

**“OPENING THE FLOODGATES”: ADULT CHILDREN SUING
THEIR PARENTS FOR COLLEGE SUPPORT: HAS THE LAW IN
NEW JERSEY GONE TOO FAR OR NOT FAR ENOUGH?**

*Lawrence Chinsky**

I. INTRODUCTION

New Jersey law provides courts with the authority to order divorced or unmarried parents to pay college support and tuition as part of child support obligations.¹ Currently, thirteen states in addition to New Jersey have laws that allow courts to award children of divorced or unmarried parents financial support toward college costs, typically as part of divorce or custody proceedings.² Cases are common in New Jersey where a

* J.D. Candidate, Rutgers Law School, May 2016. The author served as a Business Editor for the *Rutgers University Law Review* during the 2015–2016 academic year. The author would like to thank his children for providing the inspiration for this Note and the 2015–2016 staff of the *Rutgers University Law Review* for their dedicated work in preparing this Note for publication.

1. N.J. STAT. ANN. § 2A:34-23 (West 2015); *see also* *Newburgh v. Arrigo*, 443 A.2d 1031, 1038 (N.J. 1982). College support and tuition will hereinafter be referred to collectively as “college costs.”

2. States with statutes that allow courts to order college costs to children of divorced parents include Connecticut, Hawaii, Illinois, Indiana, Iowa, Massachusetts, Missouri, New York, Oregon, Utah, and Washington. *See* CONN. GEN. STAT. ANN. § 46b-56c (West 2009); HAW. REV. STAT. ANN. § 580-47(a) (LexisNexis 2014); 750 ILL. COMP. STAT. ANN. 5/513 (West 2009); IND. CODE ANN. § 31-16-6-2 (West 2007); IOWA CODE ANN. §§ 598.1(8), 598.21 (West 2013); MASS. GEN. LAWS ANN. ch. 208, § 28 (West 2015); MO. ANN. STAT. § 452.340(5) (West 2013); N.Y. FAM. CT. ACT § 413(1)(c)(7) (McKinney 2010); OR. REV. STAT. ANN. § 107.108 (West 2013); UTAH CODE ANN. § 15-2-1 (West 2013); WASH. REV. CODE ANN. § 26.19.090 (West 2005). In addition, the common law in the District of Columbia, Mississippi, and South Carolina allows courts in those jurisdictions to award college costs to children of divorced parents. *See* *Butler v. Butler*, 496 A.2d 621, 622 (D.C. 1985); *Nichols v. Tedder*, 547 So. 2d 766, 769 (Miss. 1989); *McLeod v. Starnes*, 723 S.E.2d 198, 204–05 (S.C. 2012). Many other states will enforce separation agreements or divorce decrees in which the parents stipulate that they will contribute toward college expenses for their children. *See* *Van Camp v. Van Camp*, 969 S.W.2d 184, 186 (Ark. 1998); *Slaton v. Slaton*, 428 So. 2d 347, 348 (Fla. Dist. Ct. App. 1983); *Norris v. Norris*, 642 S.E.2d 34, 35 (Ga. 2007); *Rosenbloom v.*

parent, usually the custodial parent, sues a non-custodial parent for that parent's share of the child's college tuition.³ Less common are cases involving a claim brought by a child against his or her parents requesting the court to order the parents to contribute toward college costs.⁴ New Jersey, which some view as having very liberal laws awarding college costs to children of divorced parents,⁵ received significant media attention recently because of three cases that made national headlines during 2014.⁶

For instance, Rachel Canning, an eighteen-year-old New Jersey high school senior at the time, made national headlines in March 2014 by suing her parents for private school tuition, weekly support, and future college costs.⁷ Rachel's parents, who were married at the time of the suit,⁸ refused to pay for their daughter's education costs, citing strained relations between the parties.⁹ Although Morris County Superior Court Judge Peter Bogaard denied Canning's request for more than \$600 per week in support at the initial hearing, the court did not dismiss the case and scheduled a second hearing for the following month to decide whether to require Canning's parents to pay for college costs.¹⁰

Bauchat, 654 So. 2d 873, 875 (La. Ct. App. 1995); *Ovairt v. Ovairt*, 204 N.W.2d 753, 758–59 (Mich. Ct. App. 1972); *O'Donnell v. O'Donnell*, 678 N.W.2d 471, 474 (Minn. Ct. App. 2004); *Crispo v. Crispo*, 909 A.2d 308, 313 (Pa. Super. Ct. 2006); *Goldin v. Goldin*, 538 S.E.2d 326, 330 (Va. Ct. App. 2000); *Shortt v. Damron*, 649 S.E.2d 283, 286 (W. Va. 2007).

