credit for alleged overpayment of child support during the pendency of this case?

III. Did the family court err in not awarding Mother attorney's fees and costs?

LAW/ANALYSIS

I. COLLEGE EXPENSES

Mother argues the family court erred in finding that an order requiring Father to pay college expenses for Collin violates equal protection. We agree.

[1] [2] [3] [4] In *Webb,* we held that requiring a parent to contribute toward an adult child's college expenses violated the Equal Protection Clause.[4] 387 S.C. at 332–33, 692 S.E.2d at 545. We are not unmindful of the imprimatur of correctness which stare decisis lends to that decision. However, stare decisis is not an inexorable command: "There is no virtue in sinning against light or persisting in palpable error, for nothing is settled until it is settled right.... There should be no blind adherence to a precedent which, if it is wrong, should be corrected at the first practical moment." *Smith v. Daniel Const. Co.,* 253

S.C. 248, 255–56, 169 S.E.2d 767, 771 (1969) (Bussey, J., dissenting) (quoting *Sidney Spitzer & Co. v. Comm'rs of Franklin County,* 188 N.C. 30, 123 S.E. 636, 638 (1924)). Furthermore,

> [w]hen the court is asked to follow the line marked out by a single precedent case it is not at liberty to place its decision on the rule of stare decisis alone, without regard to the grounds on which the antecedent case was adjudicated.... An original case could not possibly gain authority by a mere ****203** perfunctory following on the principle of stare decisis.
>
> *State v. Williams,* 13 S.C. 546, 554–55 (1880). In that vein, stare decisis is far more a respect for a body of decisions as opposed to a single case standing alone. *See Langley v.* ***655** *Boyter,* 284 S.C. 162, 180, 325 S.E.2d 550, 560 (Ct.App.1984), *quashed on other grounds,* 286 S.C. 85, 332 S.E.2d 100 (1985) ("The doctrine of stare decisis says that where a principle of law has become settled by a *series of court decisions,* it should be followed in similar cases." (emphasis added)). This is not to say that a single case garners no protection from stare decisis, for even in those circumstances we should hesitate to revisit and reverse our decisions without good cause to do so. Our precedents simply make clear, however, that such a case is not rendered immutable by stare decisis.

[5] **[6]** Therefore, "[s]tare decisis should be used to foster stability and certainty in the law, but[ ] not to perpetuate error." *Fitzer v. Greater Greenville S.C. Young Men's Christian Ass'n,* 277 S.C. 1, 4, 282 S.E.2d 230, 231 (1981), *superseded by statute on other grounds,* S.C.Code Ann. § 33–55–200 *et seq.* (2006). Stare decisis applies with full force with respect to questions of statutory interpretation because the legislature is free to correct us if we misinterpret its words. *Layton v. Flowers,* 243 S.C. 421, 424, 134 S.E.2d 247, 248 (1964). However, the doctrine is at its weakest with respect to constitutional questions because only the courts or a constitutional amendment can remedy any mistakes made. *Agostini v. Felton,* 521 U.S. 203, 236, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997).

We are at the first practical moment to reexamine *Webb,* a "single precedent case" concerning a constitutional question because it is the first and only case in this State finding an equal protection violation in these circumstances. We now believe *Webb* reversed the burden imposed on parties operating under rational basis review for equal protection challenges and should therefore be overruled.

[7] **[8]** **[9]** **[10]** In *Webb,* we were asked to determine whether requiring a non-custodial parent to pay college expenses was a violation of equal protection. 387 S.C. at 330, 692 S.E.2d at 544. "The *sine qua non* of an equal protection claim is a showing that similarly situated persons received disparate treatment." *Grant v. S.C. Coastal Council,* 319 S.C. 348, 354, 461 S.E.2d 388, 391 (1995). Absent an allegation that the classification resulting in different treatment is suspect, a classification will survive an equal protection challenge so long ***656** as it rests on some rational basis. *Lee v. S.C. Dep't of Natural Res.,* 339 S.C. 463, 467, 530 S.E.2d 112, 114 (2000). Under the rational basis test, a classification is presumed reasonable and will remain valid unless and until the party challenging it proves beyond a reasonable doubt that there "is no admissible hypothesis upon which it can be justified." *Carolina Amusement Co. v. Martin,* 236 S.C. 558, 576, 115 S.E.2d 273, 282 (1960). If we can discern any rational basis to support the classification, regardless of whether that basis was the original motivation for it, the classification will withstand constitutional scrutiny. *Lee,* 339 S.C. at 470 n. 4, 530 S.E.2d at 115 n. 4. The classification also does not need to completely achieve its purpose to withstand constitutional scrutiny. *Id.* at 467, 530 S.E.2d at 114.

[11] In *Webb,* the majority viewed the classification created by *Risinger* for equal protection purposes as those parents subject to a child support order at the time the child is emancipated.[5] 387 S.C. at 332, 692 S.E.2d at 545. Without any elaboration, the majority ****204** concluded that there is no rational basis for treating parents subject to such an order different than those not subject to one with respect to the payment of college expenses. *Id.* Upon further reflection, we now believe that we abandoned our long-held rational basis rule that the party challenging a classification must prove there is no conceivable basis upon which it can rest and inverted the burden of proof. By not investigating whether there is any basis to support the alleged classification or refuting the bases argued, we effectively presumed

Risinger's reading of what is now section 63–3–530(A)(17) unconstitutional. ***657** Our treatment of this issue thus essentially reviewed *Risinger* under the lens of strict scrutiny as opposed to rational basis. *See Stephenson v. Bartlett,* 355 N.C. 354, 562 S.E.2d 377, 393 (2002) ("Under strict scrutiny, a challenged governmental action is unconstitutional if *the State* cannot establish that it is narrowly tailored to advance a compelling government interest" (emphasis added)); *see also Qutb v. Strauss,* 11 F.3d 488, 492 (5th Cir.1993) ("Under the strict scrutiny standard, we accord the classification no presumption of constitutionality."). Our decision in *Webb* therefore rests on unsound constitutional principles, and stare decisis does not preclude our reconsideration of the issue addressed in that case. [6]

[12] As with any equal protection challenge, we begin by addressing the class *Risinger* created under section 63–3–530(A)(17). Mother argues that the appropriate classification is divorced parents versus non-divorced parents. In his brief, Father adheres to the class *Webb* analyzed of parents subject to a child support order at the time of emancipation versus those who are not subject to one. However, Father argued Mother's proposed classification before the family court. He therefore cannot argue *Webb*'s class on appeal. *See State v. Dunbar,* 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) ("A party may not argue one ground at trial and an alternate ground on appeal."). We accordingly review *Risinger* through the same lens used by the family court: whether it improperly treats divorced parents differently than non-divorced parents.

This State has a strong interest in the outcome of disputes where the welfare of our young citizens is at stake. As can hardly be contested, the State also has a strong interest in ensuring that our youth are educated such that they can become more productive members of our society. It is entirely possible "that most parents who remain married to each other support their children through college years. On the other hand, even well-intentioned parents, when deprived of the custody of their children, sometimes react by refusing to ***658** support them as they would if the family unit had been preserved." *In re Marriage of Vrban,* 293 N.W.2d 198, 202 (Iowa 1980). Therefore, it may very well be that *Risinger* sought to alleviate this harm by "minimiz[ing] any economic and educational disadvantages to children of divorced parents." *Kujawinski v. Kujawinski,* 71 Ill.2d 563, 17 Ill.Dec. 801, 376 N.E.2d 1382, 1390 (1978); *see also LeClair v. LeClair,* 137 N.H. 213, 624 A.2d 1350, 1357 (1993), *superseded by statute on other grounds* ("The legitimate State interest served by these statutes is to ensure that children of divorced families are not deprived of educational opportunities solely because their families are no longer intact."). There is no absolute right to a college education, and section 63–3–530(A)(17), as interpreted by *Risinger* and its progeny, does not impose a moral obligation on all divorced parents with children. Instead, the factors identified by *Risinger* and expounded upon in later cases seek to identify those children whose parents would *otherwise* have paid for their college education, but for the divorce, and provide them with that benefit.

[13] We accordingly hold that requiring a parent to pay, as an incident of child support, for post-secondary education under the appropriate and limited circumstances outlined by *Risinger* is rationally related to the State's interest. While it is certainly true that not all married couples send their children ****205** to college, that does not detract from the State's interest in having college-educated citizens and attempting to alleviate the potential disadvantages placed upon children of divorced parents. Although the decision to send a child to college may be a personal one, it is not one we wish to foreclose to a child simply because his parents are divorced. It is of no moment that not every married parent sends his children to college or that not every divorced parent refuses to do so. The tenants of rational basis review under equal protection do not require such exacting precision in the decision to create a classification and its effect.

Indeed, Father's refusal to contribute towards Collin's college expenses under the facts of this case proves the very ill which *Risinger* attempted to alleviate, for Father articulated no defensible reason for his refusal other than the shield erected by *Webb.* What other reason could there be for a ***659** father with more than adequate means and a son who truly desires to attend college to skirt the obligation the father almost certainly would have assumed had he not divorced the child's mother? Had Father and Mother remained married, we believe

Father undoubtedly would have contributed towards Collin's education. Collin has therefore fallen victim to the precise harm that prompted the courts in *LeClair, Kujawinski,* and *Vrban*—as well as *Risinger*—to hold that a non-custodial parent could be ordered to contribute towards a child's college education. Thus, this case amply demonstrates what we failed to recognize in *Webb:* sometimes the acrimony of marital litigation impacts a parent's normal sense of obligation towards his or her children. While this is a harsh and unfortunate reality, it is a reality nonetheless that *Risinger* sought to address.

The dissent distinguishes *LeClair, Kujawinski,* and *Vrban* on the ground they interpret statutes which explicitly provide for an award of college expenses, contending section 63–3–530(A)(17) does not. As this case comes to us, however, *Risinger*'s reading of section 63–3–530(A)(17) has not been challenged on statutory construction grounds. Accordingly, for our purposes, section 63–3–530(A)(17) does permit the family court to award college expenses. The question before us today is only whether doing so violates equal protection.

[14] **[15]** The dissent accordingly must couch its attempt to undermine *Risinger* as one of subject matter jurisdiction which we can reach *sua sponte.* The subject matter jurisdiction of the family court is limited to what is "expressly or by necessary implication conferred by statute." *State v. Graham,* 340 S.C. 352, 355, 532 S.E.2d 262, 263 (2000). Over thirty years ago, *Risinger* held the predecessor to section 63–3–530(A)(17) permits a family court to award college expenses if certain criteria are met.[7] Since *Risinger,* the statutes conferring ***660** jurisdiction on the family court have been amended repeatedly, yet the General Assembly never limited *Risinger*'s application. "The Legislature is presumed to be aware of this Court's interpretation of its statutes." *Wigfall v. Tideland Utils., Inc.,* 354 S.C. 100, 111, 580 S.E.2d 100, 105 (2003). When the General Assembly failed to amend this section over the course of three decades, "its inaction is evidence [it] agrees with this Court's interpretation." *See id.* At this juncture, we are therefore unwilling to agree with the dissent's *sua sponte* conclusion that the General Assembly never intended to give the family court jurisdiction to order the payment of college tuition as an incident of child support. Due to the General Assembly's tacit approval of *Risinger* for over thirty years and the fact its construction has never been challenged, not even in this case, reaffirming this principle does not amount to "legislat [ing] from the bench" or a "cavalier[ ] disregard of the Legislature's express limitations on the family court's jurisdiction" as the dissent suggests. If the dissent's assessment of legislative intent were correct, we are confident the General ****206** Assembly would have amended the jurisdictional statutes accordingly since 1979.

[16] **[17]** We now hold *Risinger* does not violate the Equal Protection Clause because there is a rational basis to support any disparate treatment *Risinger* and its progeny created. In fact, the case before us particularly demonstrates the need for a rule permitting an award of college expenses in certain circumstances in order to ensure children of divorce have the benefit of the college education they would have received had their parents remained together. Accordingly, we reverse the order of the family court and remand this matter for a determination of whether and in what amount Father is required to contribute to Collin's college education under the law as it existed prior to *Webb.*[8]

***661 II. OVERPAYMENT OF SUPPORT**

Mother argues the family court erred in awarding Father a credit for an alleged overpayment in child support from the date this action was filed. We agree.

[18] The family court has the discretion to award retroactive child support from the filing date of the action upon a proper showing of a change in the child's needs or the supporting parent's ability to pay. *Ables v. Gladden,* 378 S.C. 558, 567–68, 664 S.E.2d 442, 447 (2008) (quoting *Thornton v. Thornton,* 328 S.C. 96, 115, 492 S.E.2d 86, 96 (1997); *Henderson v. Henderson,* 298 S.C. 190, 196, 379 S.E.2d 125, 129 (1989)). An increase or decrease may be ordered upon a showing of a change of condition at the time the modification is ordered. *Herring v. Herring,* 286 S.C. 447, 453, 335 S.E.2d 366, 369 (1985).

The temporary order set Father's monthly child support obligation at $1,018.33, based upon Mother's monthly pay of $1,600 and Father's monthly pay of $8,741. The order also left intact Father's obligation to pay Mother

thirty-five percent of his annual bonuses. However, the final order decreased Father's obligation to $923, based upon Mother's monthly income of $3,300 and Father's monthly income of $10,666, and inexplicably reduced the percentage of Father's annual bonus payable as support from thirty-five percent to ten percent. The court also terminated Father's obligation to pay $400 per month towards Collin's college education. Based upon these new figures, the court found Father had overpaid support during the pendency of the case. Retroactively applying both figures to the monies already paid from the filing of this action, the court found that Father had overpaid $2,669.24 in monthly support and $9,998.05 in annual support, and that Father could reduce his future monthly payments by fifteen percent until the overpayment was discharged. This was error.

We find the final monthly support order was based upon erroneous calculations of the parties' income. Further, the bonus payment reduction from thirty-five percent to ten percent was ordered without any stated explanation. We find the calculations contained in the temporary order correct and reinstate those monthly and annual support terms. Accordingly, ***662** Father has made no overpayment of support during the pendency of this action.

III. ATTORNEY'S FEES AND COSTS

[19] Mother argues the family court erred in not awarding her attorney's fees and costs. We agree.

[20] "In determining whether to award attorney's fees, the court should consider each party's ability to pay his or her own fee; the beneficial results obtained by the attorney; the parties' respective financial conditions; and the effect of the fee on each party's standard of living." *Patel v. Patel,* 359 S.C. 515, 533, 599 S.E.2d 114, 123 (2004). Mother's attorney's fees and costs in this case are at least half of her income, while ****207** Father's are far less than one-third of his income. Further, this litigation was necessary primarily because of Father's conduct. Not only had Father neglected to pay the full amount of the thirty-five percent of his annual bonus due to his children, it was his contention that Jamie was not in need of support beyond the age of majority that prompted Mother to file this action, from which she has received significant beneficial results. Therefore, we reverse and remand for an award of attorney's fees and costs to Mother.

CONCLUSION

We therefore overrule *Webb* and find that *Risinger* and its progeny do not violate the principles of equal protection. Accordingly, we reverse the family court's decision in this case and remand for a determination of what amount, if any, Father should pay towards Collin's college expenses. Additionally, we hold the family court erred in reducing Father's child support obligation for Jamie below the amount in the temporary order and in not awarding Mother attorney's fees and costs.

TOAL, C.J. and KITTREDGE, J., concur. BEATTY, J., dissenting in part in a separate opinion in which PLEICONES, J., concurs.

***663** Justice BEATTY.

I respectfully dissent in part. Unlike the majority, I do not believe a family court has jurisdiction to order a parent to pay college tuition as an incident of child support. Accordingly, I would hold that a parent has no legal obligation to pay college expenses for a child who has reached the age of majority.

In my view, our decision in this case should not be based on an assessment of the equal protection challenge. Instead, I believe we must *sua sponte* address the more fundamental issue of whether the family court has jurisdiction to order a parent to pay college tuition as an incident of continuing child support. *See Travelscape, L.L.C. v. S.C. Dep't of Revenue,* 391 S.C. 89, 109 n. 10, 705 S.E.2d 28, 38 n. 10 (2011) (recognizing that this Court may *sua sponte* address an issue involving subject matter jurisdiction); *Amisub of S.C., Inc. v. Passmore,* 316 S.C. 112, 114, 447 S.E.2d 207, 208 (1994) (stating that the appellate court must always take notice of the lack of subject matter jurisdiction).

In my opinion, a review of the decision in *Risinger* reveals that it effectively expands the jurisdiction of the family court beyond what the Legislature has authorized.

Furthermore, I believe the holding in *Risinger* violates the well-established tenets of our rules of statutory construction.

Central to my analysis of this case is a detailed review of section 63–3–530 of the South Carolina Code, which identifies forty-six areas over which the family court has exclusive jurisdiction. S.C.Code Ann. § 63–3–530 (2010) (previously codified at sections 14–21–810 and 20–7–420). Subsection 14 grants the family court jurisdiction to order child support. *Id.* § 63–3–530(A)(14) ("The family court has exclusive jurisdiction to order support of a ... child."). Our Legislature has defined a child as "a person under the age of eighteen." *Id.* § 63–1–40(1) (formerly codified at section 20–7–30). In view of these inextricably linked code sections, I believe the Legislature clearly established the general rule that a parent's payment of child support terminates once a child has reached the age of eighteen.

Section 63–3–530(A)(17), however, provides an exception to this general rule, stating that the family court has exclusive jurisdiction:

> ***664** To make all orders for support run until further order of the court, except that orders for child support run until the child is eighteen years of age or until the child is married or becomes self-supporting, as determined by the court, whichever occurs first; or without further order, past the age of eighteen years if the child is *enrolled and still attending high school, not to exceed high school graduation* or the end of the school year after the child reaches nineteen years of age, whichever is later; or in accordance with a preexisting agreement or order to provide for child support past the age of eighteen years; or in the discretion of the court, to provide for child support past age eighteen where there are physical or mental disabilities of the child or other exceptional circumstances ****208** that warrant the continuation of child support beyond age eighteen for as long as the physical or mental disabilities or exceptional circumstances continue.

Id. § 63–3–530(A)(17) (previously codified at section 14–21–810(b)(4)) (emphasis added).

This section is silent with respect to a parent's payment of college expenses for a child who has reached the age of majority. Instead, the above-emphasized language, which explicitly deals with a child's education, clearly expresses the legislative intent that a family court may only order a parent to pay child support until a child's high school graduation or until the end of a school year after the child reaches nineteen years of age. Had the Legislature intended for a parent to pay college expenses as an incident of continuing child support, I believe it would have specifically included the phrase "college graduation." Because the Legislature has not authorized the family court to order such support, we must give effect to this legislative intent and conclude that the family court lacks jurisdiction to order a parent to pay college tuition as an incident of child support. *See Mid–State Auto Auction of Lexington, Inc. v. Altman,* 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996) (recognizing that the primary rule of statutory construction is to ascertain and give effect to the intent of the Legislature).

Moreover, the Legislature explicitly limited the jurisdiction of the family court over matters concerning a child's post-majority financial situation. Pursuant to subsection 17, the family court may order payment of child support past the age ***665** of eighteen where: (1) the child has a physical or mental disability; or (2) "exceptional circumstances" are present. *Id.* § 63–3–530(A)(17).

By its very terms, the "age of majority" implies that a person has become self-sufficient and is responsible for his or her own financial endeavors. *See* S.C. Const. art. XVII, § 14 ("Every citizen who is eighteen years of age or older, not laboring under disabilities prescribed in this Constitution or otherwise established by law shall be

deemed sui juris and endowed with full legal rights *and responsibilities* ...." (emphasis added)); *see also Style v. Shaub,* 955 A.2d 403, 408 (Pa.Super.Ct.2008) (defining the "age of majority" as "either eighteen years of age or when the child graduates from high school, whichever comes later"); 27C C.J.S. *Divorce* § 1106 (Supp.2010) (stating that "as an exception to the general rule that the obligation of a divorced parent to provide child support terminates upon the child reaching majority, a financially able divorced parent may be required to support an adult child who, by reason of physical or mental disability, is unable to support himself or herself").

Contrary to these clear restrictions on a child's right to receive financial support beyond the age of majority, the Court in *Risinger* classified a college education as an "exceptional circumstance." In my view, this assessment was erroneous and should not serve as authority for the majority's decision to legally obligate a parent to pay for a child's post-majority college education.

Initially, as previously indicated, this language is outside the parameters of the educational provisions of section 63–3–530(A)(17). Furthermore, taken to its logical extreme, there would be no "cut-off" date for this legal obligation as any child of divorce, including "adult" children, would be entitled to financial support from a parent. I do not believe this is what the Legislature intended by promulgating section 14–21–810(b)(4).

