# College Expenses: Modest Proposals

By Robert J. Jenkins

Recent news reports tell us education debt now exceeds credit card debt. The extension of six-figure student and parent-plus credit recalls the subprime mortgage crisis, with the cruel twist of virtually no bankruptcy relief. This presents a timely opportunity to reconsider historic family law jurisprudence directing trial courts to reduce basic child support by a "credit" for certain college expenses and the new suggestion that a "SUNY cap" should be the default judicial template in allocating college costs. The prior contributions of James A. Montagnino[1] and Benjamin E. Schub[2] are gratefully acknowledged.

First, while acknowledging that this proposal is contrary to established case law, it is submitted that the concept of a room and board "credit" against payments due for current child support is not in accordance with either the letter or spirit of the Child Support Standards Act[3] (CSSA) and is out of touch with the temporal reality of today's college experience, which in turn leads to unnecessary litigation. Instead, any such "credit" should be made a part of the allocation of the college costs "add-on," thus leaving current care payments intact.

Second, while acknowledging New York courts' varieties of "credit" law, it is submitted that there should be no credit for "room" and that any "credits" for board be based upon a factual analysis of what costs are actually saved by a custodial parent whose child attends a "sleep away" school. The author is mindful that there is a range of case law, from "dollar for dollar" credit for room and board charges,[4] to no credit at all,[5] to a credit for a proportionate share of the child's college meal plan.[6]

Lastly, as to the so-called "SUNY cap" most recently discussed in the well-researched and reasoned decision of Hon. Matthew F. Cooper, Supreme Court, New York County in *Pamela T. v. Marc B.*,[7] recently affirmed by the Appellate Division, First Department in *Pamela B. Tishman v. Marc Bogatin*,[8] it is submitted that there should be no such thing as a "SUNY cap" on parental contribution under any circumstances. Further, courts should not countenance any other college bill "sticker shock" inspired shortcuts designed to avoid the difficult financial analysis actually required of litigants, their children, attorneys and the courts.

## I. The "Credit" Against Basic Child Support and the CSSA

The concept of applying a "credit" for college room and board payments against basic child support came into existence before the enactment of the CSSA.[9] Following its adoption, the terms and spirit of the CSSA should have signaled the death of the judicially created "credit" which would serve to reduce the basic percentage-based child support amount. The CSSA dictates clear directions to courts based upon the legislative schedule of importance: basic child support based upon a percentage of income (17%, 25%, etc.); mandatory add-ons in order of importance (child care, health insurance and expenses); and discretionary add-ons (certain child care and education expenses). There is no provision for any reduction of basic support apart from the more recent legislative provision for sharing costs of children's health insurance.[10] In fact, this specific provision for credit against basic child support for health insurance costs supports the idea that no other reductions are permitted under the CSSA.[11] The key to the spirit and discipline of the CSSA is the establishment of basic support obligations and add-ons to these obligations.

With respect to the issue of the education add-on, New York Domestic Relations Law § 240 mandates:

> Where the court determines, having regard for the circumstances of the case and of the respective parties and in the best interests of the child, and as justice requires, that the present or future provision of post-secondary, private, special, or enriched education for the child is appropriate, the court may award educational expenses. The non-custodial parent will pay educational expenses, as awarded, in a manner determined by the court, including direct payment to the educational provider.[12]

The terms of the CSSA discretionary add-on for education do not contain any language or reasonable interpretation supporting a backwards "credit" against basic child support.[13] Ignoring this legislative direction leads to very real problems and those very real problems lead parties back to court.

By way of example, assume a judgment of divorce directs the non-custodial parent to pay 75% of college expenses and reduces that parent's basic support obligation by $10,000.00 per year, representing the "credit" for room and board. Assume further that there is continuing acrimony between the parties, and while the child attends his or her first semester of college, he or she contracts mononucleosis on break and does not return to school for the spring semester. As a result, the custodial parent asks the non-custodial parent to resume the full basic child support and obtains a negative albeit abbreviated response, compelling the custodial parent to return to court for relief. This is time-consuming, expensive and unnecessary.

While it is understood that some opting out or separation agreements contain "a flow chart"-like provisions attempting to foresee each possible outcome, is it realistic to expect a court to anticipate each possible permutation, and in turn draw out, semester by semester, a variety of schedules of payments to coincide with such various

possibilities? No. However, there is a method that is in accordance with the CSSA and which will further the goal of meaningful and direct judicial decision making.

The "credit" against basic support should be abandoned so that current care basic support is maintained. If any consideration is to be given to the actual overlap between basic support and college costs, such consideration should be given as part of the determination of the parents' college cost contribution for each semester the child is enrolled. Such an approach leaves each issue separate and the parties' relative obligations clearer. Why is this so important? Because the end of the scenario proposed above taken to its many logical conclusions may result in the interruption of the child's education, in many cases for greater than a single semester, awaiting a decision from the court which could have, through the application of this proposal, been avoided.