3. See, e.g., *Black v. Black*, 92 A.3d 688, 693 (N.J. Super. Ct. Ch. Div. 2013).

4. See, e.g., Andy Polhamus, *No Contempt of Court for South Jersey Parents Sued for College Tuition*, NJ.COM (Dec. 22, 2014, 7:00 PM), http://www.nj.com/gloucester-county/index.ssf/2014/12/no_contempt_of_court_for_south_jersey_parents_sued_for_college_tuition.html.

5. "There is no doubt that New Jersey is one of the most liberal states with regard to child support, and requiring parents to pay for their children's college costs. An overwhelming majority of states do not require parents to provide their children with a college education." Theodore Sliwinski, *College Tuition Payments in New Jersey*, DIVORCE SOURCE, <http://www.divorceource.com/ds/newjersey/college-tuition-payments-in-new-jersey-3904.shtml> (last visited Feb. 13, 2016).

6. See, e.g., Kelly Wallace, *Fair or Outrageous? New Jersey Teen Sues Her Parents to Pay Up for College*, CNN (Mar. 5, 2014, 8:22 PM), <http://www.cnn.com/2014/03/05/living/nj-teen-sues-parents-for-college-education/>; see also *Rossi v. Livingston*, No. FM-12-1854-09, 2014 WL 641793, at *2 (N.J. Super. Ct. App. Div. Feb. 20, 2014), cert. denied, 94 A.3d 911 (N.J. 2014); Polhamus, *supra* note 4.

7. Wallace, *supra* note 6.

8. See Ben Horowitz, *NJ Teen Suing Parents Would Have Better Chance If It Were a Divorce Case, Lawyers Say*, NJ.COM (Mar. 5, 2014, 11:25 AM), http://www.nj.com/morris/index.ssf/2014/03/lawyers_say_teen_suing_parents_would_have_better_chance_if_it_were_a_divorce_case.html.

9. See Ben Horowitz, *Judge Rules Against NJ Teen Who Sued Parents for Financial Support*, NJ.COM (Mar. 4, 2014, 5:41 PM), http://www.nj.com/morris/index.ssf/2014/03/judge_issues_ruling_in_teens_suit_against_parents.html.

10. *Id.*

Although this hearing never took place because Canning dropped the lawsuit after moving back into her parents' home, this case brought the disparate treatment in New Jersey between children of married parents and children of divorced parents with respect to court-ordered college costs into the public spotlight.¹¹ The question is: "Why should a child of divorced or unmarried parents receive court-ordered support and a college education, but a child from an intact family not receive these same benefits?"¹² Canning broke new ground trying to test the judicial limits by bringing her suit even though there is no precedent for a child of married parents being awarded college costs by a court.¹³ One lawyer publicly weighed in on the case, stating that Judge Bogaard would "open the floodgates" to teenagers suing their parents for college costs if he ruled in Canning's favor.¹⁴

In a separate case, a twenty-one-year-old Temple University student sued both of her parents for financial assistance with her tuition.¹⁵ Caitlyn Ricci, who brought the suit, "moved out of her parents' house in early 2013" and lived with her grandparents at the time of filing her case.¹⁶ Ricci's parents were ordered by a Camden County Superior Court judge to pay \$16,000 of the \$26,000 yearly tuition bill.¹⁷ The lawyer for Ricci's father claimed his client was being discriminated against because he is divorced and noted that courts do not order married parents to contribute to their child's college costs.¹⁸ The noteworthy aspect of the Ricci case is that, similar to Canning, Ricci brought suit against both of

11. See Irving DeJohn, *Spoiled New Jersey Teen Rachel Canning Drops Lawsuit Against Parents*, DAILY NEWS (Mar. 18, 2014, 10:46 AM), <http://www.nydailynews.com/news/national/spoiled-new-jersey-teen-rachel-canning-drops-lawsuit-parents-article-1.1725361>.