Notably, none of the cases that have cited *Risinger* in the past thirty years have involved a statutory or constitutional analysis of section 14–21–810(b)(4). Thus, I do not believe the majority can blindly adhere to *Risinger* and its progeny to justify its holding. Because the Legislature has not authorized ***666** the family court to order such support or created a statutory obligation for a divorced parent to pay for an adult child's post-secondary education, I would overrule *Risinger* and, in turn, affirm our decision in *Webb.*

Based on my conclusion regarding the family court's lack of jurisdiction, I do not believe it is necessary to address the constitutional implications of section 63–3–530(A)(17). Additionally, I would note that Father had previously agreed to pay a portion of Collin's college expenses. Thus, the ****209** resolution of the instant case is not dependent upon a review of *Webb.* Accordingly, I would decline to revisit that opinion and to address the equal protection issue. *See In re McCracken,* 346 S.C. 87, 92, 551 S.E.2d 235, 238 (2001) ("[I]t is this Court's firm policy to decline to rule on constitutional issues unless such a ruling is required."). However, given the majority's decision to rule on these issues, I must express my disagreement with the majority's analysis.

The equal protection clauses of our federal and state constitutions declare that no person shall be denied the equal protection of the laws. U.S. Const. amend. XIV, § 1; S.C. Const. art. I, § 3. Equal protection "requires that all persons be treated alike under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed." *GTE Sprint Commc'ns Corp. v. Pub. Serv. Comm'n of S.C.,* 288 S.C. 174, 181, 341 S.E.2d 126, 129 (1986) (quoting *Marley v. Kirby,* 271 S.C. 122, 123–24, 245 S.E.2d 604, 605 (1978)). "Courts generally analyze equal protection challenges under one of three standards: (1) rational basis; (2) intermediate scrutiny; or, (3) strict scrutiny." *Denene, Inc. v. City of Charleston,* 359 S.C. 85, 91, 596 S.E.2d 917, 920 (2004). "If the classification does not implicate a suspect class or abridge a fundamental right, the rational basis test is used." *Id.* "Under the rational basis test, the requirements of equal protection are satisfied when: (1) the classification bears a reasonable relation to the legislative purpose sought to be affected; (2) the members of the class are treated alike under similar circumstances and conditions; and, (3) the classification rests on some reasonable basis." *Id.*

In view of the above-outlined law, it is arguable that this case should be analyzed under the strict scrutiny test as the ***667** reduction of a parent's income clearly impinges upon a fundamental property right. *See Wingfield v. S.C. Tax Comm'n,* 147 S.C. 116, 152, 144 S.E. 846, 858 (1928) ("The court appreciates the earnest plea that every person is entitled to the enjoyment of life, liberty, and property, and to the equal protection of the laws guaranteed by the federal and state Constitutions, and will protect and safeguard these fundamental rights to the extent, if necessary, of declaring invalid any legislative enactment clearly shown to be in violation of them."). I cannot conceive of any plausible argument that could withstand this heightened level of scrutiny. Moreover, as will be discussed, I believe there is an equal protection

violation even under the rational basis test, the lowest level of scrutiny.

For several reasons, I disagree with the majority's conclusion that requiring a parent to pay, as an incident of child support, for post-secondary education is rationally related to the State's interest in ensuring the education of our state's youth.

Initially, I would note that the out-of-state cases relied upon by the majority are distinguishable in that underlying those decisions is a statute that specifically provides for the payment of college expenses beyond the age of majority.[9] In contrast, section 63–3–530(A)(17) is silent with respect to the payment of college expenses. Despite the lack of this provision, the ***668** Court in *Risinger* interpolated into the statute a legal obligation for a parent. In my opinion, this was in error as a parent's only financial responsibility for a child's college expenses emanates from a moral obligation.

****210** In reaching its decision, the majority seizes upon this moral obligation. A moral obligation, however, cannot substantiate the imposition of a legal obligation. Although I am cognizant of the deleterious financial and emotional effects of divorce, these alone do not justify disparate treatment of children of divorced families and children of intact families. The children are similarly situated in that they are over the age of eighteen and desire parental financial support for college education. *See Grant v. S.C. Coastal Council,* 319 S.C. 348, 354, 461 S.E.2d 388, 391 (1995) ("The *sine qua non* of an equal protection claim is a showing that similarly situated persons received disparate treatment."). In analyzing this distinction, the question becomes whether section 63–3–530(A)(17), as interpreted in *Risinger,* creates a legal duty that is confined to situations of separated, divorced, or unmarried parents and their children. Thus, I disagree with the majority's class designation because I believe the class created by section 63–3–530(A)(17) is composed of separated, divorced, or unmarried parents and their children versus the parents and children of intact families. In my opinion, the State does not have a legitimate interest in treating separated, divorced, or unmarried parents and their children differently than their intact counterparts.[10]

In reaching this conclusion, I am persuaded by the factually-similar case of *Curtis v. Kline,* 542 Pa. 249, 666 A.2d 265, 270 (1995), wherein the Pennsylvania Supreme Court refutes the majority's position that only children of divorce are entitled to post-majority financial support from their parents.

***669** In *Curtis,* the court held that a statute requiring separated, divorced, or unmarried parents to provide post-secondary educational support to their adult child violated the Equal Protection Clause of the Fourteenth Amendment. *Curtis,* 666 A.2d at 270. In so holding, the court reasoned:

> Act 62 classifies young adults according to the marital status of their parents, establishing for one group an action to obtain a benefit enforceable by court order that is not available to the other group. The relevant category under consideration is children in need of funds for a post-secondary education. The Act divides these persons, similarly situated with respect to their need for assistance, into groups according to the marital status of their parents, i.e., children of divorced/separated/never-married parents and children of intact families.
>
> It will not do to argue that this classification is rationally related to the legitimate governmental purpose of obviating difficulties encountered by those in non-intact families who want parental financial assistance for post-secondary education, because such a statement of the governmental purpose assumes the validity of the classification. Recognizing that within the category of young adults in need of financial help to attend college there are some having a parent or parents unwilling to provide such help, the question remains whether the authority of the state may be selectively applied to empower only those from non-intact families to compel such help. We hold that it may not. In the absence of an entitlement on the part of any individual to post-secondary education, or a generally applicable requirement that parents assist their adult children in obtaining such an education, ... we perceive no rational basis for the state government to provide only certain adult citizens with legal means to overcome the difficulties they encounter in pursuing that end.

Id. at 269–70; *see Grapin v. Grapin,* 450 So.2d 853, 854 (Fla.1984) (recognizing that the "societal ideal of continued parental support for the education and training" of adult children did not create a legal duty, and characterizing a family court's order to do so as an "indirect method of compelling unwilling ****211** divorced parents to provide college costs for their capable adult children").

***670** In view of the foregoing, I believe that *Risinger* is a fallacy borne of noble purpose. Noble purpose, notwithstanding, this Court has no authority to legislate from the bench. Consequently, I would reverse the family court's order with respect to Father's payment of Collin's college expenses as I cannot cavalierly disregard the Legislature's express limitations on the family court's jurisdiction and the obvious equal protection deficiency of the *Risinger* decision.

PLEICONES, J., concurs.

All Citations

396 S.C. 647, 723 S.E.2d 198

Footnotes

1 Their younger son, Jamie, has autism; although he attained the age of majority in 2008, he is not expected to graduate from high school until he is twenty-one.

2 *Webb* had not yet been decided at this time.

3 The temporary order required Father to pay $1,018.33 per month, based upon Mother's monthly income of $1,600 and Father's monthly income of $8,741. The final order, however, required Father to pay $923 per month, finding Mother earned $3,300 per month and Father earned $10,666 per month.

4 In particular, *Webb* held *Risinger*'s interpretation of Section 14–21–810(b)(4) of the South Carolina Code (1976)—now codified at Section 63–3–530(A)(17) (Supp.2010)—violated equal protection. 387 S.C. at 333, 692 S.E.2d at 545.

5 In their respective dissents in *Webb,* the Chief Justice and Justice Kittredge stated the majority should have reviewed that case under the classification raised by the parties themselves, which was divorced and non-divorced parents. *Webb,* 387 S.C. at 333–34, 692 S.E.2d at 546 (Toal, C.J., dissenting); *id.* at 336, 692 S.E.2d at 547 (Kittredge, J., dissenting). Although the majority in *Webb* undertook to remedy what it perceived to be a constitutional error on grounds other than those argued by the parties, *id.* at 332 n. 5, 692 S.E.2d at 545 n. 5, the mere fact that a constitutional question is involved does not permit the Court to address issues not properly before it, *cf. In re McCracken,* 346 S.C. 87, 92, 551 S.E.2d 235, 238 (2001) ("A constitutional claim must be raised and ruled upon to be preserved for appellate review."). The dissent today would do the same thing as the *Webb* majority and review *Risinger* under a classification not properly before us.

6 We are not unmindful of Mother's alternate argument that Father separately agreed to pay for Collin's college expenses. Although we are cognizant of our hesitancy to reach constitutional questions when it is not necessary, there is no cogent reason to let the error in *Webb* persist.

7 *Risinger* held the family court's authority to award support for a child after the age of majority " 'where there are physical or mental disabilities of the child *or other exceptional circumstances that warrant it* ' " included awarding college expenses. 273 S.C. at 38, 253 S.E.2d at 653 (quoting S.C.Code Ann. § 14–21–810(b)(4) (1979) (emphasis added)). We wrote that "[t]he need for education is the most likely additional 'exceptional circumstance' which might justify continued financial support." *Id.*

8 The family court also dismissed Mother's claim because Collin chose to attend a private college. While we agree that the cost of a child's education is a relevant consideration in light of the factors identified in *Risinger* and subsequent cases, attendance at a private school does not foreclose an award of expenses. Instead, the tuition amount is to be factored in with the child's attainment of scholarships, grants, and loans as well as the parents' ability to pay when determining whether to make such an award and in what amount.

9 *See Kujawinski v. Kujawinski,* 71 Ill.2d 563, 17 Ill.Dec. 801, 376 N.E.2d 1382, 1390 (1978) (analyzing section 513 of the 1977 Illinois Revised Statutes, which states in relevant part, "The Court also may make such provision for the education and maintenance of the child or children, whether of minor or majority age, out of the property of either or both of its parents as equity may require, whether application is made therefor before or after such child has, or children have, attained majority age."); *In re Marriage of Vrban,* 293 N.W.2d 198, 201–02 (Iowa 1980) (interpreting section 598.1(2)

of the 1977 Iowa Code which provides that "child support" may include support "for a child who is between the ages of eighteen and twenty-two years who is regularly attending an approved school ..., or is, in good faith, a full-time student in a college, university, or area school; or has been accepted for admission to a college ..."); *LeClair v. LeClair,* 137 N.H. 213, 624 A.2d 1350, 1357 (1993) (interpreting sections 458:17 and 458:20 of the New Hampshire Revised Statutes that specifically provide for a divorced parent's payment of reasonable college expenses for an adult child), *superseded by,* N.H.Rev.Stat. Ann. § 461 (2005) (enactment of "Parental Rights and Responsibilities Act").

10 Furthermore, I would note that the majority defines the class as "divorced versus non-divorced parents," and distinguishes the class designation in *Webb* as "parents subject to a child support order at the time of emancipation versus those who are not subject to one." In my view, this distinction is inconsequential given the rarity of a divorce decree involving children that does not include a child support provision and the existence of a child support order involving an intact family. Thus, I believe the majority's class designation is the same as the one espoused in *Webb*.

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KeyCite Red Flag - Severe Negative Treatment
Overruled by McLeod v. Starnes, S.C., March 7, 2012

387 S.C. 328
Supreme Court of South Carolina.

Timothy L. WEBB, Appellant,
v.
Janice Rush SOWELL, f/k/a Janice Rush Webb, Defendant and Timothy Loren Webb, Jr., Third Party Defendant, of whom Janice Rush Sowell and Timothy Loren Webb, Jr. are Respondents.

No. 26807.
|
Heard Jan. 7, 2009.
|
Decided April 19, 2010.

Synopsis

Background: After the parties divorced, mother sought college expenses for son, who joined the action as a third party defendant. The Family Court, Kershaw County, Robert S. Armstrong, J., ordered father to contribute to college expenses for son. Father appealed.

[Holding:] The Supreme Court, Pleicones, J., held that post-divorce order that required father to contribute to son's college expenses violated the equal protection clause.

Reversed.

Toal, C.J., filed a dissenting opinion.

Kittredge, J., filed a dissenting opinion.

West Headnotes (2)

[1] Child Support
Adult children

Constitutional Law
Child custody, visitation, and support

Post-divorce order that required father to contribute to son's college expenses violated the equal protection clause; there was no rational basis to permit a family court to order a parent subject to a child support order to contribute to an emancipated child's post-secondary education. U.S.C.A. Const.Amend. 14; Const. Art. 1, § 3; Code 1976, § 63–3–530.

1 Cases that cite this headnote

[2] Constitutional Law
Statutes and other written regulations and rules

Constitutional Law
Statutes and other written regulations and rules

To satisfy the Equal Protection Clause, a legislative classification must bear a reasonable relation to the legislative purpose sought to be achieved, the members of the class must be treated alike under similar circumstances, and the classification must rest on some rational basis. U.S.C.A. Const.Amend. 14.

1 Cases that cite this headnote

Attorneys and Law Firms

****543** Joe Wayne Underwood, of Moses, Koon & Brackett, and Regina Hollins Lewis, of Gaffney Lewis & Edwards, both of Columbia, for Appellant.

Stephen R. Smoak, of Savage, Royall & Sheheen, of Camden, for Respondents.

Opinion

Justice PLEICONES.

***329** This is a direct appeal from the family court's order requiring appellant, Timothy L. Webb (Father),

to contribute to college expenses for his son, respondent Timothy Loren Webb, Jr. (Son). Because we find that *Risinger v. Risinger,* 273 S.C. 36, 253 S.E.2d 652 (1979) was wrongly decided and that S.C.Code Ann. § 63–3–530(A)(17) [1], as interpreted, is unconstitutional, we reverse.

****544 FACTS**

Father and respondent Janice Rush Sowell (Mother) divorced in 1994. Father and Mother had two children born of the marriage; Son is the older of the two children. Son turned 18 on April 13, 2005, and started college in the fall of that same year. In April 2006, Father brought an action to reduce child support based on Son's emancipation. Mother counterclaimed for college expenses for Son who eventually joined the legal action as a third party defendant. Mother and Father agreed to reduce Father's child support obligation to reflect only support for their daughter, but the case proceeded to trial on Mother's counterclaim regarding Son's college expenses.

Mother's counterclaim was heard in January 2007, during Son's fourth semester. At the outset of the hearing, Father moved to dismiss Mother's counterclaim based on the Equal Protection clause of the federal and state constitutions. In an order denying Father's motion, the family court observed:

> ***330** While the Court has reviewed the motion with some interest and follows the logic proposed by the Plaintiff, the Court is bound by the case of *Risinger v. Risinger* and its progeny and therefore determines that until there is further ruling by either the Court of Appeals or the Supreme Court, it is appropriate in this instance to require the Plaintiff to contribute to the support of his son's college education. Therefore, the Plaintiff's motion to dismiss on the constitutional grounds is denied.

The family court required Son to apply for "all grants, scholarships and loans" as well as "earn as much money as he can during the summer months and holidays to defray his expenses." Further, the family court specifically found that Son "has the obligation to carry as much of the burden as he can." The family court found that thereafter, Mother and Father would equally divide all reasonable college expenses, to include tuition, books, room, board, spending money, meals, supplies, fees, health insurance, transportation, and any other incidental expenses. This appeal followed.

ISSUE

Does the family court's order obligating Father to contribute to Son's college expenses violate the Equal Protection Clause?

DISCUSSION

[1] Father argues that this Court's interpretation in *Risinger* of the statute now found at S.C.Code Ann. § 63–3–530(A)(17) violates equal protection. We agree, and find no rational basis for a rule that permits a family court to order a parent subject to a child support order to contribute to an emancipated child's post-secondary education.

S.C.Code Ann. § 63–3–530 provides, in relevant part:

> (A) The family court has exclusive jurisdiction:
>
> ...
>
> (17) To make all orders for support run until further order of the court, except that orders for child support run until the child is eighteen years of age or until the child is married or becomes self-supporting, as determined by the ***331** court, whichever occurs first; or without further order, past the age of eighteen years if the child is enrolled and still attending high school, not to exceed high school graduation or the end of the school year after the child reaches nineteen years of age, whichever is later; or in accordance with a preexisting agreement or order to provide for child support past

> the age of eighteen years; or in the discretion of the court, to provide for child support past age eighteen where there are physical or mental disabilities of the child or other exceptional circumstances that warrant the continuation of child support beyond age eighteen for as long as the physical or mental disabilities or exceptional circumstances continue.

S.C.Code Ann. § 63–3–530 (2007).

The statute provides that child support orders terminate when the child reaches age 18, marries, or becomes self-supporting.[2] ****545** However, a court may order the continuation of support beyond age 18 for certain "exceptional circumstances." In *Risinger,* this Court held that a desire to attend college may constitute such "exceptional circumstances." The Court explained as follows:

> The need for education is the most likely additional "exceptional circumstance" which might justify continued financial support. Children over 18 with a physical or mental disability, and children over 18 in need of further education, have much in common. In each case, the child's ability to earn is either diminished or entirely lacking. In each case, most parents feel an obligation to help, and do help the child.
>
> *Risinger,* 273 S.C. at 38, 253 S.E.2d at 653.

As the above passage makes clear, the *Risinger* Court focused on the interests of the child. The instant case, however, requires us to examine the rights of the parents. Because the statute only allows for the *continuation* of support beyond the age of 18, the effect of the *Risinger* decision is that a court may order a parent subject to a support order at the time his or her child reaches age 18 to pay college expenses. However, the statute grants the court no such ***332** power over a parent not subject to such an order,[3] nor is there any common law duty on parents to pay for an adult child's post-secondary education.[4]

[2] The Equal Protection clauses of both the federal and state constitutions provide that no person shall be denied the equal protection of the laws. U.S. Const. amend. XIV, § 1; S.C. Const. art. I, § 3. To satisfy the Equal Protection Clause, a legislative classification must bear a reasonable relation to the legislative purpose sought to be achieved, the members of the class must be treated alike under similar circumstances, and the classification must rest on some rational basis. *See German Evangelical Lutheran Church of Charleston v. City of Charleston,* 352 S.C. 600, 608, 576 S.E.2d 150, 154 (2003).

We view the appropriate class as those parents subject to a child support order at the time of the child's emancipation and can discern no rational basis for the varied treatment of the class as compared to those parents who are not subject to such an order.[5] We therefore find that the statute, as interpreted by *Risinger,* fails the rational basis test and thus, does not meet the constitutional requirements of Equal Protection.[6]

***333 CONCLUSION**

We find that S.C.Code Ann. § 63–3–530(A)(17), as interpreted in *Risinger,* violates the Equal Protection Clause. We therefore reverse the trial court's denial of Father's motion to dismiss.

REVERSED.

WALLER and BEATTY, JJ., concur.

TOAL, C.J., dissenting in a separate opinion.

KITTREDGE, J., dissenting in a separate opinion.

****546** Chief Justice TOAL, dissenting.

I respectfully dissent. Appellant argues that S.C.Code Ann. § 63–3–530(A)(17), as interpreted by *Risinger v. Risinger,* 273 S.C. 36, 253 S.E.2d 652 (1979), violates the equal protection clauses of the United States and South Carolina constitutions. I disagree.

"In reviewing a statute challenged on equal protection grounds, great deference is given to the classification created, and it will be sustained if supported by any reasonable hypothesis and not plainly arbitrary." *Mitchell v. Owens,* 304 S.C. 23, 24–25, 402 S.E.2d 888, 889

(1991), *citing Samson v. Greenville Hosp. Sys.*, 295 S.C. 359, 368 S.E.2d 665 (1988). Furthermore, a statute enacted pursuant to legislative power is presumptively constitutional. *Nichols v. S.C. Research Auth.*, 290 S.C. 415, 351 S.E.2d 155 (1986). Finally, this Court has consistently held it will not construe a statute to do that which is unconstitutional. *See Ward v. State*, 343 S.C. 14, 19, 538 S.E.2d 245, 247 (2000), *citing Mitchell v. Owens*, 304 S.C. 23, 402 S.E.2d 888 (1991) (holding that statutes are presumed to be constitutional and will be construed so as to render them valid).