As established by the College Board's statistics, many if not most of your clients' children will not obtain a bachelor's degree in four years. The 2012 College Handbook, published by the College Board, as early as page *two* of over two thousand pages, sounds an ominous chord. The Handbook lists among its key comparative facts:

> Percentage of students who graduate within six years (most students take more than four years to earn a bachelor's degree).[14]

This is the point where you should feel the generational culture shock start to set in. It gets worse. Virtually all colleges' graduation fall well below 70%, which should serve as a gentle reminder that nearly a third of college freshmen fail to obtain a bachelor's degree in SIX years. Imagine if the standard of measurement was four years! These facts should compel us all to abandon the concept of reduction of basic child support when a child attends college away from home. If we are going to adjust for any *proven* overlap between contribution for room and board and basic support, let it be made part of the education add on set forth in the CSSA and not as a credit against basic child support.

There is a further reason to abandon the credit against basic support. Precious few parents and children have the ready cash available, either from current income, planned savings or inheritance, to pay college expenses on a pay-as-you-go basis, regardless of whether the school is private or public. Most parents, as do their children, take on debt by way of parent plus-loans or mortgages or loans from retirement assets, which are paid over time, well after the child has (hopefully) graduated. Why then, if parents amortize their college contribution over time, should non-custodial parents receive an immediate cash "credit" reduction in basic support? They should not.

## II. "Room and Board" v. "Shelter and Food"

All of the above being said, case law does in fact support the concept of a "credit" against basic support obligations. Regardless, whether the overlapping expense is considered in determining a parent's college contribution over and above basic child support or as a credit against current care child support payments, it should reflect economic reality as opposed to some form of a blind "dollar for dollar" reduction.

What is the actual cost to provide room and board for a child at home? Using available (2010) United States Department of Agriculture statistics,[15] for a single parent earning less than $57,600 per year the twelve-month-at-home room cost for an only child 17-years-old is $3,612.00 and board cost is $2,825.00, for a total of $6,437.00. (Compare that with average college room and board costs from the College Board Handbook of approximately $11,000 per *nine*-month school year.)

The reality is that room and board at college is not equivalent to the food and shelter provided at home. At home the labor is unpaid, there is no paid security force on premises nor are there other paid services, both labor and management, to administer both hotel and restaurant services for residents.

Initially, it should be now be settled fact that the custodial parent's "sleepaway school" savings in shelter costs is *de minimis* to the point of laughter. The only provable savings is for board and comes only from not having to feed the child each day for nine months. So, based upon the USDA statistics, for the nine months per year when the child is away at school, the parent saves at-home food costs of $235.00 per month, or $2,115.00 for the school year.

The savings are even less, due to economies of scale, when there other children in the household. When there are two children in the household the total at home board cost for the 17-year-old is $2,124.00 per year or $177.00 per month and $1,636.00 per year or $136.33 per month when there are three children in the home, resulting in nine-month school year savings of only $1,593.00 and $1,227.00, respectively.

Do these modest savings warrant substantial "room and board" credits? No. Is there a really a "dollar for dollar" credit due? No. Never has been.

The overlapping board/food "credit" against a parent's college contribution should be calculated by first determining the actual food and groceries savings enjoyed by the custodial parent. Because basic child support includes food and groceries, and because the parties share that cost as a proportion of their combined incomes, each should share the custodial parent's savings in the same proportion, to be applied as a credit against the non-custodial parent's contribution to the college bill, either as a lower percentage share of the college costs or as a reduction from the parent's annual college contribution cap.

The Appellate Division, Fourth Department's decision in *Pistilli v. Pistilli*[16] comes close by crediting the non-custodial parent with a *proportionate* share of the child's college meal plan. However, it does not consider the actual saving the custodial parent enjoys while the child is at

school. The cost of a meal plan provided for by the college simply does not correspond to the cost of groceries purchased at home.

## III. There Is No Reason to Create a "SUNY Cap" or Any Other Shortcuts

We have all heard from the appellate and trial bench, both formally and informally, and colleagues and commentators that there is or should be a "SUNY cap" on parental contribution to college expenses. We have all also heard about different informal "theories" of allocation of obligation for college expenses, the "one third father, one third mother, one third child" theory, the blind proportionate sharing theory, sometimes only after the child has taken out every loan available. In *Pamela B. v. Marc B.*, a decision worth reading and re-reading, the Hon. Matthew Cooper directly addressed the history of "SUNY cap" cases, eviscerating their precedential value.[17] In his decision, Justice Cooper held that courts are not in the business of determining which colleges are better than others, but rather, the real issue is which school is best suited for the child "in the ways that matter most to that particular child."[18] Applying this standard, Justice Cooper found ample justification in the record to support the child's choice of a private rather than a public school dismissing payor's contention that he could only afford to pay for a SUNY education, determining that the payor was capable of contributing 40% of the costs of the private college expenses.