12. Tanya N. Helfand, *Rachel Canning's Lawyer: Why She Sued Her Parents (Opinion)*, NJ.COM (Mar. 20, 2014, 5:15 PM), http://www.nj.com/opinion/index.ssf/2014/03/rachel_cannings_lawyer_why_she_sued_her_parents_opinion.html.

13. "The rights of kids to college whose parents haven't divorced aren't there." Ben Horowitz, *Morris County Teen Suing Parents Has Slim Chance of Prevailing, Legal Experts Say*, NJ.COM (Mar. 6, 2014, 6:15 AM), http://www.nj.com/morris/index.ssf/2014/03/morris_county_teen_suing_parents_has_slim_chance_of_prevailing_say_attorneys_with_knowledge_of_case.html (quoting Randi Mandelbaum, clinical law professor at Rutgers Law School).

14. *Id.* (quoting Randi Mandelbaum, clinical law professor at Rutgers Law School).

15. Polhamus, *supra* note 4.

16. Andy Polhamus, *Father of Temple University Student Who Sued for Tuition Speaks Out*, NJ.COM (Dec. 11, 2014, 7:00 PM), http://www.nj.com/gloucester-county/index.ssf/2014/12/father_of_temple_university_student_who_sued_for_tuition_speaks_out.html.

17. Polhamus, *supra* note 4.

18. Polhamus, *supra* note 16. "The state of New Jersey treats married people and divorced people as two separate classes, and is imparting financial obligations on divorced parents that married parents might not have It's simply because they're divorced that the law completely changes their rights as parents." *Id.*

her parents.¹⁹ A meaningful difference between the two cases was the marital status of the parents being sued.²⁰

Shortly before Rachel Canning's case came into the public spotlight, another New Jersey case concerning a parent being sued for law school tuition gained national media attention.²¹ In *Rossi v. Livingston*, the plaintiff sued her ex-husband to enforce the terms of a 2009 divorce agreement.²² As part of the divorce agreement, the father agreed to pay half of his daughter's law school costs.²³ The agreement did not address the wide disparity in cost between public and private law schools.²⁴ The daughter decided to attend Cornell Law School at a yearly cost of approximately \$75,000, even though her father offered to contribute \$7500 a year if she attended Rutgers Law School and lived at home with her mother.²⁵ The father appealed a judgment entered by the New Jersey Superior Court Chancery Division ordering him to pay \$112,500 toward his daughter's tuition at Cornell Law School.²⁶ Ultimately the Appellate Division affirmed the decision,²⁷ and the New Jersey Supreme Court denied the father's request for appeal.²⁸

19. Helfand, *supra* note 12; Polhamus, *supra* note 4.

20. See Horowitz, *supra* note 8 (noting that Canning's parents are still married); Polhamus, *supra* note 16 (noting that Ricci's parents were divorced).

21. See *Rossi v. Livingston*, No. FM-12-1854-09, 2014 WL 641793, at *2 (N.J. Super. Ct. App. Div. Feb. 20, 2014), *cert. denied*, 94 A.3d 911 (N.J. 2014).

22. *Id.* at *1. New Jersey courts have long favored the public policy of enforcing consensual matrimonial agreements that are "fair and definitive" to the parties. See *Konzelman v. Konzelman*, 729 A.2d 7, 11 (N.J. 1999) (quoting *Smith v. Smith*, 371 A.2d 1, 5 (N.J. 1977)); *accord Pacifco v. Pacifco*, 920 A.2d 73, 77 (N.J. 2007).

23. *Rossi*, 2014 WL 641793, at *1.