As a threshold matter, I must address the classification relied upon by the majority because it is not one before the Court. The majority holds that S.C.Code Ann. § 63–3–530(A)(17), as interpreted by *Risinger*, violates the equal ***334** protection clauses of the United States and South Carolina constitutions, finding that there is no rational basis for what it perceives to be the government's disparate treatment of parents subject to support orders prior to a child's emancipation and parents not subject to support orders prior to a child's emancipation. Appellant did not raise this argument,[7] but rather asserted that section 63–3–530(A)(17) violates equal protection because it treats divorced and non-divorced parents differently. Thus, in my view, the majority erroneously relies upon an argument not before the Court.

Nonetheless, assuming Appellant raised the classification relied upon by the majority, section 63–3–530(A)(17) does not treat such classes disparately. Section 63–3–530(A)(17) grants the family court jurisdiction to order continuation of a support order entered prior to a child's emancipation, but the jurisdiction granted to the family court is not confined to such situations. Section 63–3–530(A)(17) also grants jurisdiction to award support for post-secondary education "in the discretion of the court." That is, the court may order a parent to provide support to cover the expenses of exceptional circumstances encountered by an emancipated child, such as post-secondary education, whether or not there was a support order in effect prior to the child's emancipation.[8]

Turning to the classification actually raised by Appellant, I do not agree that section 63–3–530(A)(17) treats divorced parents and non-divorced parents differently. Section 63–3–530(A)(17) does not apply only to divorced parents.[9] As this ***335** Court has noted in a case that dealt with support for an unemancipated disabled adult child, this statutory section " treats divorced parents the same as ****547** all other parents." *Riggs v. Riggs*, 353 S.C. 230, 236, 578 S.E.2d 3, 6 (2003). In *Riggs*, we therefore found no merit to the husband's equal protection argument. Accordingly, pursuant to *Riggs*, there can be no equal protection violation in the instant case because no such legislative classification is made by the applicable clause of section 63–3–530(A)(17).

For these reasons, I would hold that the family court's order should be affirmed.

Justice KITTREDGE, dissenting.

I join Chief Justice Toal in dissent in rejecting the equal protection challenge to section 63–3–530(A)(17) of the South Carolina Code (Supp.2008). I write separately because my view of the equal protection challenge and *Riggs v. Riggs*, 353 S.C. 230, 578 S.E.2d 3 (2003) differs from that of the Chief Justice. Because I would affirm the family court, I would address Appellant's remaining issue. I believe legislative intent concerning a parent's potential obligation to financially contribute to his or her child's college education includes a limitation to the cost of a South Carolina publicly supported college or university. I would, therefore, remand to the family court to determine if Appellant's contribution should be modified.

I.

I join the Chief Justice in result as to the constitutionality of section 63–3–530(A)(17) (Supp.2008) (the successor statute to section 20–7–420(A)(17) of the South Carolina Code (Supp.2007)) ***336** insofar as it reflects legislative intent to authorize the family court to order parents to contribute to their child's college educational expenses under the *Risinger*[10] framework. *Risinger's* construction of legislative intent has stood the test of time, as the Legislature has amended many subsections of this jurisdictional statute through the intervening thirty years, but the " exceptional circumstances" language in subsection (A)(17) remains largely unchanged.

As Chief Justice Toal notes, the majority has ignored our issue preservation rules and redefined the class in a manner not presented "below, in brief, or at oral argument." (Toal, C.J., dissent at n.1). The majority so acknowledges in footnote 5, "[t]hough Appellant does not raise this specific classification, we note that this Court is asked, on appeal, to reconsider the validity of *Risinger.*"

From a policy standpoint, the decision of the majority may be easily understood. A legislative policy of treating children of separated, divorced, or unmarried parents differently than children of married parents for purposes of requiring parental financial support to attend college is most assuredly a debatable proposition. Because no suspect classification is involved, however, the standard of review is deferential. Against an equal protection challenge implicating no suspect classification, a court must sustain the legislation if it is reasonably related to the legislative purpose sought to be achieved, members of the class are treated alike under similar circumstances, and the classification rests on some rational relationship. *German Evangelical Lutheran Church of Charleston v. City of Charleston,* 352 S.C. 600, 608, 576 S.E.2d 150, 154 (2003); *see also In re Marriage of Vrban,* 293 N.W.2d 198, 201 (Iowa 1980) (applying the rational relationship test as neither a suspect class nor a fundamental right are implicated); *In re Marriage of Kohring,* 999 S.W.2d 228, 232–33 (Mo.1999) (finding no equal protection violation because there was no involvement of a suspect class, no infringement of a fundamental right, and the existence of a rational relationship to legitimate state interest); *Childers v. Childers,* 89 Wash.2d 592, 575 P.2d 201, 209 (1978) (applying rational relationship test).

***337** Although the policy rationale underlying section 63–3–530(A) (17) is subject to debate, I believe the statute survives an equal protection challenge. I thus vote to affirm the family court and uphold the statute on the basis that it satisfies the rational basis test. Having rejected the equal protection argument, I return to this Court's construction in *Risinger* of the "exceptional circumstances" statutory language. In this regard, I am especially mindful of the more than three decades that the Legislature has left the statutory interpretation of *Risinger* in place. ****548** *See Illinois Brick Co. v. Illinois,* 431 U.S. 720, 736, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977) (recognizing that "considerations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation"). I would defer to the Legislature, and if the Legislature, as a policy matter, wants to overrule *Risinger's* statutory construction, they are certainly free to do so.

II.

I respectfully disagree with Chief Justice Toal's view, as extrapolated from *Riggs v. Riggs,* 353 S.C. 230, 578 S.E.2d 3 (2003), that the Legislature intended to authorize the family court to order parents of intact families to contribute to the college educational expenses of their children. I do not read *Riggs* that broadly. *Riggs* dealt with a disabled adult child and targeted statutory language authorizing the family court to order "child support past age eighteen where there are physical or mental disabilities." *Id.* at 234, 578 S.E.2d at 5 (quoting from S.C.Code § 20–7–420(A)(17), the predecessor to § 63–3–530(A)(17)). The Court relied initially on "a common law duty of parental support for a child who has reached majority but is so physically or mentally disabled as to be unable to support herself." *Id.* at 234–35, 578 S.E.2d at 5. *Riggs* observed that "[w]here the disability prevents the child from becoming emancipated, the presumption of emancipation upon reaching majority is inapplicable." *Id.* at 235, 578 S.E.2d at 5.

The Court in *Riggs* next construed the language of section 20–7–420(A)(17) which authorized the family court to order "child support past age eighteen where there are physical or mental disabilities." *Id.* at 234–35, 578 S.E.2d at 5. *Riggs* ***338** found the statutory provision "to be consistent with this common law duty and h[e]ld the family court is vested with jurisdiction to order child support for an unemancipated disabled adult child." *Id.* at 235, 578 S.E.2d at 5.

The issue of an unemancipated disabled adult child, with its common law underpinnings, is a far cry from a non-disabled adult child who wants to attend college. Imposing a duty of support in the former situation (through the common law and statutorily) is easily understandable. In

the absence of a clear expression of legislative intent, I would not venture beyond *Risinger*. Accordingly, I would hold that legislative approval for the family court ordering a parent to contribute to his or her adult child's college educational expenses is limited to children of separated, divorced, or unmarried parents.

III.

Because I reject Appellant's constitutional challenge and vote to affirm the family court, I would address Appellant's contention concerning the scope of his financial obligation. My assessment of legislative intent is that a parent's contribution should be determined and limited based on the cost of a South Carolina publicly supported college or university. Respondent suggests it is unfair to limit a child's selection to a South Carolina publicly supported college or university. I agree with Respondent on that point, but I view the issue differently. The issue, as I see it, is to what degree the Legislature has authorized the family court to compel the contribution of a parent to an adult child's college education. Given that *Risinger* discerned legislative intent from the "exceptional circumstances" provision, I find it incongruous that the Legislature would place no reasonable limitation on a parent's contribution.

The *Risinger* framework entails a host of limitations as a function of legislative intent, including consideration of the adult child's ability to work to defray college expenses, exhaustion of scholarships, availability of student loans, and the parent's ability to contribute. Regardless of a parent's wealth, the *Risinger* factors will apply in all cases. As I construe legislative intent, it matters not that a parent can easily afford the most expensive college education. Parents ***339** will often allow an adult child to attend the college of his or her choice, but that is a voluntary decision free from governmental interference.[11] I do ****549** not believe the Legislature has authorized the family court to accept an adult child's college selection without regard to the costs. I believe a limitation to a South Carolina publicly supported college or university is in accord with legislative intent as set forth in *Risinger*.

IV.

I respectfully dissent. I would affirm the order of the family court requiring Appellant, pursuant to section 63–3–530(A)(17), to contribute to the son's college educational expenses. But I would limit Appellant's contribution to what his pro rata assessment would have been at a South Carolina publicly supported college or university. Accordingly, I would remand to the family court to determine if Appellant's contribution should be modified.

All Citations

387 S.C. 328, 692 S.E.2d 543

Footnotes

1 This statute was previously codified at § 20–7–420(17).

2 Of course, this portion of the statute and the *Risinger* case do not address situations in which a parent seeks to enforce an agreement regarding post-secondary education expenses.

3 We disagree with the Chief Justice's interpretation of S.C.Code Ann. § 63–3–530(A)(17). Though statutes are presumed constitutional and, if possible, will be construed to render them valid, we cannot ignore the plain reading of the statute. *See State v. Mills,* 360 S.C. 621, 624, 602 S.E.2d 750, 752 (2004) (despite rule of construction, "when the terms of the statute are clear and unambiguous, we are constrained to give them their literal meaning."). The portion of the statute cited by the Chief Justice's dissent plainly allows only for the "*continuation* of child support beyond age eighteen...." S.C.Code Ann. § 63–3–530(A)(17) (emphasis added).

4 We confine our opinion to post-secondary education only.

5 Though Appellant does not raise this specific classification, we note that this Court is asked, on appeal, to reconsider the validity of *Risinger*. Having found that this Court's prior interpretation of the statute created an unconstitutional

classification, we feel bound to remedy the error. *See Am. Petroleum Inst. v. South Carolina Dep't of Revenue,* 382 S.C. 572, 580, 677 S.E.2d 16, 20 (2009) (duty of this Court to determine if statute exceeds the bounds of the constitution).

6 Because we find that S.C.Code Ann. § 63–3–530(A)(17), as interpreted by *Risinger,* violates Equal Protection, we need not decide the remaining issue. *See Futch v. McAllister Towing of Georgetown, Inc.,* 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (appellate court need not discuss remaining issues when disposition of prior issue is dispositive).

7 Appellant never raised this argument below, in brief, or at oral argument.

8 The majority ignores this reading of section 63–3–530(A)(17) as well as precedent requiring it, where possible, to construe statutes in a constitutional manner. *See Ward,* 343 S.C. at 19, 538 S.E.2d at 247 (holding this Court will not construe a statute to do that which is unconstitutional).

9 In relevant part, the statute at issue provides as follows:

> The family court has exclusive jurisdiction: ...
>
> (17) To make all orders for support run until further order of the court, except that orders for child support run until the child is eighteen years of age or until the child is married or becomes self-supporting, as determined by the court, whichever occurs first; or without further order, past the age of eighteen years if the child is enrolled and still attending high school, not to exceed high school graduation or the end of the school year after the child reaches nineteen years of age, whichever is later; or *in accordance with a preexisting agreement or order to provide for child support past the age of eighteen years; or in the discretion of the court, to provide for child support past age eighteen where there are physical or mental disabilities of the child or other exceptional circumstances that warrant the continuation of child support beyond age eighteen for as long as the physical or mental disabilities or exceptional circumstances continue.*

(emphasis added).

10 *Risinger v. Risinger,* 273 S.C. 36, 39, 253 S.E.2d 652, 653–54 (1979).

11 A different situation is presented where parents, through a court approved separation agreement, agree to voluntarily provide support at a certain level to an adult child's college education expenses.

End of Document

293 N.W.2d 198
Supreme Court of Iowa.

In re the MARRIAGE OF Myrna J. VRBAN and Gregory P. Vrban.
Upon the Petition of Myrna J. VRBAN, Appellee,
v.
and concerning Gregory P. VRBAN, Appellant.

No. 62447.
|
June 18, 1980.

Synopsis

Appeal was taken by husband from a dissolution decree of the Marion District Court, Van Wifvat, J., awarding custody of four children to wife, providing for child support, and dividing marital property. The Supreme Court, LeGrand, J., held that: (1) statute allowing a trial court to order a divorced parent to pay support for an adult child "who is regularly attending an approved school" or who is in good faith "a full time student in a college" is designed to meet a specific and limited problem which the legislature could reasonably find to exist in a home split by divorce and is not violative of equal protection as failing to impose a similar requirement upon married parents; (2) trial court did not err in ordering support to continue through college before children were accepted into college though it would have been better if court had spelled out that support would continue past age of 18 only if statutory conditions were met; (3) award which amounted to a total of $942 per month for support of wife and her four daughters was not excessive where, aside from fact that husband was able to work steadily and had substantial money capacity, wife's income was a little more than one half of husband's, and wife had four children living with her, while husband had only one; and (4) property inherited by one spouse is a proper factor to be considered in arriving at a fair settlement.

Affirmed.

West Headnotes (16)

[1] **Constitutional Law**
Rational Basis Standard; Reasonableness

When there is no suspect classification or fundamental right involved, courts will not apply the strict scrutiny standard, but will apply the less rigorous traditional equal protection test. U.S.C.A.Const. Amend. 14.

1 Cases that cite this headnote

[2] **Constitutional Law**
Statutes and other written regulations and rules

A statute will not be ruled invalid under the equal protection test unless it is patently arbitrary and bears no rational relationship to a legitimate governmental interest. U.S.C.A.Const. Amend. 14.

Cases that cite this headnote

[3] **Constitutional Law**
Equal protection

Constitutional Law
Equal protection

There is a presumption of constitutionality, and one who asserts a statute is unconstitutional has burden of proving beyond a reasonable doubt that the classification violates equal protection. U.S.C.A.Const. Amend. 14.

1 Cases that cite this headnote

[4] **Child Support**
Post-secondary education

Payment by a divorced parent for higher education is a matter of legitimate state interest. I.C.A. §§ 261.25, 598.1, subd. 2; Acts 68th Gen.Assem. c. 13, § 8.

1 Cases that cite this headnote

[5] **Constitutional Law**
Statutes and other written regulations and rules

Question to be determined under equal protection analysis is whether statute bears a rational relationship to a state interest and, if so, whether the class distinction drawn therein is arbitrary or reasonable. U.S.C.A.Const. Amend. 14.

Cases that cite this headnote

[6] **Child Support**
Validity

Constitutional Law
Families and children

Statute allowing a trial court to order a divorced parent to pay support for an adult child "who is regularly attending an approved school" or who is in good faith "a full time student in a college" is designed to meet a specific and limited problem which the legislature could reasonably find to exist in a home split by divorce and is not violative of equal protection as failing to impose a similar requirement upon married parents. I.C.A. § 598.1, subd. 2; Acts 68th Gen.Assem. c. 13, § 8; U.S.C.A.Const. Amend. 14.

26 Cases that cite this headnote

[7] **Child Support**
Post-secondary education

It is neither arbitrary nor unreasonable for legislature to consider that there is no necessity to statutorily require married persons to support their children while attending college but that such a requirement is necessary to further the state interest in the education of children of divorced parents. I.C.A. § 598.1, subd. 2.

9 Cases that cite this headnote

[8] **Child Support**
Post-secondary education

Factors to be considered in applying statute authorizing a court to order a divorced parent to pay support for adult child who is regularly attending an approved school or who is in good faith a full-time student in a college include the financial condition of the parent, ability of the child for college work, age of the child, and whether the child is self-sustaining or not. I.C.A. § 598.1, subd. 2.

13 Cases that cite this headnote

[9] **Child Support**
Post-secondary education

Statute providing that child support may include support for a child who is between the ages of 18 and 22 years and who is in good faith a full-time student in a college is not limited in application to situations when the children are actually ready to enter college. I.C.A. § 598.1, subd. 2.

1 Cases that cite this headnote

[10] **Child Support**
Education

Trial court did not err in ordering support to continue through college before children were accepted into college though it would have been better if court had spelled out that support would continue past age of 18 only if statutory conditions were met. I.C.A. § 598.1, subd. 2.

3 Cases that cite this headnote

[11] **Child Custody**
Right to control child in general

Rights of children are not controlled by custodial parent.

Cases that cite this headnote

[12] **Child Support**
Excessiveness in general

Child support allowed by trial court was not subject to being disapproved because it was more than custodial parent requested. I.C.A. § 598.1, subd. 2.

Cases that cite this headnote

[13] **Child Support**
Excessiveness in general

Divorce
Earnings;earning capacity

Divorce
Child custody and support

Award which amounted to a total of $942 per month for support of wife and her four daughters was not excessive where, aside from fact that husband was able to work steadily and had substantial money capacity, wife's income was a little more than one half of husband's, and wife had four children living with her, while husband had only one. I.C.A. § 598.1, subd. 2.

Cases that cite this headnote

[14] **Divorce**
Fault in separation or divorce

Factors to be considered by trial court in dividing the property, less the fault standard, include the living standards, age, contribution of the parties to the marriage, educational background, number and ages of the children, net worth of the property acquired, earning capacity, life expectancy, and ability to pay; however, factors are not meant to arrive at mathematical precision.

1 Cases that cite this headnote

[15] **Divorce**
Gifts and inheritance

Property inherited by one spouse is a proper factor to be considered in arriving at a fair settlement.

Cases that cite this headnote

[16] **Divorce**
Gifts and inheritance

Divorce
Disposition of Property

Property settlement made by trial court in divorce proceeding was subject to being approved under circumstances and, though record was very unsatisfactory with respect to wife's claim that husband had an interest in his mother's estate, neither party gave trial court a basis upon which to make an equitable division under law then inapplicable.

Cases that cite this headnote

Attorneys and Law Firms

***200** Larry J. Handley of Hermann & Handley, Ankeny, for appellant.

William W. Hardin, Knoxville, for appellee.

Considered by REYNOLDSON, C. J., and LeGRAND, REES, HARRIS, and ALLBEE, JJ.

Opinion

LeGRAND, Justice.

This is an appeal by respondent, Gregory P. Vrban, from a dissolution decree which awarded custody of four children to his wife, Myrna J. Vrban, provided for child support, and divided the marital property. Custody of a fifth child was awarded to respondent. We affirm the decree entered by the trial court.

Gregory does not place in issue the custody award but does challenge the economic provisions of the decree. He contends that the trial court's award of child support was

excessive and attacks the property division as inequitable. He also raises the constitutionality of section 598.1(2), The Code 1977, which allows a trial court to order a divorced parent to pay support for an adult child "who is regularly attending an approved school" or who is in good faith "a full-time student in a college." We consider the constitutional issue first.

*201 I. THE CONSTITUTIONALITY OF SECTION 598.1(2).

The trial court ordered that the respondent pay $25 per week in child support for each of the four daughters "until such time as each becomes self supporting or through school, including college, whichever occurs first." Gregory concedes that the trial court was empowered to award support through college under section 598.1(2), The Code 1977. However, he argues the statute creates an unreasonable classification by treating adult children of divorced parents differently from adult children of married parents. While divorced parents may be required to support their adult children if the conditions of the statute are met, there is no similar obligation for those parents who remain married. Gregory asks us to hold this to be a violation of the equal protection provision of the Fourteenth Amendment to the United States Constitution and Article I, sections 1 and 6, of the Iowa Constitution.

Section 598.1(2) provides in pertinent part:

> "Support " or "support payments " means any amount which the court may require either of the parties to pay under a temporary order or a final judgment or decree, and may include . . . child support . . . and any other term used to describe such obligations. Such obligations may include support for a child who is between the ages of eighteen and twenty-two years who is regularly attending an approved school . . . , or is, in good faith, a full-time student in a college, university, or area school; or has been accepted for admission to a college . . . ; or a child of any age who is dependent on the parties to the dissolution proceeding because of physical or mental disability.

As the respondent points out, this statute distinguishes the support obligations of married parents from those of divorced parents. There is no statutory requirement that married parents support their adult children except when the child suffers from some disability of mind or body and is "unable to care for itself upon attaining majority." Davis v. Davis, 246 Iowa 262, 266, 67 N.W.2d 566, 568 (1954). There is no such infirmity in the present case, and we must decide if the statute violates the equal protection clause of the federal or state constitutions.

[1] Since there is no suspect classification or fundamental right involved, we do not apply the strict scrutiny standard. We use, instead, the less rigorous traditional equal protection test. Bierkamp v. Rogers, 293 N.W.2d 577, -- (Iowa 1980); Hawkins v. Preisser, 264 N.W.2d 726, 729 (Iowa 1978).