Among its many important points, the crux of *Pamela T. v. Marc B.* is that each decision and agreement must be based upon its own merits and not on shortcuts. None of the shortcuts comes to terms with the actual obligation of counsel and the courts: to determine each parent's and each child's abilities and resources to contribute to the costs of college education. Any decision or agreement should be determined not by an artificial standard such as the cost of a public college education, but by what annual contribution each party and each child is capable of, and should be based upon ability, earnings and resources, including appropriate debt incursion.

The real cost of college is tuition and that cost, for private institutions, has risen and risen to the point of absurdity. Tuition is much more than salaries of professors and structures; it includes administration costs and not just celebrity coaches. Many of the "high end" labor costs are based upon a celestial marketplace, where top administrative and faculty positions command high six to seven figure compensation packages. These astronomical costs are borne by your clients and their children.

This reality has resulted in most of SUNY schools accepting incoming freshmen with SAT scores comparable with and in some cases higher than most mid-level small liberal arts colleges in the state. Competition has increased for SUNY schools, and when the SUNY tuition is one-fifth to one-seventh that of private schools, there should be no wonder.

However, this should not be the unsaid basis for a court to limit parental contribution to a "SUNY cap" or some other shortcut without regard to the actual financial ability of a parent or the child's reasoned choice of school. Further, there are only so many spaces at SUNY schools, thus rendering the "SUNY cap" impractical.

The "SUNY cap" and other shortcuts are simply improper reflex responses to college bill "sticker shock " utilized to replace what should be a reasoned analysis of the contribution a parent can actually afford to send a child to school. In the end, what counsel and courts should do is determine what each party is capable of providing and then setting their respective "cap" at that amount rather than on some artificial and meaningless construct.

## Endnotes

1. Montagnino, *Crediting College Expenses Against Child Support*, 227 NYLJ March 18, 2002 at p. 23.
2. Schub, *Revisiting the Crediting of College Expenses Against Child Support*, 235 NYLJ April 6, 2006 at p. 10.
3. New York Domestic Relations Law § 240 (McKinney 2010).
4. *See, e.g., Ataande v. Ataande*, 77 AD3d 742 (2d Dep't 2010).
5. *See, e.g., Rath v. Melens*, 15 AD3d 837 (4th Dep't 2005); *Burns v. Burns*, 233 AD2d 852 (4th Dep't 1996).
6. *See, e.g., Pistilli v. Pistilli*, 53 AD3d 1138 (4th Dep't 2008).
7. *Pamela T. v. Marc B.*, 33 Misc3d 1001 (Sup. Ct., N.Y. Co. 2011).
8. *Pamela B. Tishman v. Marc Bogatin*, 94 A.D.3d 621 (1st Dep't 2012)
9. *See, e.g., Guiry v. Guiry*, 159 AD2d 556 (2d Dep't 1990); *Healy v. Healy*, 190 AD2d 965 (3d Dep't 1993), each cited with approval by the Appellate Division, Third Department in *Haessly v. Haessly,* 203 AD2d 700 (3d Dep't 1994), post adoption by New York of the Child Support Standards Act.
10. New York Domestic Relations Law § 240 (1-b)(c)(5)(ii) (McKinney 2010).
11. *See People v. Barnhurst*, 101 Misc.2d 684 (N.Y. Crim. Ct. 1979): AWhere the legislature has listed specific items in a statute, it is the general rule that the express mention of one thing implies the exclusion of other similar things [*expressio unis est exclusio alterius*]...,"; *see also*, New York Statutes § 74 (McKinney 1971, 2012 Pocket Part].
12. New York Domestic Relations Law § 240 (1-b)(c)(7).
13. However, there is virtually no legislative history in support of or in opposition to this proposal, save the bill jacket, which contains the 1987 report of the NY Commission on Child Support, which noted at page 29, par. 12, that education costs are to be determined *after* basic support is calculated (emphasis supplied).
14. 2012 College Handbook; The College Board.
15. http://www.cnpp.usda.gov/expendituresonchildrenbyfamilies.htm. This an interactive site and was very helpful.
16. *Pistilli v. Pistilli*, *supra* at 1139-1140.
17. *Pamela T. v. Marc B.*, *supra*.
18. *Pamela T. v. Marc B.*, *supra* at 1012.

Robert J. Jenkins, Esq., was an original Family Court Hearing Examiner from 1985-1999, then a Court Attorney Referee in a Supreme Court Dedicated Matrimonial Part, retiring in 2010. He maintains a consulting practice in Syracuse, NY. He can be reached at RJJenkinsEsq@gmail.com. He also thanks Hon. Brian F. DeJoseph, JSC., E. Scott Brown, Esq. and Andrew T. Wolfe, Esq. for their help and advice.