24. *Id.*

25. *Id.* at *2 (including tuition, room and board, and other expenses estimated by the school to be incurred while attending law school). At the time of the lawsuit, defendant was a history professor at Rutgers University. Jeff Goldman, *NJ Court Orders Divorced Father to Pay Half of Daughter's Pricey Law School Expenses*, NJ.COM (Mar. 5, 2014, 10:35 AM), http://www.nj.com/news/index.ssf/2014/03/nj_father_ordered_to_pay_half_of_daughters_pricy_law_school_expenses.html. Although Rutgers employees do not receive any discounts for children attending school above the undergraduate level, see *Tuition Remission*, RUTGERS U. HUM. RESOURCES, <http://uhr.rutgers.edu/benefits/non-state-benefits-rutgers-positions/tuition-remission#Eligibility-Requirements-for-Dependent-Children> (last visited Feb. 13, 2016), the cost of attending Rutgers Law School is less than half of the cost of Cornell Law School. See *Paying for Law School*, RUTGERS SCH. L.—NEWARK, <https://law.newark.rutgers.edu/admissions-financial-aid/paying-law-school> (last visited Feb. 13, 2016) ("[F]ull-time tuition and student fees at Rutgers are \$26,084 per year."); *Tuition Rates and Fees*, CORNELL U. OFF. BURSAR, <https://www.dfa.cornell.edu/bursar/students-parents/tuition-rates-fees#professional> (last visited Feb. 13, 2016) (stating that the full-year tuition in Cornell's J.D. program is \$59,900).

26. *Rossi*, 2014 WL 641793, at *2–3.

27. *Id.* at *1.

28. *Rossi v. Livingston*, 94 A.3d 911 (N.J. 2014).

In *Rossi*, the father had a falling out with his daughter, and they had been estranged for three years.²⁹ Also, the daughter had graduated from Rutgers University three years earlier.³⁰ Although the father had agreed to pay half of the daughter's law school tuition, he made this agreement anticipating involvement in the daughter's school-selection process and did not expect his relationship with his daughter to deteriorate the way it did.³¹ The fact that the court dismissed any cheaper alternatives for law school and did not address the daughter helping to subsidize her law school tuition through student loans demonstrates the disparate treatment between children of divorced parents and children of married parents. Furthermore, *Rossi* highlighted the potential financial liability that New Jersey parents may have with respect to their children's college costs.

The publicity generated by Rachel Canning, Caitlyn Ricci, and *Rossi* may encourage other teenagers or young adults to sue their parents for college costs, as well as graduate or law school costs. Canning may also encourage other teenagers to "test the waters" by petitioning the courts to order college costs to children of married parents under laws that were enacted to address a perceived disadvantage to children of divorced or non-married parents.³²

This Note argues that New Jersey needs to level the playing field by eliminating the disparate treatment of children of divorced parents and children of married parents by either expanding the present law to include all children or by joining the majority of states that do not allow courts to award college costs to children of divorced or unmarried parents. This Note also recommends that if New Jersey is unwilling to expand or reverse its current law, the state should explore imposing sensible alternatives to mitigate the perceived discrimination experienced by children of married parents.

Part II surveys New Jersey law that allows courts to award college costs to children of divorced parents. Part II also provides an overview of the constitutional challenges brought under the Fourteenth Amendment against college and post-majority support laws within New Jersey and other states. Part III reviews the argument made by Rachel Canning that New Jersey courts discriminate against children of married parents by denying them the right to force their parents to provide for college costs, by means of the courts, and the legal arguments as to why married parents should be court-ordered to pay for their children's college

29. *Rossi*, 2014 WL 641793, at *1–2.

30. *Id.* at *1.

31. *Id.* at *3.

32. *See infra* Part V.A.2.

education in certain cases.³³ Part IV reviews the counterargument of why the current law should not be expanded to include ordering college costs to children of married parents.

Part V argues that New Jersey needs to eliminate the inherent unfairness of children of married parents being denied a benefit in court-ordered college costs that is commonly provided to children of divorced parents and also recommends alternatives to the present approach should New Jersey be unwilling to expand or reverse the current law.