[2] [3] A statute will not be ruled invalid under this test "unless it is 'patently arbitrary' and bears no rational relationship to a legitimate governmental interest." Frontiero v. Richardson, 411 U.S. 677, 681, 93 S.Ct. 1764, 1768, 36 L.Ed.2d 583, 589 (1973); Hawkins, 264 N.W.2d at 729. In Redmond v. Carter, 247 N.W.2d 268, 271 (Iowa 1976), we summarized the test this way:

> The equal protection clause proscribes state action which irrationally discriminates among persons. Brightman v. Civil Serv. Com'n. of City of Des Moines, 204 N.W.2d 588, 591 (Iowa 1973). We recognize that it is often necessary for the state to divide persons into classes for legitimate state purposes, but the distinction drawn between classes must not be arbitrary or unreasonable. . . . Such discrimination is unreasonable if the classification lacks a rational

> relationship to a legitimate state purpose. Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 172, 92 S.Ct. 1400, 1405, 31 L.Ed.2d 768, 777 (1972).

See also Bierkamp v. Rogers, 293 N.W.2d 577, -- (Iowa 1980); State v. Kyle, 271 N.W.2d 689, 692 (Iowa 1978); Kreft v. Fisher Aviation, Inc., 264 N.W.2d 297, 301 (Iowa 1978). There is a presumption of constitutionality, and one who asserts a statute is unconstitutional has the burden of proving beyond a reasonable doubt that the classification violates equal protection. Bierkamp, 293 N.W.2d at --; ***202** Hawkins, 264 N.W.2d at 729 (Iowa 1978); City of Waterloo v. Selden, 251 N.W.2d 506, 508 (Iowa 1977).

[4] Thus we reach the question whether under our de novo review section 598.1(2) violates constitutional equal protection guarantees. In Gerk v. Gerk, 259 Iowa 293, 299-300, 144 N.W.2d 104, 109 (1966), we pointed out the increasing importance which society places on education. The state has recognized this trend and has responded by maintaining three state universities (as well as other educational programs) at public expense. The substantial interest which the state has in this matter is attested to by the ever-increasing appropriations for educational purposes. See s 261.25, The Code 1979; 68th G.A., 1979 Sess., ch. 13, s 8. Clearly higher education is a matter of legitimate state interest.

[5] However, this alone does not settle the issue raised. The further and determinative question is this: Does section 598.1(2) bear a rational relationship to this state interest and, if so, is the distinction drawn between the classes arbitrary or unreasonable?

[6] The respondent argues that divorced parents are arbitrarily ordered to support their adult children in order to accomplish this state purpose while no similar requirement is imposed upon married parents. However, this does not necessarily make the classification arbitrary or unreasonable. The statute was designed to meet a specific and limited problem, one which the legislature could reasonably find exists only when a home is split by divorce. Childers v. Childers, 89 Wash.2d 592, 600-602, 575 P.2d 201, 207 (1978); R. Washburn, Post-Majority Support: Oh Dad, Poor Dad, 44 Temple L.Q. 319, 329 n. 55 (1971).

The legislature could find, too, that most parents who remain married to each other support their children through college years. Making It: A Guide to Student Finances 23 (A. Johnson ed. 1973); R. Freeman, Crisis in College Finance? Time for New Solutions 100 (1965); S. Harris, A Statistical Portrait of Higher Education 100, 114-23 (1972). On the other hand, even well-intentioned parents, when deprived of the custody of their children, sometimes react by refusing to support them as they would if the family unit had been preserved. Childers v. Childers, 89 Wash.2d 592, 602-604, 575 P.2d 201, 208 (1978).

[7] The legislature could consider these facts and decide there is no necessity to statutorily require married parents to support their children while attending college but that such a requirement is necessary to further the state interest in the education of children of divorced parents. The differences in the circumstances between married and divorced parents establishes the necessity to discriminate between the classes. The statute is neither arbitrary nor unreasonable. See Redmond v. Carter, 247 N.W.2d 268, 271 (Iowa 1976).

[8] In summary, we find the state has a legitimate interest in promoting higher education for its citizens. Section 598.1(2) is rationally related to protecting that interest and does so in a manner that is neither arbitrary nor unreasonable. It does not require such support in all cases. It allows the trial court, in its discretion, to award support of the children through college under the proper circumstances. Among the factors to be considered are the financial condition of the parent, ability of the child for college work, age of the child, and whether the child is self-sustaining or not. See Sandler v. Sandler, 165 N.W.2d 799, 802 (Iowa 1969); Gerk v. Gerk, 259 Iowa 293, 300, 144 N.W.2d 104, 109 (1966).

We hold section 598.1(2) does not violate the equal protection clauses of either the federal or state constitutions.

II. CHILD SUPPORT.

[9] [10] The respondent next contends the trial court erred in ordering support to continue through college before the children were accepted into college. His argument is premised on that portion of the statute which states: "(Child support) may include support for a child who is between the ages of eighteen and twenty-two years who . . . is in good faith, a full-time student in a *203 college . . . ." s 598.1(2), The Code (emphasis added). Respondent insists this language permits reliance on the statute only when the children are actually ready to enter college.

We do not agree with this restrictive reading of the statute. In the case of In re Marriage of McFarland, 239 N.W.2d 175, 180 (Iowa 1976), we modified a support decree to include the college expenses of the children who had not yet satisfied the requirements of the statute. We said:

> Support for each daughter shall terminate when she reaches age 18 unless the conditions in section 598.1(2), The Code, relating to education are met, in which event the obligations shall continue for such child until she reaches the age of 22 so long as those conditions exist.

The trial court in the present case did no more than that which is permitted by McFarland. It would have been better if the trial court had spelled out that support would continue past the age of 18 only if the conditions of section 598.1(2) were met, as was done in McFarland. However, we believe this was implicit in the decree, and we so interpret it now.

[11] [12] The respondent next argues that the child support allowed by the trial court should not be approved because it is more than the petitioner requested. This does not make the award excessive or improper. We have held the rights of children are not controlled by the custodial parent. Anthony v. Anthony, 204 N.W.2d 829, 834 (Iowa 1973) (an agreement injurious to the best interests of a child will be held invalid for any purpose); Gerk v. Gerk, 259 Iowa 293, 298, 144 N.W.2d 104, 108 (1966) (father cannot be relieved from the duty to support his minor children by agreement with the mother). The trial court, in its sound discretion, may order child support in an amount greater than that requested by the custodial parent. See s 598.1(2).

We now consider the respondent's further argument that the child support is in fact excessive.

In evaluating a child support award, we use the criteria articulated in In re Marriage of Zoellner, 219 N.W.2d 517, 525 (Iowa 1974):

> It has frequently been said by this court that in making a child support allowance each case is peculiarly dependent on its facts. Factors to be considered are parties' age, health, present earning capacity, future prospects, amount of resources owned by each or both parties, contributions of each to the joint accumulations, the children involved, duration of the marriage, indebtedness of each or both, and any other relevant factors which might assist the trial court in reaching a just and equitable decision. (Citations omitted). Stated somewhat differently, a child support allowance cannot be made or evaluated in a vacuum; the entire record must be examined. (Citations omitted). The difficulty is not in the applicable legal principles but in determining what is justified under the facts presented. No two cases are alike and therefore precedents are of little value. (Citations omitted).

[13] Respondent was, at the time of the decree, forty-four years old. Although not in the best of health, he is able to work steadily and has substantial earning capacity. Petitioner, too, is beset by physical ailments, particularly arthritis. She has a stable income but it amounts to a

little more than one-half of his. In addition, petitioner has four children living with her while respondent has only one. The trial court award would give petitioner a total of $942 per month to support herself and four daughters. Respondent would have $512 to support himself and his son.

We have reviewed the record and have considered all of respondent's contentions, including his claim to credit for house payments which he made when petitioner refused to do so. We affirm all of the provisions of the decree relating to child support.

III. PROPERTY DIVISION.

[14] The respondent also challenges the property division. Factors to be considered ***204** by the trial court, less the fault standard, are listed in Schantz v. Schantz, 163 N.W.2d 398, 405 (Iowa 1968). They include the living standards, age, contributions of the parties to the marriage, educational background, number and ages of the children, net worth of the property acquired, earning capacity, life expectancy, and ability to pay. These factors are not meant to arrive at mathematical precision. In re Marriage of Andersen, 243 N.W.2d 562, 564 (Iowa 1976); In re Marriage of Briggs, 225 N.W.2d 911, 912 (Iowa 1975).

We are disinclined to alter the trial court's conclusions. However, several matters cause us some concern. The record discloses petitioner inherited a parcel of real estate upon which one witness placed an off-hand value of $5,500. There was also evidence from which it appears probable that respondent has a one-ninth interest in his mother's estate, the principal asset of which is a 160-acre farm. Neither of these items was considered by the trial court in reaching a division of the property. Respondent claims he should have some interest in petitioner's real estate; petitioner has not cross-appealed concerning the trial court's failure to include respondent's inheritance in the settlement.

The record is very unsatisfactory on this score. Respondent was a reluctant and evasive witness when being questioned about his mother's estate. For some inexplicable reason, no value was put on his potential share nor was it ever clearly established he was a beneficiary under her will.

[15] We have said property inherited by one spouse is a proper factor to be considered in arriving at a fair settlement. Locke v. Locke, 246 N.W.2d 246, 252-53 (Iowa 1976). However, in this case the litigants gave the trial court no basis upon which to make an equitable division. The trial court apparently decided to leave the inheritance of each undisturbed. This would appear to be to respondent's advantage, but since petitioner did not cross-appeal, she cannot (and does not) complain. It would be manifestly unfair to award respondent an interest in petitioner's inheritance without giving her the same consideration concerning his.

[16] Under the particular facts shown by this record, we approve the property settlement as made by the trial court. As a matter of interest, we point out a recently enacted statute to take effect July 1, 1980, deals with the treatment of inherited property in dissolution cases. See An Act Relating to Dissolution of Marriage, Annulment and Separate Maintenance Actions and Providing a Penalty, H.F. 2562, s 3 (to be codified in ch. 598, The Code).

IV. THE DECREE OF THE TRIAL COURT IS AFFIRMED.
AFFIRMED.

All Citations

293 N.W.2d 198

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KeyCite Red Flag - Severe Negative Treatment
Superseded by Statute as Stated in In re Goulart, N.H., January 30, 2009

137 N.H. 213
Supreme Court of New Hampshire.

Ronald O. LeCLAIR
v.
Erlyan LeCLAIR.

No. 91-564.
|
May 14, 1993.

Synopsis

Former wife filed petition requesting order requiring former husband to contribute to adult child's college expenses. The Superior Court, Hillsborough County, Barry, J., approving recommendation of Martha W. Copithorne, Marital Master, entered decree, and husband appealed. The Supreme Court, Brock, C.J., held that: (1) statute providing for termination of child support when child finishes high school or reaches age of 18 does not eliminate court's discretion to order divorced parent to contribute to adult child's college expenses, and (2) statutes authorizing court to order such contribution by divorced, but not married, parents did not violate equal protection guarantees.

Affirmed.

West Headnotes (16)

[1] **Child Support**
Record

In reviewing order that required former husband to pay portion of adult child's college expenses, Supreme Court would rely on marital master's finding that former husband would have sufficient assets to contribute to child's education equally with former wife if he sold his business and real estate pursuant to purchase and sales agreement; husband did not submit copy of agreement for Supreme Court to review, and there was no transcript in case. Sup.Ct.Rules, Rule 13(3).

Cases that cite this headnote

[2] **Child Custody**
Constitutional and Statutory Provisions
Child Support
Constitutional and Statutory Provisions

Court's powers in custody, maintenance, and education of children in divorce and separation cases are conferred entirely by statute. RSA 458:17.

1 Cases that cite this headnote

[3] **Child Support**
Education

Statutes governing awards of support, maintenance, custody, and education of children in divorce actions do not mandate that trial court order divorced parent to contribute to adult child's college expenses in all cases; rather, trial court has discretion to decide whether or not to order parent to pay such expenses. RSA 458:17, 458:20.

6 Cases that cite this headnote

[4] **Child Support**
Education

Statute providing that, unless court specifies differently, child support obligation terminates when child finishes high school or reaches age of 18 does not eliminate court's discretion to order divorced parent to pay reasonable college expenses of adult child; statute authorizing orders requiring divorced parent to contribute to college expenses was enacted after termination statute, and termination statute addresses only duration of child support and places no limit on parent's obligation to pay for reasonable educational expenses. RSA 458:17, 458:20, 458:35-c.

5 Cases that cite this headnote

[5] **Child Support**
Discretion

Supreme Court will uphold trial court's order in divorce action allocating college expenses of adult children unless evidence clearly demonstrates abuse of discretion. RSA 458:17, 458:20.

Cases that cite this headnote

[6] **Child Support**
Presumptions and burden of proof

Party challenging trial court's order in divorce action allocating responsibility for payment of adult child's college expenses has burden of showing that order was improper and unfair. RSA 458:17, 458:20.

Cases that cite this headnote

[7] **Constitutional Law**
Federal/state cognates

Supreme Court relies on New Hampshire Constitution to resolve equal protection challenge based on both United States and New Hampshire Constitutions and uses federal case law only as aid to analysis as United States Constitution offers no greater protection than New Hampshire Constitution under its equal protection provisions. Const. Pt. 1, Art. 2; U.S.C.A. Const.Amend. 14.

3 Cases that cite this headnote

[8] **Constitutional Law**
Discrimination and Classification

Equal protection under law does not forbid classifications, but requires courts to examine individuals affected and purpose and scope of state-created classifications. Const. Pt. 1, Art. 2.

2 Cases that cite this headnote

[9] **Constitutional Law**
Strict scrutiny and compelling interest in general

"Strict scrutiny test," in which government must show compelling state interest in order for its action to be valid, applies when classification involves suspect class based on race, creed, color, gender, national origin, or legitimacy, or affects fundamental right. Const. Pt. 1, Art. 2.

1 Cases that cite this headnote

[10] **Constitutional Law**
Particular Rights

"Fair and substantial relation test" applies to equal protection claims involving statutory classifications involving important substantive rights, including right to tort recovery, and right to use and enjoy private real property subject to zoning regulations. Const. Pt. 1, Art. 2.

1 Cases that cite this headnote

[11] **Constitutional Law**
Statutes and other written regulations and rules

"Rational basis test" applies to equal protection claims in which statutory classification does not involve suspect class, fundamental right, or important substantive right under New Hampshire Constitution. Const. Pt. 1, Art. 2.

8 Cases that cite this headnote

[12] **Constitutional Law**
Economic or social regulation in general

Absent showing that suspect class, fundamental right, or substantive right is involved, economic classifications are

typically subject to rational basis test. Const. Pt. 1, Art. 2.

Cases that cite this headnote

[13] **Constitutional Law**
Statutes and other written regulations and rules

Under "rational basis test," party challenging legislation has burden to prove that whatever classification is promulgated is arbitrary or without some reasonable justification. Const. Pt. 1, Art. 2.

4 Cases that cite this headnote

[14] **Child Support**
Validity

Constitutional Law
Families and children

Rational basis test applied to former husband's equal protection challenge to statutes authorizing orders requiring divorced parent to pay adult child's college expenses which created classification between divorced parents and married parents; challenge raised primarily economic issues and did not involve suspect classification, fundamental right, or important substantive right under New Hampshire Constitution. RSA 458:17, 458:20; Const. Pt. 1, Art. 2.

5 Cases that cite this headnote

[15] **Child Support**
Validity

Constitutional Law
Families and children

Statutes authorizing orders requiring divorced parent to pay adult child's college expenses do not violate equal protection clause by granting court power to order divorced parent, but not married parent, to pay such expenses; state has legitimate interest in promoting higher education for its citizens and ensuring that children of divorced parents are not deprived unjustly of opportunities they might otherwise have had, had their parents not divorced, legislature could rationally conclude that, absent judicial involvement, children of divorce may be less likely than children of intact families to receive college financial support from both parents, and statutes do not require trial court to award college expense support, but, rather, grant it discretion to do so. RSA 458:17, 458:20; Const. Pt. 1, Art. 2.

7 Cases that cite this headnote

[16] **Child Support**
Education

Trial court could order former husband to pay adult child's private college expenses, even though public higher education was allegedly requested, available, and reasonable under circumstances; there is no presumption in favor of public higher education institutions. RSA 458:17, 458:20.

Cases that cite this headnote

Attorneys and Law Firms

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Opinion

**1352 BROCK, Chief Justice.

The plaintiff, Ronald O. LeClair, appeals from a decree, recommended by the Marital Master (*Martha W. Copithorne,* Esq.), and approved by the Superior Court (*Barry,* J.), ordering him to contribute to the costs of his adult son's college education. We affirm.

The parties were divorced in April 1978, and have one son, Jeremy, who was five years old at the time of the divorce. The court did not enter a child support order against either party at that time. Jeremy lived with his father until he was sixteen, then he moved in with his mother. Jeremy began his freshman year at Babson College in the fall of 1991. The master found that although the defendant made efforts to discuss Jeremy's college plans with her former husband, their communication was so poor that the parties did not discuss Jeremy's choice of college prior to his decision to attend Babson.

In February 1991, the defendant filed a petition requesting that the court order the plaintiff to make a reasonable contribution toward Jeremy's college expenses. The plaintiff filed an answer alleging, among other things, that he did not have sufficient assets or income to make a substantial contribution toward such college expenses.

The master found that the total cost for tuition, room and board at Babson for the 1991–92 academic year was $22,900.00. She found that the total parental contribution for that academic year, after deducting student loans, grants, work study, Jeremy's savings, and contributions from Jeremy's paternal grandmother, would be $8,056.00.

The master reviewed the financial status of both parties and found that although the plaintiff was not receiving a salary from his nursery business, he was receiving returns on loans previously made to the business, and had received income from the sale of business assets. The master determined that the plaintiff's financial situation ***217** could improve substantially if he sold his real estate and nursery business pursuant to a then existing option agreement. The plaintiff was ordered to contribute $2,000.00 per academic year toward his son's education, for a total of four years, if he did not sell his real estate and business pursuant to the option agreement. If the option to purchase was exercised, each party's share of the remaining three years would be calculated by taking the total cost of attending the college, subtracting the "the loans, grants, [Jeremy's] expected financial contribution as determined by the college financial aid office, and gifts or grants from grandparents," and dividing the total remaining by half. Because the real estate and business has been sold, each party is responsible for the contributions under the formula just described.

[1] The master granted the plaintiff's request to exclude from evidence the purchase and sales agreement because of a nondisclosure clause as to the sales price. The master reviewed the purchase and sales agreement in chambers and ordered no further disclosure of the contract price. She did provide, however, that "[i]n the event either party appeals this decision, the contract shall be submitted to the [supreme court] as an exhibit to be sealed." The plaintiff did not submit a copy of the option agreement to this court; thus, we rely on the master's finding, *see Sup. Ct. R.* 13(3); *Cook v. Wilson Trucking Co.*, 135 N.H. 150, 157, 600 A.2d 918, 922 (1991), that in the event that the property was sold "the Plaintiff [would] have sufficient assets to contribute equally with the [defendant] to his son's college education."

The plaintiff argues that, with the passage of RSA 458:35–c, the legislature intended to eliminate the superior court's jurisdiction to order a divorced parent to contribute toward post-majority college expenses. Alternatively, he argues that the superior court did not have subject matter jurisdiction to award post-majority college expenses in a case where there was never an underlying child support order. We disagree.

[2] The court's powers in custody, maintenance, and education of children in divorce and separation cases are conferred entirely by statute. ****1353** *Whipp v. Whipp*, 54 N.H. 580, 582 (1874). RSA 458:17 provides the superior court with broad discretionary powers in relation to the support, maintenance, and custody of children of divorce:

> "In all cases where there shall be a decree of divorce or nullity, the court shall make such further decree in relation to the support, education, and custody of the children as shall ***218** be most conducive to their benefit and may order a reasonable provision for their support and education."

RSA 458:17, I (1992). This provision has been a part of New Hampshire statutory law for over a century. *See* GS 163:11 (1867); RL 339:15 (1942). Until 1987, the statute

all cases. Rather, the trial court has the discretion to decide whether or not to order a parent to pay such expenses. *See Gnirk,* 134 N.H. at 201–02, 589 A.2d at 1010.