II. NEW JERSEY LAW PROVIDING PARENTAL SUPPORT FOR COLLEGE COSTS TO CHILDREN OF DIVORCED PARENTS

A. History

New Jersey's history of awarding college costs to children of divorced parents dates back to before the turn of the twentieth century.³⁴ In the 1949 decision of *Cohen v. Cohen*, the court interpreted a New Jersey statute as giving the court the authority to order college costs.³⁵ In 1971, the New Jersey Supreme Court continued this interpretation in *Grotzky v. Grotzky*, noting that "where the circumstances indicated that such was the reasonable and just course, orders have been entered directing not only the ordinary support for minor children but payment of their college expenses as well."³⁶

In the 1982 decision *Newburgh v. Arrigo*, the New Jersey Supreme Court made a sweeping change to how New Jersey courts handle post-

33. See Verified Complaint or Counterclaim at 2, *Canning v. Canning*, No. FD-14-397-14 (N.J. Super. Ct. Ch. Div. Feb. 24, 2014). Children of married parents are denied this right because of the court's reluctance to interfere with the "fundamental right to parent," whereby children of divorced or never married parents are routinely awarded parental assistance with college costs. See *infra* Part III.

34. See, e.g., *Streitwolf v. Streitwolf*, 43 A. 904, 906 (N.J. 1899).

35. 69 A.2d 752, 754 (N.J. Super. Ct. App. Div. 1949).

It empowers the Court to make such order 'touching the care, custody, education and maintenance of the children, or any of them, as the circumstances of the parties and the nature of the case shall render fit, reasonable and just'. [sic] . . . [I]n a family where a College education would seem normal, and where the child shows scholastic aptitude and one or other of the parents is well able financially to pay the expense of such an education, *we have no doubt the Court could order the payment.* *Id.* (emphasis added) (discussing R.S. 2:50-37, replaced by N.J. STAT. ANN. § 2A:34-23 (West 2014)).

36. 277 A.2d 535, 537 (N.J. 1971) (citing *Khalaf v. Khalaf*, 275 A.2d 132, 136-37 (N.J. 1971); *Hoover v. Voigtman*, 248 A.2d 136 (N.J. Super. Ct. 1968); *Nebel v. Nebel*, 239 A.2d 266 (N.J. Super. Ct. Ch. Div. 1968), *aff'd*, 247 A.2d 27 (N.J. Super. Ct. App. Div. 1968)).

majority support awards for education during divorce proceedings.³⁷ After this decision, a prominent New Jersey family law lawyer believed that “New Jersey became . . . the most liberal jurisdiction in this nation, in terms of the post-high school financial duty parents are required to bear.”³⁸ In *Newburgh*, the court stated: “In general, financially capable parents should contribute to the higher education of children who are qualified students. In appropriate circumstances, parental responsibility includes the duty to assure children of a college and even of a postgraduate education such as law school.”³⁹ The court then laid out twelve factors to be considered when evaluating a claim for parental contribution of college costs.⁴⁰

In 1988, six years after the *Newburgh* decision, the New Jersey legislature amended the child support statute by adding ten factors a court should consider when determining child support.⁴¹ Although not as

37. 443 A.2d 1031, 1033, 1037–39 (N.J. 1982). *Newburgh v. Arrigo* involved a dispute over the proceeds of a wrongful death claim by the son of the deceased against his father’s second wife. *Id.* at 1033. The son, Steven, argued that, although he was eighteen years old, he was entitled to support while he pursued a college degree and attended law school. *Id.* The trial court ruled that Steven had no right to support because he had reached the age of majority of eighteen years old. *Id.* The Appellate Division reversed in part, disagreeing with the trial court’s ruling that the right to support ended at age eighteen. *Id.*

38. Alan Cornblatt, *Who Should Pay the Price for Higher Education?* *Newburgh v. Arrigo—A Critical Analysis*, N.J. LAW.: MAGAZINE, May 1997, at 21.

39. *Newburgh*, 443 A.2d at 1038.

40. *Id.* at 1038–39. The twelve *Newburgh* factors are:

(1) whether the parent, if still living with the child, would have contributed toward the costs of the requested higher education; (2) the effect of the background, values and goals of the parent on the reasonableness of the expectation of the child for higher education; (3) the amount of the contribution sought by the child for the cost of higher education; (4) the ability of the parent to pay that cost; (5) the relationship of the requested contribution to the kind of school or course of study sought by the child; (6) the financial resources of both parents; (7) the commitment to and aptitude of the child for the requested education; (8) the financial resources of the child, including assets owned individually or held in custodianship or trust; (9) the ability of the child to earn income during the school year or on vacation; (10) the availability of financial aid in the form of college grants and loans; (11) the child’s relationship to the paying parent, including mutual affection and shared goals as well as responsiveness to parental advice and guidance; and (12) the relationship of the education requested to any prior training and to the overall long-range goals of the child.