[4] The plaintiff argues that the legislature expressed its intent to eliminate the trial court's discretion to order a divorced parent to pay reasonable college expenses by enacting RSA 458:35–c in 1990. He contends that the legislature intended to have all support orders, including educational support orders, terminate when the child reaches age eighteen or terminates high school. We disagree. RSA 458:35–c provides:

> "Unless the court ... specifies differently, the amount of a child support obligation stated in the order for support shall ***220** remain as stated in the order until all dependent children for whom support is provided in the order shall terminate their high school education or reach the age of 18 years, whichever is later, or become married, or become a member of the armed services, at which time the child support obligation terminates without further legal action."

RSA 458:35–c (1992).

First, RSA 458:35–c was enacted in 1985, not in 1990. *See* Laws 1985, 344:3. This date differential is important because RSA 458:20 was enacted in 1987, and thus, clarifies the purportedly ambiguous language in RSA 458:35–c in relation to the support of children in high school. Second, RSA 458:17 and RSA 458:20 permit the court to make orders in relation to support and education, while RSA 458:35–c addresses only the issue of duration of child support, and does not place a time limit on a parent's obligation to pay for reasonable educational expenses. The legislative history indicates that the language providing for alternative dates for the termination of support was inserted not as a limitation on the court's jurisdiction to order divorced parents to contribute toward college expenses of their adult children, but rather as a means to continue child support where a child has reached age eighteen, but continues to be enrolled in high school. *See* Hearing on HB 735 and HB 734 Before the Senate Committee on Public Institutions and Health and Welfare (May 1, 1985); *N.H.S.Jour.* 1183 (1985) (statement of Sen. McLane). RSA 458:35–c addresses the legislature's concern that certain noncustodial parents were unilaterally ending child support payments when their children, who were still in high school, reached age eighteen. *See N.H.S.Jour.* 1183 (1985) (statement of Sen. McLane). Alternatively, the plaintiff relies on RSA 458:35–c to argue that the court does not have jurisdiction to originate a child support order after his son turned age eighteen and graduated from high school. Because the plain language of RSA 458:20 permits the court to exercise such jurisdiction, we find no merit in this argument.

Viewing the plain language and legislative history of RSA 458:17 and RSA 458:20 together with that of RSA 458:35–c, we conclude that the legislature did not intend to eliminate the superior court's jurisdiction to order divorced parents to pay reasonable college expenses of their adult children. We also conclude that the court has jurisdiction to order a divorced parent to contribute toward reasonable college expenses after his or her child reaches age eighteen.

***221** **[5]** **[6]** This court consistently has afforded the superior court broad "discretion in originating, modifying, or refusing to modify support orders to appropriately allocate responsibility for the post-secondary education expenses of adult children." *Gnirk,* 134 N.H. at 204, 589 A.2d at 1012. We will uphold the superior court's order unless "the evidence demonstrates clearly an abuse of such discretion." ****1355** *Azzi,* 118 N.H. at 655, 392 A.2d at 149 (quotation omitted). The party challenging the court's order has the burden of showing that the order was "improper and unfair." *Hunneyman v. Hunneyman,* 118 N.H. 652, 653, 392 A.2d 147, 148 (1978) (quotation omitted).

The master stated that the plaintiff's realization from the sale of his business and real estate would enable him to pay the amount ordered for his son's educational expenses. Because the plaintiff did not submit a copy of the purchase and sales agreement for this court to review and there is no transcript in this case, we must defer to the master's

findings and recommendations on this issue. *See Sup. Ct. R.* 13(3); *Cook v. Wilson Trucking Co.*, 135 N.H. at 157, 600 A.2d at 922. A review of the limited record before us reveals no abuse of discretion.

The plaintiff next argues that to require a divorced parent to pay private college expenses for an adult child, when the court does not have the power to issue a similar order to a married parent, is a violation of equal protection under the State and Federal Constitutions. N.H. CONST. pt. I, art. 2; U.S. CONST. amend. XIV.

The defendant argues that the equal protection issue was not properly preserved for appeal. Despite appellate counsel's assurances during oral argument that the issue was raised in the plaintiff's motion for reconsideration, *see State v. Tselios,* 134 N.H. 405, 407, 593 A.2d 243, 245 (1991) (issue raised in motion for reconsideration preserved for appellate review), the only reference to equal protection in the record below is a handwritten addendum to the plaintiff's objection to the defendant's motion to post security. It is questionable whether this fleeting reference provided the trial court with a full opportunity to address this issue, *see id.,* and thus, the issue arguably is not preserved for appellate review. Nonetheless, we find some utility in addressing this equal protection issue "because similar claims may be raised in the future," *Appeal of Bosselait,* 130 N.H. 604, 608, 547 A.2d 682, 686 (1988), *cert. denied,* 488 U.S. 1011, 109 S.Ct. 797, 102 L.Ed.2d 788 (1989).

[7] Because the Federal Constitution offers no greater protection than our State Constitution under its equal protection provisions, ***222** *see Carson v. Maurer,* 120 N.H. 925, 932, 424 A.2d 825, 831 (1980), we rely on our State Constitution, *see State v. Ball,* 124 N.H. 226, 232, 471 A.2d 347, 351 (1983), and use federal case law "only as an aid to our analysis." *State v. Gravel,* 135 N.H. 172, 176, 601 A.2d 678, 680 (1991).

"The first question in an equal protection analysis is whether the State action in question treats similarly situated persons differently." *Appeal of Marmac,* 130 N.H. 53, 58, 534 A.2d 710, 713 (1987). "If the persons are not similarly situated, ... no equal protection problem is involved." *Locke v. Ladd,* 119 N.H. 136, 138, 399 A.2d 962, 963 (1979). For purposes of this case, we will assume, as did the parties, that, by virtue of their status as parents, married and divorced parents are similarly situated under the law for purposes of the issue before us. We, therefore, conduct an equal protection analysis to determine if the classification between married and divorced parents created by RSA 458:17 and RSA 458:20 is constitutionally permissible.

[8] In considering an equal protection challenge under our State Constitution, "we must first determine the appropriate standard of review: strict scrutiny; fair and substantial relationship; or rational basis." *Boehner v. State,* 122 N.H. 79, 83, 441 A.2d 1146, 1148 (1982). Equal protection under the law does not forbid classifications, *see* 2 B. Schwartz, *Rights of the Person* § 471, at 496–97 (1968), but requires us to examine the individual rights affected and the purpose and scope of the State-created classifications. *See Allgeyer v. Lincoln,* 125 N.H. 503, 508–09, 484 A.2d 1079, 1082–83 (1984).

[9] We apply the strict scrutiny test, in which the government must show a compelling State interest in order for its actions to be valid, when the classification involves a suspect class based on "race, creed, color, gender, national origin, or legitimacy," *State v. LaPorte,* 134 N.H. 73, 76, 587 A.2d 1237, 1239 (1991) (quotation omitted), or ****1356** affects a fundamental right, *see Merrill v. City of Manchester,* 124 N.H. 8, 14–15, 466 A.2d 923, 927 (1983) (private real property ownership rights recognized as fundamental); *Provencal v. Provencal,* 122 N.H. 793, 797, 451 A.2d 374, 377 (1982) (decisions regarding custody and rearing of minor children involve fundamental rights).

[10] We apply the fair and substantial relation test to classifications involving "important substantive rights," including the right to tort recovery, *see Brannigan v. Usitalo,* 134 N.H. 50, 55, 587 A.2d 1232, 1236 (1991); ***223** *City of Dover v. Imperial Cas. & Indemn. Co.,* 133 N.H. 109, 116, 575 A.2d 1280, 1284 (1990), and the right to use and enjoy private real property subject to zoning regulations, *see Asselin v. Town of Conway,* 135 N.H. 576, 577, 607 A.2d 132, 133 (1992). Under this test, the classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation,"

Carson v. Maurer, 120 N.H. at 932, 424 A.2d at 831 (quotation and emphasis omitted).

[11] **[12]** **[13]** Finally, we apply the rational basis test to claims in which the classification does not involve a suspect class, a fundamental right, or an important substantive right under our State Constitution. Under the rational basis test, " 'legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.' " *LaPorte,* 134 N.H. at 76, 587 A.2d at 1239 (quoting *Cleburne v. Cleburne Living Center,* 473 U.S. 432, 439, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313 (1985)). Absent a showing that a suspect class, fundamental right, or substantive right is involved, "economic classifications are typically subject to the rational basis test." *Petition of State Employees' Assoc. & Goulette,* 129 N.H. 536, 540, 529 A.2d 968, 971 (1987) (unequal pay scale of State employees reviewed under rational basis test); *Couture v. Couture,* 124 N.H. 500, 502, 471 A.2d 1191, 1192 (1984) (classification between divorced parents with minor children and divorced adults without minor children in alimony scheme under RSA 458:19 considered under rational basis test); *Boehner v. State,* 122 N.H. at 83–84, 441 A.2d at 1149 (unequal tax burden on district court host communities considered under rational basis standard). Under the rational basis analysis, the party challenging the legislation has the burden "to prove that whatever classification is promulgated is arbitrary or without some reasonable justification." *Petition of State Employees' Assoc. & Goulette,* 129 N.H. at 540, 529 A.2d at 971.

Couture is analogous to the case at bar. In *Couture,* the plaintiff father, who had custody of the couple's minor child, argued that RSA 458:19 violated his equal protection rights. Under that statute, the superior court may order alimony payments to be made "provided that in cases in which no children are involved, or in which the children have reached the age of majority, the order shall be effective for not more than 3 years or 3 years after the youngest child attains the age of majority, whichever occurs first." RSA 458:19. The father argued that because he had custody of the couple's minor child, the alimony award should have had a three-year duration. He claimed that equal protection entitled him to the same treatment afforded to divorced persons without minor children, and thus his alimony obligation ***224** should be limited. Under a plain reading of the statute, we rejected his argument and held that because "no suspect classification, fundamental interest, or important substantive right is implicated by this application of RSA 458:19, the rational-basis test is the appropriate test for determining the merits of the challenge." *Id.* We upheld the constitutionality of the statute, observing that "a different approach is obviously warranted in dealing with the break-up of families which include minor children as distinguished from families in which there are no minor children." *Id.,* 471 A.2d at 1193.

[14] Here, the plaintiff raises primarily an economic issue. The classification between divorced and nondivorced parents, created in RSA 458:17 and RSA 458:20, involves no suspect classifications, and does not involve a fundamental or important ****1357** substantive right under our State Constitution. Thus, we agree with his statement that this equal protection challenge centers "on whether the law is rationally related to a legitimate state interest."

[15] The plaintiff has aptly stated that "[t]he objective of the court in extending its protection to children of divorced parents is to ensure that they are not unjustly deprived of opportunities they would otherwise have had, had their parents not divorced." RSA 458:17 and RSA 458:20 confer upon the court the authority to order a divorced parent to contribute toward the reasonable college expenses of his or her children. The legitimate State interest served by these statutes is to ensure that children of divorced families are not deprived of educational opportunities solely because their families are no longer intact.

The legislature's rationale for conferring the superior court with the authority to order a divorced parent to contribute toward an adult child's college costs is not specified in the legislative history, *see* Laws 1987, ch. 278; *N.H.S.Jour.* 963 (1987) (statement of Sen. Podles); however, its intent to codify our decisions that recognize the court's jurisdiction under such circumstances is apparent. *See* Hearing on HB 36 Before the Senate Judiciary Committee (April 3, 1987); *N.H.S.Jour.* 963 (1987) (statement of Sen. Podles). We can assume, therefore, that the legislature recognized the increasing

importance of post-secondary education for the citizens of this State. *See French,* 117 N.H. at 699, 378 A.2d at 1128–29.

Despite our limited insight into the legislature's intent, we observe that heightened judicial involvement over the financial and personal lives of divorced families with children may be warranted, although similar involvement may not be necessary with intact families. The ***225** legislature contemplated the need to have such heightened judicial control over divorced families because of unique problems that exist in a home that is split by divorce. *See In re Marriage of Vrban,* 293 N.W.2d 198, 202 (Iowa 1980). Our statutory law provides the superior court with the power to oversee the financial arrangements of divorced families—to order alimony, divide property, and order support and educational costs—where it does not have similar power over intact families. *See generally* RSA ch. 458 (1992). While financial support of the family unit may be an unquestioned responsibility in an intact home, such support decisions often become regulated by court order in a disputed divorce. Because of these unique problems, we can assume that the legislature could rationally conclude that absent judicial involvement, children of divorce may be less likely than children of intact families to receive college financial support from both of their parents.

In summary, we find that the State has the dual legitimate interests of promoting higher education for its citizens, and of extending protections to children of divorce to ensure that they are not deprived of opportunities they otherwise would have received had their parents not divorced. RSA 458:17 and RSA 458:20 are rationally related to protecting these interests, and do so in a manner that is neither arbitrary nor without reasonable justification. *See Petition of State Employees' Assoc. & Goulette,* 129 N.H. at 540, 529 A.2d at 971. These statutes do not require the superior court to order college expenses in all cases. Rather, these statutes allow the superior court, in its sound discretion, to award reasonable college expenses of adult children under the proper circumstances. We, therefore, hold that RSA 458:17 and RSA 458:20 do not violate equal protection under our State Constitution.

[16] The plaintiff further argues that the court erred by ordering him to pay for private college costs when public education was requested, available, and reasonable under the circumstances of the case. He urges us to create a presumption in favor of public higher education institutions. This, we will not do.

We also note that the plaintiff contends that he was not included in the decisionmaking process as to his son's choice of college. The record indicates, however, that the defendant attempted to contact the plaintiff regarding these issues, and that ****1358** the plaintiff did not reply. The plaintiff cannot now complain about a situation for which he was responsible.

***226** The crux of this case is whether the superior court abused its discretion under the circumstances of the case. *Gnirk,* 134 N.H. at 201–02, 589 A.2d at 1010. We have held that the superior court may order the divorced parents of a child "to provide a reasonable contribution toward the costs of post-secondary education if it is equitable in light of the circumstances of all of the parties." *Id.* at 204, 589 A.2d at 1012. There is no transcript in this case, and a review of the limited record before us reveals no abuse of discretion. Accordingly, we affirm the order below.

Affirmed.

All concur.

All Citations

137 N.H. 213, 624 A.2d 1350, 82 Ed. Law Rep. 1120

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KeyCite Yellow Flag - Negative Treatment
Declined to Follow by In re Marriage of Plummer, Colo., April 6, 1987

89 Wash.2d 592
Supreme Court of Washington, En Banc.

Joyce E. CHILDERS, Petitioner,
v.
Leland E. CHILDERS, Respondent.

No. 44555.
|
Feb. 2, 1978.

Synopsis

In a marriage dissolution proceeding, the Superior Court, King County, Nancy A. Holman, J., entered a decree of dissolution and ordered, inter alia, that the husband pay support for the parties' three sons while they attended college. The husband appealed, and the Court of Appeals, Division I, King County, Williams, C. J., 15 Wash.App. 792, 552 P.2d 83, reversed as to the support order on the ground that a parent owes no duty of support to a child who has attained legal majority. The wife petitioned for review, and the Supreme Court, Hicks, J., held that: (1) the Dissolution of Marriage Act empowered the trial court, in its discretion and under proper circumstances, to order child support to continue beyond a child's majority; (2) the trial court did not abuse discretion in determining that the parties' sons were "dependent" for purposes of the Act where the sons lived at home and were not self-sustaining when the decree was entered; (3) under circumstances including the fact that the divorcing husband was a medical doctor, the trial court did not abuse discretion in ordering the husband to pay support for his three sons while they attended college, and (4) the statute authorizing courts to decree support for the education of children past the age of majority did not offend equal protection by creating an unreasonable distinction between married and divorced parents.

Decision of the trial court affirmed and judgment of the Court of Appeals reversed in part.

West Headnotes (18)

[1] Child Support
Age

For purpose of the 1973 Dissolution of Marriage Act provision which authorizes trial courts to order support for "dependent" children to whom a duty of support is owed, "dependent" does not mean "minor." RCWA 26.09.010 et seq., 26.09.100, 26.09.110.

2 Cases that cite this headnote

[2] Child Support
Emancipation of child in general

In view of fact that term "minor" refers to a fixed and arbitrary status while terms "dependent" and "emancipated" both refer to statuses which are to be determined under the facts of the case, legislature intended to effect a change in the law by altering wording of old support statute so as to eliminate references to "minors" and instead referring to children as "dependent" and "emancipated." RCWA 26.09.010 et seq., 26.09.100, 26.09.110.

8 Cases that cite this headnote

[3] Child Support
Age

Provision of the 1973 Dissolution of Marriage Act which states in relevant part that, unless otherwise agreed in writing or expressly provided in the decree, provisions for the support of a child are terminated by emancipation of the child or by the death of the parent who is obligated to support the child evidences a legislative intent that support obligations should no longer hinge on minority and that a trial court should have jurisdiction to enter a decree of support for children over the age of 18. RCWA 26.09.170.

7 Cases that cite this headnote

[4] **Statutes**
Superfluousness
Statutes
Conflict

A statute cannot be construed so that an entire provision is meaningless, unless necessary to save the statute or act from constitutional infirmity or to reconcile conflicting statutes.

2 Cases that cite this headnote

[5] **Child Support**
Age

Section of the 1973 Dissolution of Marriage Act which states in relevant part that, unless otherwise agreed in writing or expressly provided in the decree, provisions for child support are terminated by the emancipation of the child or by the death of the parent who is obligated to support the child empowers the trial court to order child support to continue past a child's majority. RCWA 26.09.010 et seq., 26.09.170.

11 Cases that cite this headnote

[6] **Statutes**
Defined terms;definitional provisions
Statutes
Context

Legislative definitions generally control in construing the statutes in which they appear; however, when the same word or phrase is used elsewhere, the meaning depends on common usage and the context in which it is used, unaffected by other statutory definitions.

5 Cases that cite this headnote

[7] **Child Support**
Factors Relating to Child

For purpose of the 1973 Dissolution of Marriage Act provisions empowering the trial court to order support for "dependent" children to whom a duty of support is owed, a "dependent" is one who looks to another for support and maintenance, who is in fact "dependent" and who relies on another for the reasonable necessities of life; whether a child is "dependent" is a question of fact to be determined from all relevant factors. RCWA 26.09.010 et seq., 26.09.100, 26.09.170.

9 Cases that cite this headnote

[8] **Child Support**
Factors Relating to Child

For purpose of determining whether a child is a "dependent" for whom support may be ordered in a marriage dissolution action, age is but one factor; other factors include the child's needs, prospects, desires, aptitudes, abilities and disabilities as well as the parents' level of education, standard of living and current and future resources; also to be considered is the amount and type of support that the child would have been afforded if the parents had stayed together. RCWA 26.09.010 et seq., 26.09.100, 26.09.170.

9 Cases that cite this headnote

[9] **Child Support**
Factors Relating to Child

In marriage dissolution action, trial court did not abuse discretion in determining that parties' three sons were "dependent" and thus eligible for child support where the sons lived at home and were not self-sustaining when the decree was entered.

1 Cases that cite this headnote

[10] **Child Support**
Post-secondary education

Where it was likely that, had the parties stayed together, their three sons would have remained dependent on their father, a medical doctor, beyond the age of 18 while they obtained college educations, it was within the trial court's discretion, in marriage dissolution proceeding, to require the father to pay support for his three sons while they attended college.

10 Cases that cite this headnote

[11] **Child Support**
Obligation of Parents

There is a parental duty to support children. RCWA 26.16.205.

Cases that cite this headnote

[12] **Child Support**
Post-secondary education

Whether a parent has a duty to assist a child with a college education is circumstantial; not every parent has such a duty of support.

3 Cases that cite this headnote

[13] **Child Support**
Post-secondary education

In a marriage dissolution proceeding, trial court is now free to make whatever order is necessary and fair, after full inquiry into the facts and circumstances, to provide for a child's college education. RCWA 26.09.010 et seq., 26.09.100, 26.09.110.

2 Cases that cite this headnote

[14] **Child Support**
Post-secondary education

It is not the policy of the state of Washington to require divorced parents to provide adult children with a college education in all circumstances; instead, what exists is the long-standing special power of the courts, in equity, to assure that the disadvantages of children of broken homes are minimized.

9 Cases that cite this headnote

[15] **Child Support**
Validity

Constitutional Law
Families and children

Legitimate governmental interest in minimizing irremediable disadvantages to children whose parents have divorced was sufficient to provide a reasonable basis for any classification which might be created by those sections of the 1973 Dissolution of Marriage Act which empower a trial court, in appropriate circumstances, to require a divorced parent to support his or her child beyond the age of majority while the child is pursuing a college education. RCWA 26.09.010 et seq., 26.09.100, 26.09.110; U.S.C.A.Const. Amend. 14.

16 Cases that cite this headnote

[16] **Constitutional Law**
Statutes and other written regulations and rules

Faced with an equal protection challenge, a statutory classification is measured against the rational relationship test and is upheld if it is rationally related to some legitimate governmental interest. U.S.C.A.Const. Amend. 14.

4 Cases that cite this headnote

[17] **Child Support**
Validity

Constitutional Law
Class Legislation;Discrimination and Classification in General

Statutory distinction, assertedly embodied in the Dissolution of Marriage Act, between married and divorced parents pursuant to

which divorced parents could be required to provide for their children's college education while married parents could bid their children a fiscal farewell at the age of 18 was not based upon a "suspect classification" and, therefore, was not required to be measured against the strict scrutiny test. RCWA 26.09.010 et seq., 26.09.100, 26.09.110; U.S.C.A.Const. Amend. 14.

9 Cases that cite this headnote

[18] Child Support
Validity

Constitutional Law
Families and children

Provision of the Dissolution of Marriage Act which empowers trial court, in its discretion and under appropriate circumstances, to order support for the education of normal children past the age of majority did not violate equal protection requirements by reason of creating an unreasonable distinction between married and divorced parents; state's overriding interest in the welfare of children provided reasonable and justifiable ground for any resulting inequality. RCWA 26.09.010 et seq.; U.S.C.A.Const. Amend. 14.

13 Cases that cite this headnote

Attorneys and Law Firms

***593** ****203** Bonjorni, Harpold & Fiori, Duncan A. Bonjorni, Auburn, for petitioner.

Donald E. Watson, Seattle, Stephen R. Thomas, Seattle, for respondent.

Opinion

***594** HICKS, Associate Justice.

In a dissolution proceeding, may a parent be required to support a child beyond the age of majority while a college education is pursued? Within the sound discretion of the trial court, our answer is yes.

The trial court entered a decree of dissolution and awarded the custody of the children to the petitioner (wife), divided the property, fixed support payments to be paid by the respondent (husband), and awarded an attorney's fee. The court's order required husband to pay support for the parties' three sons while they attend college. Should each of the sons elect to complete work for a baccalaureate degree, each would be 22 years of age. That is 4 years beyond the present age of majority. RCW 26.28.010.

The Court of Appeals reversed as to the support order on the grounds that a parent owes no duty of support to a child who has attained the legal age of majority. The court reasoned that the privileges and immunities section of our state constitution (article 1, section 12) and equal protection under the fourteenth amendment to the United States Constitution would be violated by imposing such a duty, as there is no reasonable ground for making a distinction between divorced parents and married parents, the latter being "free to bid their children a fiscal farewell at age 18." Childers v. Childers, 15 Wash.App. 792, 796, 552 P.2d 83, 85 (1976). We granted wife's petition for review. We reverse the Court of Appeals in part and affirm the trial court.

The parties were married in April 1953. They have three sons, born 1954, 1956 and 1959. Husband is a medical doctor practicing alone in King County. At trial, he was 53 years of age and wife was 45 years of age. Wife had no employment history other than as a waitress and some slight experience in helping around her husband's office. She was not college-trained.

Husband appealed to the Court of Appeals from that portion of the decree which requires him to pay $500 per month maintenance for his wife while she pursues a baccalaureate degree in an accredited school, ****204** college or university ***595** as a full-time student; to pay tuition, books and miscellaneous educational fees of each son; and to maintain medical and dental insurance for the benefit of the wife and sons until such time as the sons are no longer dependent upon the parties for support. Husband abandons, in this court, his appeal concerning maintenance for his wife while she furthers her education.

RCW 26.08.110, the statute in effect prior to enactment of the 1973 Dissolution of Marriage Act, provided that support could be ordered only for minor children of a marriage:

> and shall make provision for costs, and for the custody, support and education of the minor children of such marriage.

(Italics ours.) Cases cited by husband in support of his contention that the parental duty of support terminates when the child reaches majority are all based on the above statute. Those cases, mainly Sutherland v. Sutherland, 77 Wash.2d 6, 459 P.2d 397 (1969), Ditmar v. Ditmar, 48 Wash.2d 373, 293 P.2d 759 (1956) and Van Tinker v. Van Tinker, 38 Wash.2d 390, 229 P.2d 333 (1951) all antedate the 18-year age of majority (enacted in 1971) and the 1973 dissolution act. They are therefore not controlling in this case.

[1] The 1973 dissolution act, RCW 26.09, eliminated all reference to minority, and granted the court authority to order support for dependent children to whom a duty of support is owed. RCW 26.09.100 provides in part:

> (T)he court may order either or both parents owing a duty of support to any child of the marriage dependent upon either or both spouses to pay an amount reasonable or necessary for his support.

That "dependent" child does not mean "minor" child is apparent from RCW 26.09.110, which states in part:

> The court may appoint an attorney to represent the interests of a minor or dependent child with respect to his custody, support, and visitation.

(Italics ours.) "When the term 'or' is used it is presumed to be used in the disjunctive sense, unless the legislative intent is clearly contrary." 1A C. Sands, Sutherland on ***596** Statutory Construction s 21.14, n. 1 (4th ed. 1972) (cases cited). We have said "or" does not mean "and". State v. Tiffany, 44 Wash. 602, 87 P. 932 (1906).

We have also said that from a change in the wording of a statute, a change in legislative purpose shall be presumed. We quoted as follows in Graffell v. Honeysuckle, 30 Wash.2d 390, 400, 191 P.2d 858, 864 (1948):

> "... Where a statute is amended, it will not be presumed that the difference between the two statutes was due to oversight or inadvertence on the part of the legislature. To the contrary, the presumption is that every amendment of a statute is made to effect some purpose, and effect must be given the amended law in a manner consistent with the amendment. The general rule is that a change in phraseology indicates persuasively, and raises a presumption, that a departure from the old law was intended, and amendments are accordingly generally construed to effect a change ..."

[2] We have no doubt that a change in the law was intended by the change in wording from the old support statute (referring to "minor", a fixed and arbitrary status) to the new support statute (referring to "dependent" and "emancipated", both of which are statuses to be determined under the facts of each case). The legislature may well have decided as a result of the lower majority age, that support obligations should no longer hinge on minority, but that trial courts should have discretion to determine when a duty of support is owed, or ceases to be, and when a child is dependent, or ceases to be.

[3] **[4]** That this was the intent of the legislature seems apparent from a reading of RCW 26.09.170:

> Unless otherwise agreed in writing or expressly provided in the decree, provisions for the support of a child are terminated by emancipation of the child or by the death of the parent obligated to support the child.

**205 (Italics ours.) The italicized language evidences a legislative intent that the trial court have jurisdiction to enter a decree of support for children past age 18. How else could it be "otherwise . . . expressly provided in the decree"? A *597 statute cannot be construed so that an entire provision is meaningless, unless necessary to save the statute or act from constitutional infirmity, or to reconcile conflicting statutes. Connolly v. Department of Motor Vehicles, 79 Wash.2d 500, 487 P.2d 1050 (1971); Miller v. Pasco, 50 Wash.2d 229, 310 P.2d 863 (1957); Groves v. Meyers, 35 Wash.2d 403, 213 P.2d 483 (1950). It appears to us that the effect of the Court of Appeals' construction of the act in Childers v. Childers, 15 Wash.App. 792, 552 P.2d 83 (1976) (Contra, In re Marriage of Melville, 11 Wash.App. 879, 526 P.2d 1228 (1974) and Reedy v. Reedy, 12 Wash.App. 844, 846, n. 1, 532 P.2d 626 (1975).) is to nullify or render meaningless the italicized phrase.

[5] We construe the dissolution act as basing any support obligation on dependency, not minority, and ending the obligation at emancipation, not majority. Though it appears that emancipation, as the term is used in this act, is determined by factors in addition to age, we do not address the question as it is not an issue in this case. [1] RCW 26.09.170 states that child support obligations cease when the child becomes emancipated unless, as here, it is otherwise provided in the decree. Since the trial court is empowered under RCW 26.09 to order support to continue past a child's majority, we turn now to determine if there is an abuse of discretion in so ordering under the facts of this case.

The Childers' boys are children of the marriage. The other criteria set out in RCW 26.09.100 are that they be dependent and that their father owe them a duty of support. Both are matters of fact.

*598 [6] [7] [8] Although the legislature has defined dependent child variously throughout the code as 18 and under, under 21, or simply in financial need, [2] the chapter before us contains no definition. Legislative definitions generally control in construing the statutes in which they appear, but when the same word or phrase is used elsewhere the meaning depends on common usage and the context in which it is used, unaffected by the other statutory definitions. A dependent is, in our view and as used in this context, one who looks to another for support and maintenance, one who is in fact dependent, one who relies on another for the reasonable necessities of life. Dependency is a question of fact to be determined from all surrounding circumstances, or as the legislature put it: "all relevant factors". RCW 26.09.100. Age is but one factor. Other factors would include the child's needs, prospects, desires, aptitudes, abilities, and disabilities, and the parents' level of education, standard of living, and current and future resources. Also to be considered is the amount and type of support (i. e., the advantages, educational and otherwise) that the child would have been afforded if his parents had stayed together. See Puckett v. Puckett, 76 Wash.2d 703, 458 P.2d 556 (1969).

[9] [10] We find no abuse of discretion in the trial court's determination that the Childers' boys were dependents. They lived at home and were not self-sustaining at the time the decree was entered. As to their status as dependents continuing through 4 years of continuous pursuit of a baccalaureate degree, we think it reasonable to assume that a medical doctor, himself with years of higher education which brings him a higher than average income, would willingly treat his sons as dependents if they chose and showed an aptitude for college, **206 but for the fact of the divorce. Where, as here, the children would have most likely remained dependent on their father past 18 while they obtained a college education, it is within the discretion of *599 the trial court to define them as dependents for that purpose.

[11] This brings us to the language "duty of support". That there is a parental duty of support owing to children has been clear since 1881:

> The expenses of the family and the education of the children are chargeable upon the property of both husband and wife, or either of them, and in relation thereto they may be sued jointly or separately.

Code of 1881, s 2407. This statute remained unchanged until amended in 1969, when stepchildren were added for the duration "of the relationship of husband and wife." RCW 26.16.205.

We stated long ago that this duty of support can extend to education, the type and extent to be determined under the facts of each case. Reference is often had to Washington's example in this area, with the reasoning from the case of Esteb v. Esteb, 138 Wash. 174, 244 P. 264, 246 P. 27 (1926) most frequently cited. In Esteb we held that the court has the legal right to require a divorced father to provide funds for a college education for his minor daughter whose custody was in the mother. We quote extensively the reasoning, at pages 178, 182, 244 P. at 265, 267:

As to the amount of education that should be considered necessary, courts have never laid down a hard and fast rule. . . .

Applying the rule as stated by the courts and the text-writers, it will be seen that the question of what sort of an education is necessary, being a relative one, the court should determine this in a proper case from all the facts and circumstances.

Nor should the court be restricted to the station of the minor in society, but should, in determining this fact, take into consideration the progress of society, and the attendant requirements upon the citizens of today. . . . An opportunity (in the 1800's) for a common school education was small, for a high school education less, and for a college education was almost impossible to the average family, and was generally considered as being only within ***600** the reach of the most affluent citizens. While there is no reported case, it is hardly to be doubted that the courts at that time would have even held that a high school education was not necessary, inasmuch as very few were able to avail themselves of it. But conditions have changed greatly in almost a century that has elapsed since that time. Where the college graduate of that day was the exception, today such a person may almost be said to be the rule. . . . That it is the public policy of the state that a college education should be had, if possible, by all its citizens, is made manifest by the fact that the state of Washington maintains so many institutions of higher learning at public expense. It cannot be doubted that the minor who is unable to secure a college education is generally handicapped in pursuing most of the trades or professions of life, for most of those with whom he is required to compete will be possessed of that greater skill and ability which comes from such an education.

[12] That assisting a child with a college education, though at times referred to as a necessary, will not be a duty of support of all parents, but is circumstantial, is learned from Golay v. Golay, 35 Wash.2d 122, 123, 124, 210 P.2d 1022, 1023 (1949):

(The rule is) that the expense of educating a child is included among the necessities for which a parent can be held liable. The quality and the quantity of necessities for which a parent is liable has been gauged in American and English Jurisprudence from time immemorial by the parents' station in life. Upon the question of education as a necessity, we would undoubtedly be constrained to hold that as far as the compulsory school attendance law applies, a parent would be liable ****207** in any case. A rich man, well able to pay, might very well be held for a college education of an extended and expensive sort. However, the father in this instance is not a rich man, and from the evidence in the record, can scarcely spare any money from his own needs.

Voluntary parental sacrifices to enable children to attend college are very common. The appellant's station in life, however, is such that the obligation should not be placed upon him by law against his will.

***601** **[13]** Thus, it has long been the law in Washington that a divorced parent may have a duty of support for college education if it works the parent no significant

hardship and if the child shows aptitude. This duty is no longer limited by minority, hence the court need not resort to the stratagem used in Underwood v. Underwood, 162 Wash. 204, 298 P. 318 (1931) wherein we ordered the father to contribute to a trust fund during the child's minority so as to secure for the child a college education during his majority. The legislature having removed the jurisdictional disablement, the court is now free to order whatever is necessary and fair after full inquiry into the facts and circumstances.

We turn to the issue of the claimed constitutional infirmity which the Court of Appeals raised and decided sua sponte. The fact that married parents may legally bid their children "a fiscal farewell" at age 18 when some divorced parents may be legally required to provide financial support when they are able but do not choose to do so, led the Court of Appeals to its conclusion. The fact that most married parents choose willingly to make financial sacrifices for their children's education, including college and regardless of age, seems to have been disregarded. [3]

[14] It is not the policy of this state to require divorced parents to provide adult children with a college education in all circumstances. If an absolute duty of support for such a purpose were imposed on divorced parents, there would perhaps be an unreasonable classification. Instead, what ***602** exists is the long standing special powers the courts have had (in equity, regardless of legislation) over the children of broken homes to assure that their disadvantages are minimized.

In allowing for divorce, the state undertakes to protect its victims. Perhaps there has been an equal protection problem in regard to the children who have been deprived of economic advantages which they would have had absent the remedy of divorce, and which children of married parents retain. Quoting from R. Washburn, Post-Majority Support: Oh Dad, Poor Dad, 44 Temple L.Q. 319, 327, 329 (1971):

A number of courts adopt the policy that a child should not suffer because his parents are divorced. The child of divorced parents should be in no worse position than a child from an unbroken home whose parents could be expected to supply a college education. (Footnoted to Jackman v. Short, 165 Ore. 626, 656, 109 P.2d 860 (1941), where the court stated 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.") . . .

Where the disability is internally or externally caused, the child whose parents are still married will most often ****208** continue to receive support after majority. To terminate support when the parents are divorced creates a special disadvantage not shared by children whose parents remain together. If the father could have been expected to provide advanced education for his child, it is not unfair to expect him to do so after he has been divorced.

(Footnotes omitted.)

That the divorced parent, especially noncustodial, will sometimes not willingly provide what he otherwise would have but for the divorce, we recognized long ago in Esteb v. Esteb, 138 Wash. 174, 184, 244 P. 264, 267, 246 P. 27 (1926):

Appellant's counsel strenuously argued that it is the father's right to determine what education he will give his children, and that, if he decides not to give them a college education, and to save his money for other purposes, the courts should not interfere.

***603** This rule is a salutary one, and should always be applied to a proper case. whenever a father has the custody of a child, the law presumes that he will provide for the child education in that vocation for which it is best fitted, and which will enable it to meet the conditions of modern life. But can the courts indulge that presumption, where the custody of the child has been taken from the father? . . . Parents, when deprived of the custody of their children, very often refuse to do for such children what natural instinct would ordinarily prompt them to do. . . . In most cases the father, who is the one who holds the purse strings, and whose earning capacity is greater than that of the mother, is the one who is able to give the minor a proper education. To adopt the rule contended for by appellant would be to put the court, in providing for the custody of the child, in the dilemma of knowing that if the child is given to the mother the father would, in very many cases, refuse to give it an education greater than that

required under the penalty of the law, and that the mother could not do so.

We again recognized the problem in Underwood v. Underwood, supra, 162 Wash. at 210, 298 P. at 320:

> Respondent's duty to his child is paramount. It is the birthright of every (child) to obtain at least a general and useful education. The responsibility of providing the necessary funds to assure this advantage to the minor rests primarily on the respondent. Untold sacrifices are made by parents who remain steadfast to their marital obligations in order to educate their children. The same responsibility rests on parents who seek and obtain a divorce. Parents who remain steadfast to their marital vows are frequently compelled by thrift, perseverance and economy to accumulate savings while their earning capacity is good, so as to be able to adequately educate their children when the time or occasion arrives.

In the 1973 act, the legislature simply allows the courts to secure for the children what they would have received from their parents except for the divorce, limited to that which is necessary for the children's and society's well-being and that which will not work an undue hardship on parents. Nothing more is expected of divorced parents than married parents, and nothing less.

***604** **[15]** In all probability more married parents will be making sacrifices financially for their children 18 and up than will the divorced parents who, in the sound discretion of the trial court, will have a legally imposed duty to do so. Even if the legislation does create a classification, it rests upon a reasonable basis. It is based on considerations already mentioned, and the facts known to the legislature and this court as well as to the layman, of the disruptions to homelife, bitterness and emotional upset which attend most marital breaks. The irremediable disadvantages to children whose parents have divorced are great enough. To minimize them, when possible, is certainly a legitimate governmental interest.

Note too that the governmental interest at stake here extends beyond the children to our nation as a whole. A well-educated ****209** citizenry is one of the major goals of a democratic society.

[16] **[17]** Under an equal protection challenge, a statutory classification such as is claimed to exist in this case, is measured against the rational relationship test and upheld if rationally related to some legitimate government interest. We do not utilize a strict scrutiny test because the classification is not suspect, nor is there any fundamental right not to provide support for one's children past age 18. We have no trouble asserting that a rational relationship exists between the legislative scheme before us and the compelling state interest in seeing that children are properly provided for within the boundaries of the needs of the children and what parents can afford.

Sparkman & McLean v. Govan Inv. Trust, 78 Wash.2d 584, 588, 478 P.2d 232, 235 (1970), summarizes the applicable rules as follows:

It is the well-established rule of law in this state that a statutory classification having some reasonable basis does not offend the equal protection clause or the privileges and immunities clause. O'Connell v. Conte, 76 Wash.2d 280, 283, 456 P.2d 317 (1969); Boeing Co. v. State, 74 Wash.2d 82, 86, 442 P.2d 970 (1968); ***605** State v. Persinger, 62 Wash.2d 362, 382 P.2d 497 (1963). In order to successfully attack a particular classification, it must be shown that such classification is manifestly arbitrary, unreasonable, inequitable, and unjust. Treffry v. Taylor, 67 Wash.2d 487, 408 P.2d 269 (1965); Kelleher v. Minshull, 11 Wash.2d 380, 119 P.2d 302 (1941).

Accordingly, the question is not whether the statute is discriminatory in nature, nor is it of paramount concern if the classification results in some inequality. The crucial determination is whether there are reasonable and justifiable grounds giving rise to the classification. State v. Persinger, supra; State v. Kitsap County Bank, 10 Wash.2d 520, 117 P.2d 228 (1941). Finally, in making this

determination, it is recognized that the legislature has a wide range of discretion in defining the classifications and that such enactments are presumptively valid. O'Connell v. Conte, supra.

This "classification", which the Court of Appeals finds in this case, results in no actual inequality, but if it did there are reasonable and justifiable grounds for it. The state has an overriding interest in the welfare of its children, for the good of the individual children and for the greater good of society as a whole, and the statute here challenged is rationally related to the protection of that interest.

[18] It has long been the rule in Washington that a court could require a divorced parent to support a defective child beyond majority. Van Tinker v. Van Tinker, 38 Wash.2d 390, 229 P.2d 333 (1951); Schultz v. Western Farm Tractor Co., 111 Wash. 351, 190 P. 1007 (1920). A divorced parent has been held to support obligations past majority when there is a separation agreement to that effect. Riser v. Riser, 7 Wash.App. 647, 501 P.2d 1069 (1972). We now hold that there is no constitutional infirmity in RCW 26.09, and that it gives the trial court discretion, under proper circumstances and after consideration of all relevant factors, to decree support for the education of normal children past the age of majority.

The trial court has not here abused its discretion. It is to be understood that the pursuit of that education ordered ***606** by the court should begin immediately after high school and follow a regular continuous course of study, barring unforeseen emergencies.

We affirm the trial court in all respects and affirm the Court of Appeals holding that petitioner is entitled to support while she seeks a baccalaureate degree. We reverse the Court of Appeals in regard to support of the Childers' sons terminating at age 18.