Id.

41. Act of Nov. 14, 1988, 1988 N.J. Sess. Law Serv. 153 (West) (amending section 2A:34-23 of the New Jersey Statutes Annotated (the “N.J.S.A.”)). Section 2A:34-23(a) of the N.J.S.A. states:

In determining the amount to be paid by a parent for support of the child and the period during which the duty of support is owed, the court in those cases not governed by court rule shall consider, but not be limited to, the following factors: (1) Needs of the child; (2) Standard of living and economic circumstances of each

specific as *Newburgh* for determining college support, the amendments to the statute codified some of the *Newburgh* factors and added a factor that explicitly requires courts to consider the “[n]eed and capacity of the child for education, including higher education.”⁴²

Typically, an ex-spouse is the party who brings an action against the other parent to pay their share of college costs that were agreed to by the parties or were awarded as part of a divorce proceeding.⁴³ However, in the 1989 case of *Johnson v. Bradbury*, an eighteen-year-old sued both of her parents for financial assistance with her college education.⁴⁴ In *Johnson*, the daughter alleged that her father promised her a college education from the time she was twelve years old.⁴⁵ She moved to Florida with her father to establish residency for college but returned to New Jersey where her mother lived after relations soured with her father.⁴⁶ After her mother refused to take her in, she filed suit against both parents seeking financial support “to defray the cost of her college education.”⁴⁷ In deciding the case, the court analyzed the case against the father under contract law because of his “promises” and analyzed the mother’s case from a family law perspective.⁴⁸

parent; (3) All sources of income and assets of each parent; (4) Earning ability of each parent, including educational background, training, employment skills, work experience, custodial responsibility for children including the cost of providing child care and the length of time and cost of each parent to obtain training or experience for appropriate employment; (5) Need and capacity of the child for education, including higher education; (6) Age and health of the child and each parent; (7) Income, assets and earning ability of the child; (8) Responsibility of the parents for the court-ordered support of others; (9) Reasonable debts and liabilities of each child and parent; and (10) Any other factors the court may deem relevant.

N.J. STAT. ANN. § 2A:34-23(a) (West 2015).

42. § 2A:34-23(a)(5). During the 1995 legislative session, a bill was introduced that would have amended section 2A:34-23 of the N.J.S.A. to prohibit the courts from ordering parents to pay for college and postgraduate education expenses. Kathy Barrett Carter, *Bill Voted Absolving Dads of College Bills*, STAR-LEDGER (Newark, N.J.), Dec. 16, 1994, News Bank, Inc., Record No. sl19943125349456c. The bill passed in the Assembly, but stalled in the Senate after several public hearings on the bill took place. *Legislative Update*, 4 ABOUT FACE NJ, no. 1, 1996, at 4. Ultimately, the bill never passed into law because of strong opposition from groups arguing that children of divorced parents would be harmed by the measure. See Kathy Barrett Carter, *Divorced Parents Debate Bill on College Costs*, STAR-LEDGER (Newark, N.J.), Oct. 20, 1995, News Bank, Inc., Record No. sl19953125143551.

43. See, e.g., *Rossi v. Livingston*, No. FM-12-1854-09, 2014 WL 641793, at *2 (N.J. Super. Ct. App. Div. Feb. 20, 2014), *cert. denied*, 94 A.3d 911 (N.J. 2014).

44. 558 A.2d 61, 62 (N.J. Super. Ct. App. Div. 1989).