WRIGHT, C. J., and ROSELLINI, HAMILTON, STAFFORD, UTTER, BRACHTENBACH, HOROWITZ and DOLLIVER, JJ., concur.

All Citations

89 Wash.2d 592, 575 P.2d 201

Footnotes

1 We find the common meaning of "emancipate" in Webster's Third New International Dictionary (1971):
"1: to release (a child) from the paternal power, making the person released sui juris."
It is not absolutely linked to majority. See H. Clark, Jr., Law of Domestic Relations s 8.3 (1968); M. Inker and R. McGrath, College Education of Minors, 10 Boston B.J. No. 6, at 12, 13 (1966).

2 See, e. g., RCW 13.04.010, 51.08.030, 74.12.010, 74.13.020, 74.20.020, 74.20A.020(3).

3 Children whose parents are still married most often continue to receive support past majority. R. Washburn, Post-Majority Support: Oh Dad, Poor Dad, 44 Temple L.Q. 319, 329 n. 55 (1971).
Most young adults attending college receive parental support for a substantial percentage of the cost of a college education. Making It: A Guide to Student Finances 23 (A. Johnson ed., 1973); R. Freeman, Crisis in College Finance? Time for New Solutions 100 (1965); S. Harris, A Statistical Portrait of Higher Education, 100, 114-123 (1972).
It should also be noted that not only college is at issue here. Most children have not graduated from high school by the time they reach their 18th birthday. Thus, the custodial parent, usually the mother, would be left with the full responsibility for the child's necessaries while the child is still in high school.

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172 Or.App. 717
Court of Appeals of Oregon.

In the Matter of the MARRIAGE OF Lisa Lynn McGINLEY, nka Lisa Lynn Hamilton–Treick, Respondent–Cross–Appellant,
and
Daniel Case McGinley,
Appellant–Cross–Respondent.

(D8712–68732; CA A101792)

Argued and Submitted March 6, 2000.

Decided Feb. 28, 2001.

Synopsis

Former husband and former wife moved in two successive proceedings to modify dissolution judgment. The Circuit Court, Multnomah County, Elizabeth Welch, J., ordered, in part, that father provide support for daughter's college education and set amount of father's support obligation to son. Both parties appealed. The Court of Appeals, Armstrong, J., held that: (1) divorced parents of children attending school are not a suspect class for purposes of federal Equal Protection Clause and state Equal Privileges and Immunities Clause; (2) statute that requires parents who are not currently married to each other to support children attending school, but does not impose similar burden on parents currently married to each other, is rationally related to legitimate state interest and thus doe not violate federal Equal Protection Clause or state Equal Privileges and Immunities Clause; (3) trial court was required to make findings supporting its deviation from support guidelines with respect to support award for son; and (4) failure in second proceeding to increase father's support obligation to daughter based on a decrease in her college financial aid award was not error.

Vacated and remanded in part; otherwise affirmed.

See also, 156 Or.App. 449, 965 P.2d 486.

West Headnotes (10)

[1] **Child Support**
Time of taking effect;retrospective modification

Father's equal protection challenge to statute that required divorced parents to support children attending school was not moot as result of father's having fulfilled statutory support obligation to daughter, as Court of Appeals had power to make any modification of father's support obligation for daughter retroactive to the date that father moved to modify the dissolution judgment. U.S.C.A. Const.Amend. 14; Const. Art. 1, § 20; ORS 107.108.

2 Cases that cite this headnote

[2] **Constitutional Law**
Education

Class composed of divorced parents of children attending school is not a suspect class under state Equal Privileges and Immunities Clause. Const. Art. 1, § 20; ORS 107.108.

Cases that cite this headnote

[3] **Child Support**
Validity

Constitutional Law
Family Law

Statute that requires parents who are not currently married to each other to support children attending school, but does not impose similar burden on parents currently married to each other, is rationally related to legitimate state interest in having an educated populace and therefore doe not violate state Equal Privileges and Immunities Clause. Const. Art. 1, § 20; ORS 107.108.

Cases that cite this headnote

[4] **Constitutional Law**
Rational Basis Standard; Reasonableness

Under federal Equal Protection Clause, challenged laws will be subject to rational basis review unless they discriminate against a suspect class or infringe on a fundamental right. U.S.C.A. Const.Amend. 14.

4 Cases that cite this headnote

[5] **Constitutional Law**
Discrimination and Classification

In equal protection context, fact that the benefitted group includes members of the class allegedly discriminated against precludes a holding that the law discriminates against that class. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[6] **Constitutional Law**
Marital status

Divorced parents of children attending school are not a suspect class for equal protection purposes. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[7] **Constitutional Law**
Families and children

Statute that requires parents who are not currently married to each other to support children attending school, without imposing similar burden on parents currently married to each other, does not directly and significantly interfere with the exercise of fundamental right to marry and is therefore subject only to rational basis analysis under federal Equal Protection Clause. U.S.C.A. Const.Amend. 14; ORS 107.108.

2 Cases that cite this headnote

[8] **Child Support**
Validity

Constitutional Law
Families and children

Statute that requires parents who are not currently married to each other to support children attending school, without imposing similar burden on parents currently married to each other, is rationally related to legitimate state interest in having an educated populace and therefore does not violate federal Equal Protection Clause. U.S.C.A. Const.Amend. 14; ORS 107.108.

1 Cases that cite this headnote

[9] **Child Support**
Determination and disposition of cause

Child support award for son that was imposed on father in postdissolution proceeding would be vacated on appeal and that portion of judgment would be remanded, where trial court failed to enter findings required by statute in support of decision to depart from child support guidelines by not taking into account the amount that father was paying for daughter. ORS 25.280; Or.Admin.R. 137–050–0330(2)(a), 137–050–0490.

4 Cases that cite this headnote

[10] **Child Support**
Education

Trial court's failure, in a second postdissolution proceeding to modify child support orders, to increase father's support obligation to daughter based on a decrease in her college financial aid award was not error, where change in circumstances arising from that decrease in financial aid was anticipated at time of trial in first postdissolution proceeding. ORS 107.135(2)(a).

Cases that cite this headnote

Attorneys and Law Firms

**956 *718 Charles F. Hinkle argued the cause for appellant-cross-respondent. With him on the briefs was Stoel Rives LLP.

Mark A. Johnson, Portland, argued the cause for respondent-cross-appellant. With him on the brief was Findling & Johnson LLP.

Before EDMONDS, Presiding Judge, and ARMSTRONG and KISTLER, Judges.

Opinion

*719 ARMSTRONG, J.

Father appeals from a judgment modifying his child support obligation for his son and affirming his support obligation for his daughter, who is a student at a private liberal arts college. Mother cross-appeals from the judgment. She challenges the trial court's refusal to increase father's support obligation for daughter based on a decrease in daughter's financial aid award. On *de novo* review, we affirm in part and reverse in part.

The court entered a judgment in 1988 dissolving mother and father's marriage. The dissolution judgment awarded custody of the parties' two children to mother and ordered father to pay both child and spousal support. Both parties sought to modify the dissolution judgment in 1996 and again in 1997. In response to the first motion, the trial court terminated spousal support due to changed circumstances, terminated child support for son based on son's incarceration in the state correctional system, and increased father's support obligation for daughter based on her educational expenses as a child attending school, ORS 107.108. In its ruling on the second motion for modification, the trial court refused to increase father's support obligation for daughter because it concluded that no substantial change of economic circumstances had occurred; it reinstated father's support obligation for son as a result of son's transitional release from state boot camp; and it declined to terminate father's support obligation for daughter based on father's contention that ORS 107.108 violates the state and federal constitutions.

Father appeals, assigning error (1) to the trial court's refusal to hold that ORS 107.108 violates the state and federal constitutions and (2) to the amount of child support that the court ordered for son. Father argues that ORS 107.108 violates the Oregon Constitution's Equal Privileges and Immunities Clause, Or. Const., Art. I, § 20, and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. With regard to son's support, father argues that the trial court improperly deviated from *720 the Uniform Child Support Guidelines without entering findings to support the deviation. ORS 25.280. Mother cross-appeals. She assigns error to the trial court's refusal to increase father's support obligation for daughter based on a decrease in daughter's financial aid award. She alleges that the trial court committed an error of law in not recognizing the decrease as a change in circumstances that was sufficient to justify a modification. ORS 107.135(2)(a) (1997).

We conclude that ORS 107.108 does not violate either the state or federal constitutional guarantee of equal treatment. Additionally, we conclude that the decrease in daughter's financial aid award did not constitute **957 an unanticipated substantial change in economic circumstances. ORS 107.135(2)(a) (1997). Accordingly, we affirm the child support award for daughter. With regard to the support award for son, we agree with father that the trial court improperly deviated from the guidelines without making findings to support its decision to do so. ORS 25.280. We therefore remand that portion of the judgment to the trial court for entry of findings or modification of the award.

[1] Before discussing the merits of the case, we first address mother's concern that both father's constitutional challenge to ORS 107.108 and mother's cross-appeal may be moot as a result of father having fulfilled his statutory support obligation to daughter since the court entered its second modification judgment. "A case becomes moot for the purpose of an appeal when, because of a change of circumstances prior to the appellate decision, the decision would resolve merely an abstract question without practical effect." *State ex rel Juv. Dept. v. Holland,* 290 Or. 765, 767, 625 P.2d 1318 (1981) (citations omitted). Because we have the power to make any modification of father's support obligation for daughter retroactive

to the date that father moved to modify the dissolution judgment, our decision could affect father's support obligation for daughter. *See Pedroza and Pedroza,* 128 Or.App. 102, 107, 875 P.2d 478 (1994) ("[M]odification of a support order can be made retroactive to the date of the filing of the motion to modify.") (citations omitted). Consequently, that issue is not moot.

***721** In our analysis of the merits, we turn first to father's state and federal constitutional challenges to ORS 107.108.[1] ORS 107.108(1) provides in relevant part that, in cases of dissolution or separation, "the court may enter an order against either parent, or both of them, to provide for the support or maintenance of a child attending school." The statute defines a "child attending school" as

> "a child of the parties who is unmarried, is 18 years of age or older and under 21 years of age and is a student regularly attending school, community college, college or university, or regularly attending a course of professional or technical training designed to fit the child for gainful employment. A child enrolled in an educational course load of less than one-half that determined by the educational facility to constitute 'full-time' enrollment is not a 'child attending school.' " ORS 107.108(8). Enacted in 1973, ORS 107.108 reflects Oregon's commitment to make higher education as available as possible to its citizens. Our state's tradition of requiring divorced parents to support their children while they attend college goes back at least to the Supreme Court's 1941 decision in *Jackman v. Short,* 165 Or. 626, 638–39, 109 P.2d 860 (1941), in which the court held that the trial court properly required a noncustodial father to help pay for his 18–year–old daughter to attend Oregon State College.[2] In so holding, the court emphasized the importance of a college education in our society.[3] Since the court decided *Jackman,* the ****958** importance of a college education to success in our society has ***722** undoubtedly become greater. *See, e.g.,* Charles F. Willison, *But Daddy, Why Can't I Go to College? The Frightening De–Kline of Support for Children's Post Secondary Education,* 37 BC L. Rev. 1099, 1124 (1996); Leslie J. Harris et al., *Making and Breaking Connections Between Parents' Duty to Support and Right to Control Their Children,* 69 Or. L. Rev. 689, 721 (1990). Morever, we specifically recognized the importance of such an education in our recent decision in *Crocker and Crocker,* 157 Or.App. 651, 660, 971 P.2d 469 (1998), *rev allowed* 328 Or. 418, 987 P.2d 511 (1999), in which we upheld ORS 107.108 and affirmed the legitimacy of the state's interest in having a well-educated populace.

Although father does not dispute the value of higher education, he argues that the state's decision to require divorced parents to support their children in such endeavors, while not imposing a similar burden on married parents living together, violates the state and federal constitutions. Father urges that classifications based on marriage or divorce should be recognized as suspect under both the state and federal constitutions and, therefore, that such classifications should be subject to heightened scrutiny by courts. Alternatively, he argues under the federal Equal Protection Clause that ORS 107.108 interferes with the fundamental right to make decisions about marriage and divorce and, for that reason, that the law should be subject to strict scrutiny. Finally, father contends that, even if we do not apply heightened scrutiny, ORS 107.108 is invalid under both the state and federal constitutions because it is not rationally related to any legitimate governmental purpose. We conclude that the law does not discriminate against a suspect class and therefore that it is not subject to heightened scrutiny on that basis under Article I, section 20, of the Oregon Constitution or the Fourteenth Amendment to the United States Constitution. We also conclude that the law does not significantly interfere with the exercise of a fundamental right and therefore that heightened scrutiny is not warranted under the Fourteenth Amendment. Finally, we conclude that ***723** ORS 107.108 does not otherwise impermissibly distinguish among people or classes of them. We therefore affirm the trial court's decision rejecting father's challenge to ORS 107.108.

We begin by addressing father's state constitutional challenge to ORS 107.108. Article I, section 20, provides that "[n]o law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens." "[T]he clause 'forbids inequality of privileges or immunities not available upon the same terms, first,

to any citizen, and second, to any class of citizens.' "[4] *Tanner v. OHSU,* 157 Or.App. 502, 520, 971 P.2d 435 (1998) (quoting *State v. Clark,* 291 Or. 231, 237, 630 P.2d 810, *cert. den.* 454 U.S. 1084, 102 S.Ct. 640, 70 L.Ed.2d 619 (1981)). Article I, section 20, distinguishes between true classes, which are protected in varying ways against discrimination, and pseudo-classes, which are not. Pseudo-classes are those that are created by the challenged law and that have no existence apart from it, whereas true classes are based on "antecedent personal or social characteristics or societal status." *Id.* at 521, 971 P.2d 435 (internal quotation marks and citation omitted). Among true classes, cases construing Article I, section 20, have further distinguished between suspect classes and nonsuspect classes and have required a higher level of scrutiny by courts of laws discriminating ****959** against suspect classes. *Id.* at 522–23, 971 P.2d 435. Although there is not yet any overarching definition of a "suspect class," it has been established that "the focus of suspect class definition is not necessarily the immutability of the common, class-defining characteristics, but instead the fact that such characteristics are historically regarded as defining distinct, socially recognized groups that have been the subject of adverse social or political stereotyping or prejudice." *Id.* at 523, 971 P.2d 435.

***724 [2]** We have already decided that ORS 107.108 discriminates against a true class. That "class comprises people who, like father, are divorced parents of children attending school. They can be identified by their status as divorced parents of such children and not by the challenged law." *Crocker,* 157 Or.App. at 660, 971 P.2d 469. The next question we must answer under Article I, section 20, is one that we expressly left open in *Crocker:* whether that class of parents comprises a suspect class. *Id.*[5] For the reasons that follow, we conclude that it does not.

As a preliminary matter, we note that, although father argues that ORS 107.108 distinguishes between parents solely on the basis of marital status, that is not precisely true. The class of parents who are burdened by the statute[6] includes parents who are currently married (to spouses who are not the biological parents of the children attending school), as well as parents who never remarried after divorcing the parents of the children at issue.[7] Thus, the burdened class includes individuals who are currently married and those who are not. Similarly, the class of parents whom the statute does not reach includes parents who married once and have never divorced, as well as those who were divorced before marrying the parents of the children who now wish to attend school. Thus, to the extent that status as a divorcé or divorcée has in the past caused a person to be the target of pernicious stereotypes, the statute does not distinguish between people on that basis and, therefore, it cannot be argued that the statute is based on those stereotypes. *See, e.g., Califano v. Jobst,* 434 U.S. 47, 55, 98 S.Ct. 95, 54 L.Ed.2d 228 (1977) (discussing statutory classifications in the context of a federal equal protection challenge); *cf.* ***725** *Tanner,* 157 Or.App. at 525, 971 P.2d 435 (holding that the fact that the class of persons not entitled to insurance benefits for their partners included both homosexual and heterosexual persons did not defeat plaintiffs' Article I, section 20, challenge, because the class of persons receiving such benefits for their partners, by definition, excluded all members of the class challenging the statute). Consequently, there is no need for us to address whether a classification strictly based on marital status would be suspect for purposes of Article I, section 20.

The question remains, however, whether the classification created by ORS 107.108 (*i.e.,* between parents of children attending school who are currently married to each other and parents of children attending school who are not) is a suspect classification. As stated previously, we will consider a classification to be suspect if it is based on "characteristics [that have been] historically regarded as defining distinct, socially recognized groups that have been the subject of adverse social or political stereotyping or prejudice." *Tanner,* 157 Or.App. at 523, 971 P.2d 435. Father argues that ORS 107.108 discriminates against divorced parents and ****960** that such parents, particularly fathers, have been the subject of adverse stereotypes and prejudice.

Arguably, divorced parents are part of a distinct, socially recognized group, although the group is not as well recognized as are other socially recognized groups. There are songs and movies and books about divorced parents and organizations of and for them. There also have been several national and statewide campaigns to recover unpaid child support from such people. Thus, although

father has not provided evidence of entrenched group status, we will assume for the sake of argument that divorced parents do comprise a socially recognized group.

The next question under Article I, section 20, is whether that group has been the subject of "adverse social or political stereotyping or prejudice." *Tanner,* 157 Or.App. at 523, 971 P.2d 435. Although the issue is not beyond dispute, we conclude that divorced parents have not been the subject of stereotyping or prejudice to an extent that would render them a suspect class. Gender, race, religious affiliation, alienage, and sexual orientation are among the classifications identified as ***726** suspect for purposes of Article I, section 20. *Id.* at 524, 971 P.2d 435. It is almost universally understood that members of all of those groups have been routinely targeted for adverse treatment over the years in our society. To cite but a few examples, both African–Americans and women did not obtain federally guaranteed voting rights until relatively late in our country's history. *See* U.S. Const., Amends. XV and XIX. Racial discrimination in public accommodation was prevalent well into the 1960s. *See, e .g., Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241, 85 S.Ct. 348, 13 L.Ed.2d 258 (1964). Homosexual sexual practices have historically been, and in some states continue to be, outlawed. *See, e.g., Bowers v. Hardwick,* 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986). Aliens and members of unpopular religious groups have been frequent victims of discriminatory laws and have been routinely subject to social ostracism. *See, e.g., Graham v. Richardson,* 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971); *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993). It is not apparent that divorced parents face anything similar to the social and political obstacles that members of the groups identified above face, and father has not provided us with evidence to the contrary. Although father argues that ORS 107.108 is based on the stereotype that divorced parents have less interest in paying for their children's college education than do married cohabiting parents [8] we do not find that generalization, standing alone, to be significant enough to justify the recognition of the group as a suspect class. Accordingly, we conclude that the distinction among classes that is embodied in ORS 107.108 is not subject to heightened scrutiny under Article I, section 20.

Under Article I, section 20, when the challenged classification does not involve a suspect class, we have applied a rational basis test to evaluate whether the classification violates the provision. We will assume that that is the relevant test for us to apply here. *Sherwood School Dist. 88J v. Washington Cty. Ed.,* 167 Or.App. 372, 386, 6 P.3d 518, *rev. den.* 331 Or. 361 (2000). [9]

***727** To satisfy that test, "the classification involved must bear some rational relationship to [a] legitimate end." *Withers v. State,* 163 Or.App. 298, 309, 987 P.2d 1247 (1999), *rev. den.* 331 Or. 284, 18 P.3d 1101 (2000). Although we have already decided that ORS 107.108 satisfies Article I, section 20's rational basis test, *Crocker,* 157 Or.App. at 663, 971 P.2d 469, father urges us to overrule *Crocker* in light of a Pennsylvania Supreme Court case that held, under a similar state statute, that there was no rational basis for the legislature's decision to give children with divorced parents an advantage over those with intact families in paying for their college ****961** education. *Curtis v. Kline,* 542 Pa. 249, 666 A.2d 265 (1995). We decline to do so.

We have identified the interest served by ORS 107.108 as the state's interest in having a well-educated populace. *Crocker,* 157 Or.App. at 660, 971 P.2d 469. The legitimacy of that interest is undisputed. *See* Willison, 37 BC L. Rev. at 1123. Moreover, as we indicated in *Crocker,* it is rational to believe that children from non-intact families will have more difficulty paying for their college education than will children from intact families, in part because of lack of support from divorced parents:

> "[L]egislators could rationally believe that, because of the nature of divorce and separation, there will be instances in which children will not receive support from their parents to attend school precisely because the parents are divorced or separated, despite the fact that the parents have the resources to provide the support and it is in the children's best interest for them to do so. * * * Providing courts with the authority

> to require those parents to support their children attending school is a rational response to that problem."

Crocker, 157 Or.App. at 661, 971 P.2d 469. [10] Indeed, the economic disadvantages suffered by children of divorced parents are well documented. *See* Willison, 37 BC L. Rev. at 1115–20. ORS 107.108 ***728** reflects the legislature's effort to ameliorate that disadvantage, and nothing in the Pennsylvania Supreme Court's decision in *Kline* convinces us that that effort is irrational.

In particular, we note, as we did in *Crocker,* that the legislative distinction embodied in ORS 107.108 mirrors the distinction in ORS 107.105(1)(c), which allows courts to order divorced parents to pay child support for minor children but which contains no similar provision with respect to married parents who are living together. *Crocker,* 157 Or.App. at 662, 971 P.2d 469. [11] Although Oregon law draws a distinction between support for children under 18 years of age and support for those 18 to 21 years of age, the distinction presumably reflects a difference in the importance of that support to the two groups. In that light, we believe that the legislature could have reasoned as follows in deciding to authorize courts to require divorced parents to support their children attending school and, if it had, that its decision would be rational: Children under 18 years of age are likely to be attending high school and to have less ability than do older people to earn an income sufficient for their needs. Because of the importance attached to a high school education and the inability of younger children to provide for themselves, the state has chosen to impose on all parents, whether married or not, the obligation to support their children under 18 years of age. ORS 109.010; ORS 109.510. [12] In contrast, the legislature could have believed that children between 18 and 21 have a greater ability to earn an income sufficient to meet their needs and that it is less critical to them and to society that they receive a post-secondary education in addition to a high school education. Because the consequences of failing to provide support for 18–to 21–year–old children may be less significant than they are for children under 18 years of age, the state has not chosen to impose an obligation on all parents to provide support for their 18–to 21–year–old children.

***729** However, the legislature reasonably could believe that divorced parents are likely to have greater difficulty than are married parents in making joint decisions about financial support for their 18–to 21–year old children. As a consequence, there is a greater likelihood that children of divorced parents will receive less support for post-secondary education than will children of married parents. ORS 107.108 addresses that difference ****962** by providing a mechanism by which the state will intercede on behalf of the children of divorced parents to obtain support for them to attend school. ORS 107.105(1)(c) provides the same assistance to children who are under 18 years of age whose parents are divorced by interjecting the state into decisions about financial support for them while not interjecting the state into those decisions for children whose parents are married.

[3] If, as father contends, it violates Article I, section 20, to treat divorced parents differently from married parents with regard to the obligation to support their 18–to 21–year old children who are attending school, then it violates that provision to treat parents differently with regard to support for their children under 18 years of age. As far as we know, every state in the country distinguishes between divorced parents and married parents with regard to state involvement in decisions about the financial support of their children under the age of majority. It would be remarkable for us to conclude that the constitutional guarantee of equal treatment that is found in some form in most, if not all, state constitutions and in the federal constitution, is violated by such a difference in treatment. *See generally* Willison, 37 BC L Rev at 1114–15. We conclude that the distinction embodied in ORS 107.108 does not violate Article I, section 20, of the Oregon Constitution.

We turn now to father's contention that ORS 107.108 violates the Fourteenth Amendment's Equal Protection Clause because it impermissibly classifies parents according to marital status and because it infringes on the fundamental right to marry. We reject both contentions.

[4] Section 1 of the Fourteenth Amendment provides that "[n]o State shall * * * deny to any person within

its jurisdiction the equal protection of the laws." Under that clause, *730 challenged laws will be subject to rational basis review unless they discriminate against a suspect class or infringe on a fundamental right. *See, e.g., Massachusetts Bd. of Retirement v. Murgia,* 427 U.S. 307, 312, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976). Father argues that classification according to marital status should be recognized as suspect and that ORS 107.108 should therefore be subjected to heightened scrutiny.

[5] First of all, we note that the Supreme Court has previously suggested that distinctions based on marital status are not suspect.[13] Moreover, as we indicated above, ORS 107.108 does not strictly classify according to marital status, because both the burdened group and the benefitted group under ORS 107.108 contain currently married and previously divorced persons. Under the interpretation of discrimination adopted by the Supreme Court, the fact that the benefitted group includes members of the class allegedly discriminated against precludes a holding that the law discriminates against that class. *See Geduldig v. Aiello,* 417 U.S. 484, 496 n. 20, 94 S.Ct. 2485, 41 L.Ed.2d 256 (1974) (holding that discrimination based on pregnancy is not gender discrimination for the purposes of the Equal Protection Clause because some "non-pregnant" women are members of the benefitted class).[14] Having concluded that distinctions between married and unmarried people have not yet been recognized as suspect and that ORS 107.108 does not discriminate on that basis, we turn to whether the narrower class that ORS 107.108 burdens should be recognized as suspect.

[6] As we noted earlier, the distinction that ORS 107.108 actually draws is between divorced parents whose children wish to attend college and parents who are married to the *731 parents of the children who wish to attend **963 college. The Supreme Court has defined a "suspect class" as "one saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Murgia,* 427 U.S. at 313, 96 S.Ct. 2562 (internal quotation marks and citation omitted). Based on that definition, we conclude that divorced parents of children attending school should not be recognized as a suspect class for purposes of the Equal Protection Clause. Many of the same reasons that supported our decision under Article I, section 20, are applicable here. No showing has been made that divorced parents of children attending school have historically been subject to discriminatory laws or that they have been shut out of the political process. Unlike the situations with respect to race, gender, and alienage, we know of no history of places of public accommodation refusing to serve divorced parents, nor have we been made aware of cases of employment discrimination against that class. To the extent that father is attempting to use the challenged law itself as evidence of a history of purposeful discrimination, his position is unavailing. We are not aware of any equal protection case in which a court has held that the history of purposeful discrimination necessary to support recognition of a suspect class may consist of the challenged law itself; we believe that that history must contain evidence apart from the challenged law, especially when there is no evidence that the law is based on pernicious stereotypes.

We conclude that divorced parents of children attending school are not a suspect class for purposes of the Equal Protection Clause and that ORS 107.108 should not, therefore, be subject to heightened scrutiny on the basis that it discriminates against a suspect class. We turn to father's contention that ORS 107.108 interferes with a fundamental right and should be subjected to strict scrutiny on that basis.

[7] Father argues that ORS 107.108 interferes with the fundamental right to marry. Because it is well established that the right to marry is fundamental, the remaining question is whether ORS 107.108 "significantly interferes with the exercise of that right." *Zablocki v. Redhail,* 434 U.S. 374, 383, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978). If it does, it is subject *732 to strict scrutiny. *See id.* at 388, 98 S.Ct. 673. However, for the reasons that follow, we conclude that the statute does not significantly interfere with the right to marry.

In *Zablocki,* the Supreme Court addressed a Wisconsin statute that required noncustodial parents with outstanding child support obligations to obtain a court order before remarrying. Under the statute, the court order would be granted only if the parent submitted proof

of compliance with the child support obligations and showed that the child was not currently a public charge or likely to become one in the future. Because the parent in *Zablocki* was indigent and, therefore, was unable to meet his support obligations, he was unable to marry under Wisconsin law. In holding that the statute significantly interfered with the right to marry, the Court noted that it prevented some members of the affected class from marrying at all, that it burdened others to such an extent that they would be "in effect * * * coerced into forgoing their right to marry," and that even those who met the statutory requirements would "suffer a serious intrusion into their freedom of choice in an area in which we have held such freedom to be fundamental." *Id.* at 387, 98 S.Ct. 673. However, in holding the statute unconstitutional, the Court emphasized that "reasonable regulations that do not significantly interfere with the marital relationship may be legitimately imposed." *Id.* at 386, 98 S.Ct. 673 (citation omitted).

Federal appeals courts have built on the analysis in *Zablocki* to further delimit the constitutionally permissible level of state interference with the right to marry. In *P.O.P.S. v. Gardner,* 998 F.2d 764 (9th Cir.1993), the Ninth Circuit upheld Washington's child support guidelines against equal protection and due process challenges. The organization challenging the guidelines argued that they resulted in such high awards of child support that noncustodial parents were effectively precluded from remarrying. In rejecting that argument, the court stated that, ****964** unlike the statute in *Zablocki,* the guidelines did not directly interfere with the marital relationship because they did not bar anyone from getting married. It also noted that courts had authority to deviate from the guidelines in the event that a child support obligation was so high that it effectively prevented a noncustodial parent from remarrying. Finally, the court noted that the

> ***733** "burden of child support awards may very well discourage some people from having additional children and may discourage some from entering new marriages. But all financial obligations impact family decisions. Providing financial and emotional support is the responsibility one assumes by choosing to have children. Every obligation imposed by the State cannot be subject to strict scrutiny."

P.O.P.S., 998 F.2d at 768–69.

Similarly, in *Wright v. MetroHealth Medical Ctr.,* 58 F.3d 1130 (6th Cir.1995), the Sixth Circuit upheld a hospital's anti-nepotism policy against the plaintiffs' allegation that it interfered with their right to marry. The policy provided for the transfer of one spouse in the event that both became employed in the same location. The court suggested that, although anti-nepotism policies may place economic burdens on the decision to marry, they do not directly interfere with that decision. It further noted that the policy at issue did "not create a legal obstacle that would prevent a class of people from marrying," and that it therefore did "not directly and substantially interfere with the fundamental right to marry." *Id.* at 1135–36. Accordingly, it subjected the policy to a rational basis analysis.

We conclude that the burden imposed by ORS 107.108 does not substantially interfere with the fundamental right to marry.[15] The law allows courts to impose an economic burden on divorced parents when their adult children wish to attend college. Although father argues that the law rewards those who decide to stay married to the parents of their children and that it therefore, in effect, interferes with the decision to divorce, the burden that he describes is indirect and attenuated, rather than direct and substantial as was the burden in *Zablocki.* Unlike the statute in *Zablocki,* nothing in ORS 107.108 conditions the right to divorce on a parent's ability or willingness to assist his or her child in obtaining a post-secondary education. Instead, ORS 107.108 operates similarly to the child support guidelines in *P.O.P.S.* ***734** and the anti-nepotism policy in *Wright.* It economically burdens the decision to divorce in an indirect way. Indeed, the burden often is imposed, as in this case, *after* the divorce has become final. Moreover, because the parent's support obligation under ORS 107.108 is necessarily tied to the parent's income and ability to pay, it cannot be said that the obligations imposed by ORS 107.108 are so prohibitive that they could effectively bar indigent individuals from divorcing. Because we conclude that ORS 107.108 does not discriminate against a suspect class or directly and substantially interfere with the exercise of a fundamental right, we hold that it is subject to rational basis analysis only.

[8] Rational basis analysis under the Equal Protection Clause is similar to the equivalent analysis under Article I, section 20. As we stated above, the state has a legitimate interest in having an educated populace, and requiring divorced parents to contribute to their children's education is a rational means of furthering that interest. Father does not dispute the legitimacy of the state's interest in education; instead he argues that the statutory distinction between divorced parents and parents who remain married to one another is irrational. It is simply too late in the day to make that argument under the Equal Protection Clause. As the United States Supreme Court said nearly 30 years ago:

> "Particularly with respect to social welfare programs, so long as the line drawn by the State is rationally supportable, the courts will not interpose their judgment as to the appropriate stopping point. '[T]he Equal ****965** Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all.' *Dandridge v. Williams,* 397 U.S. 471, 486–487[, 90 S.Ct. 1153, 25 L.Ed.2d 491] (1970)."

Aiello, 417 U.S. at 495, 94 S.Ct. 2485. ORS 107.108 is one means of providing for the welfare of Oregon's younger citizens. The legislature is entitled to significant latitude in attempting to reach that goal. Its decision to assist children of divorced parents, who are likely to be more economically vulnerable than are other children, is not irrational.

In summary, we conclude that ORS 107.108 violates neither the state nor federal constitutional guarantee of ***735** equal treatment. We therefore affirm the trial court's conclusion on that point.

[9] We turn briefly to father's second assignment of error. He argues that the trial court improperly deviated from the guidelines in setting the amount of child support for son without entering findings to support its decision to do so. ORS 25.280. The trial court's judgment provided that child support for son would be determined according to the guidelines, except that the award would not take into account the amount that father was paying for daughter. The guidelines contemplate that a parent's total support obligation for all joint children will be determined in one calculation, according to the parent's income. *See, e.g.,* OAR 137–050–0490 (1997). Where, as here, the support obligation for one joint child is calculated separately, and then the parent is not given any credit for having fulfilled that obligation when the amount of the second child's support is calculated, the support amount will be affected in two different ways. First, the parent's income will be artificially inflated by the court's failure to deduct the amount being paid for the first child. *See* OAR 137–050–0400 (1997) (providing for income deductions for support obligations for nonjoint children). [16] Second, because the guidelines provide that an only child will receive a higher proportion of his or her parent's income than will a child who is part of a larger family, *see* OAR 137–050–0490, Table 1 (1997), separate calculation of the support awards for each child will result in the parent's paying a larger amount for each child.

Although the trial court may have had legitimate reasons to deviate from the guidelines, it had to enter findings to justify its decision to do so. *See* ORS 25.280 (creating a rebuttable presumption that the support amount determined under the guidelines is the correct amount and providing that "a written finding or a specific finding on the record ***736** that the application of the formula would be unjust or inappropriate in a particular case" will be sufficient to rebut the presumption); OAR 137–050–0330(2)(a) (1997) (reiterating the requirement of findings to rebut the presumption). Accordingly, we vacate the child support award for son and remand it to the trial court for entry of findings or modification according to the guidelines.

[10] Finally, we address mother's cross-appeal. She assigns error to the trial court's failure to increase father's support obligation for daughter based on the decrease in her college financial aid award. She argues that the decrease constituted a substantial change in her economic circumstances. *See* ORS 107.135(2)(a) (1997). [17] "In order to obtain a modification of [a] child * * * support order[ ], [the party requesting modification] must demonstrate a substantial change in circumstances. In addition to being substantial, that change in circumstances must be one that could not have been anticipated at ****966** the time of the judgment." *Boyd and Boyd,* 152 Or.App. 785, 788,

954 P.2d 1281 (1998) (citation omitted). Father argues that mother and daughter were notified before the entry of the judgment in the first modification proceeding that daughter's financial aid award had been decreased and, therefore, that the decrease did not occur within the relevant time period and does not entitle mother to modification. Mother counters that daughter's financial aid package did not become final until *after* trial and that the trial date, rather than the date of entry of the judgment, is the relevant date for determining whether the change occurred after the first proceeding. There is authority for mother's argument. *See, e.g., Sills and Sills,* 63 Or.App. 157, 160, 662 P.2d 795, *rev. den.* 295 Or. 446, 668 P.2d 382 (1983). However, in this case, daughter testified in the first modification proceeding that she believed that she would receive less financial aid that year and that she understood that an increase in father's support obligation would cause a decrease in her financial aid award, and the trial court discussed the possibility of a decreased financial ***737** aid award on the record. Based on those facts, we cannot conclude that the award reduction was unanticipated. Accordingly, we affirm the amount of the support ordered for daughter.

Child support award for son vacated and remanded for entry of findings or modification; otherwise affirmed.

All Citations

172 Or.App. 717, 19 P.3d 954

Footnotes

1 Mother raises various preservation issues with respect to this assignment of error; we reject them without discussion.

2 Under the statutes in place in *Jackman,* the age of majority was 21, and courts had no authority to require parents to support their children after they had reached that age. *Jackman,* 165 Or. at 638, 109 P.2d 860; Or. Code 1930, § 6–915. *See also Mack v. Mack,* 91 Or. 514, 517, 179 P. 557 (1919). Although the age of majority in Oregon is now 18, the situation in *Jackman* differs from that in our case because courts now have express statutory authority to provide for support of children who have reached the age of majority but who are not yet 21. ORS 107.108. Another difference between the two statutory schemes is that the applicable statute in *Jackman* simply allowed courts to order support for the education of children without specifying the level of education, Or Code 1930, § 6–915, whereas Oregon courts are now specifically authorized to order support for post-secondary educational expenses, ORS 107.108.

3 The court stated that "[o]ne of the principal purposes of an education is still to train the young for the discharge of their duties to society and to afford them such knowledge of our government and American institutions that upon reaching majority they will intelligently perform their part in the great social order." *Jackman,* 165 Or. at 639, 109 P.2d 860. It also quoted Blackstone's statement that " '[t]he last duty of parents to their children is that of giving them an education suitable to their station in life; a duty pointed out by reason, and of far the greatest importance of any.' " *Id.* (quoting 1 *Blackstone's Commentaries,* *450 (Lewis ed 1898)).

4 Father argues both that he is a member of a class that is discriminated against in violation of Article I, section 20, and that he also is discriminated against as an individual in violation of that provision. In order to establish the latter, father would have to show that "the government * * * made or applied * * * [ORS 107.108] so as to grant or deny privileges or immunities to * * * [him as an individual] without legitimate reasons related to * * * [his] individual situation." *State v. Clark,* 291 Or. 231, 239, 630 P.2d 810, *cert. den.* 454 U.S. 1084, 102 S.Ct. 640, 70 L.Ed.2d 619 (1981). Father has not made any attempt to demonstrate that the law was enacted to target him personally or that it has been applied differently to him than to others. Accordingly, his claim that ORS 107.108 discriminates unlawfully against him as an individual fails.

5 The father in *Crocker* did not argue that anything other than rational basis analysis was required to test the validity of ORS 107.108 under Article I, section 20, or the Fourteenth Amendment. Accordingly, we decided the case using a rational basis analysis. *Crocker,* 157 Or.App. at 660, 971 P.2d 469.

6 As discussed in *Crocker,* courts are also authorized to order parents who never married each other and parents who are married but living apart to support their children while they attend school. *Crocker,* 157 Or.App. at 656–57, 971 P.2d 469. *See also* ORS 109.155; ORS 108.110. The overarching distinction for purposes of the larger statutory scheme is therefore between parents who are married to and living with the parents of the children who are attending school and those who are not. However, for purposes of our analysis, we will focus on the class created by the challenged statute, ORS 107.108, to determine whether the class that ORS 107.108 burdens is suspect.

7 Indeed, mother and father in this case have both remarried.

8 We accept father's assertion that the law is based on that generalization for the purposes of argument only.

9 Cf. Hon. Rex Armstrong, Ruth M. Spetter and Wendie L. Kellington, *Constitutional Limitations and Exactions,* in Oregon State Bar CLE, *Land Use* Ch. 14 at 14–12 (2000 Supp.) (suggests possible refinement of rational basis test under Article I, section 20, in light of the purpose of the provision).

10 Although, as father argues, there undoubtedly are divorced parents who are willing to contribute to their children's education and married parents of equivalent economic circumstances who are not, that fact does not make the classification irrational. *Crocker,* 157 Or.App. at 662, 971 P.2d 469 ("A statute does not have to be perfect in order for it to be rational.")

11 But cf. ORS 419B.400 (authorizes juvenile court that has assumed jurisdiction of a child to order parents to provide support for child, including a child attending school).

12 But cf. ORS 109.520; ORS 419B.552(1)(b) (support obligation terminates for children under 18 years of age who marry or are emancipated).

13 See *Jobst,* 434 U.S. at 53, 98 S.Ct. 95 ("Differences in race, religion, or political affiliation could not rationally justify a difference in eligibility for social security benefits, for such differences are totally irrelevant to the question whether one person is economically dependent on another. But a distinction between married persons and unmarried persons is of a different character.")

14 Because father has not produced any direct evidence that the legislature was motivated by animus against men in enacting ORS 107.108 and because the burdened and benefitted classes under ORS 107.108 contain both men and women, the Supreme Court's analysis in *Aiello* also forecloses father's suggestion that ORS 107.108 discriminates based on gender. *Aiello,* 417 U.S. at 496 n. 20, 94 S.Ct. 2485.

15 We assume for purposes of argument that the right to divorce is part of, and entitled to the same degree of protection as, the right to marry. *See, e.g., Boddie v. Connecticut,* 401 U.S. 371, 376, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971) (implying that the right to divorce is part of the fundamental right to marry).

16 Although both children are joint children in this case, *see* OAR 137–050–0320(1) (1997), one way to implement the court's decision to deviate from the guidelines in order to cover more of daughter's educational expenses would be to treat daughter as a nonjoint child for purposes of calculating son's award. However, a decision to consider a joint child as a nonjoint child would itself be a deviation from the guidelines that would require findings to support it.

17 ORS 107.135(2)(a) (1997) provides that "[a] substantial change in economic circumstances of a party, which may include, but is not limited to, a substantial change in the cost of reasonable and necessary expenses to either party, is sufficient for the court to reconsider its order of support."

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