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

In reversing the lower court's dismissal, the appellate division concluded that the parental obligation of support is not limited by "the instance of a custodial parent against a non-custodial parent" or when "both parents are united in their determination to declare the child emancipated."⁴⁹ Although the plaintiff's parents were divorced in *Johnson*, the court's application of the duty of parental support principles could easily be applied to Canning, where the child brought suit against both parents. Additionally, the contract law argument could prove advantageous to children such as Canning because her parents had a preexisting college fund, possibly providing the expectation that college would be paid for by her parents and creating an implied contract.⁵⁰

B. Present Law and Constitutional Challenges to Newburgh and Section 2A:34-23(a) of the N.J.S.A.

Even with the latest cases and the associated media attention,⁵¹ as well as the continuous calls by many state politicians for reform,⁵² the New Jersey Supreme Court's holding in *Newburgh v. Arrigo* and section 2A:34-23(a) of the New Jersey Statutes Annotated (the "N.J.S.A.") remain in force as the state's current law for determining college support for children of divorced parents. In fact, the 2006 case of *Gac v. Gac*⁵³ is the last time the New Jersey Supreme Court heard a case centered on the case law established by *Newburgh*. In *Gac*, the court stated that "a trial court should balance the statutory criteria of N.J.S.A. 2A:34-23(a) and the *Newburgh* factors, as well as any other relevant circumstances, to reach a fair and just decision whether and, if so, in what amount, a parent or parents must contribute to a child's educational expenses."⁵⁴ Thus, *Newburgh* has survived as the law in New Jersey for over thirty years.

Up to this point, New Jersey courts have side-stepped any constitutional challenges arguing that the provisions under *Newburgh* and N.J.S.A. 2A:34-23(a), requiring divorced parents to pay college costs, violates the Equal Protection Clause of the Fourteenth Amendment.⁵⁵ In *Gac*, the New Jersey Supreme Court declined to address the

49. *Id.* at 64.

50. Certification of Rachel Canning at 6, *Canning v. Canning*, No. FD-14-397-14 (N.J. Super. Ct. Ch. Div. Feb. 24, 2014).

51. *See supra* Part I.

52. *See supra* Part II.A.

53. 897 A.2d 1018 (N.J. 2006).

54. *Id.* at 1023.

55. "[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

constitutional issues raised by the defendant that not forcing married parents, but only divorced parents, to provide for their children's college costs violated the constitutions of New Jersey and the United States.⁵⁶ Because the defendant raised the constitutional issue only on appeal, and the resolution of the constitutional issue was not needed to resolve the case, the court avoided the opportunity to address the constitutionality of *Newburgh*, effectively maintaining *Newburgh* as the law in New Jersey.⁵⁷

C. Constitutional Challenges to Court-Ordered College Costs in Other States

Although the New Jersey Supreme Court has not addressed the constitutionality of *Newburgh*, the highest courts of many other states have analyzed the constitutionality of forcing divorced parents to pay college costs of their adult children.⁵⁸ Also, in many of these states, statutes have been interpreted by the courts to limit support only to children who have not yet reached the state's age of majority,⁵⁹ while other states have statutes that explicitly require parental support for educational expenses past the age of majority.⁶⁰

The Pennsylvania Supreme Court's decision in *Curtis v. Kline*⁶¹ is often cited as a leading case for divorced or unmarried parents challenging court-ordered college costs.⁶² In *Curtis*, the court declared the

56. *Gac*, 897 A.2d at 1022, 1026.

57. *Id.* at 1026.

58. *See, e.g.*, *Curtis v. Kline*, 666 A.2d 265, 267–70 (Pa. 1995); *McLeod v. Starnes*, 723 S.E.2d 198, 204 (S.C. 2012); *Childers v. Childers*, 575 P.2d 201, 209 (Wash. 1978) (en banc).

59. *See, e.g.*, *Ex parte Christopher*, 145 So. 3d 60, 72 (Ala. 2013) (holding that the common law rule, allowing courts to award college costs to children over the age of majority, violated the statutory provisions set out by the legislature); *Cariseo v. Cariseo*, 459 A.2d 523, 524 (Conn. 1983); *Walborn v. Walborn*, 817 P.2d 160, 165–66 (Idaho 1991); *Stokes v. Maris*, 596 So. 2d 879, 881–82 (Miss. 1992).

60. *See, e.g.*, 750 ILL. COMP. STAT. ANN. 5/513 (West 2009).

61. 666 A.2d 265.

62. *See, e.g.*, *Christopher v. Christopher*, 145 So. 3d 42, 55 (Ala. Civ. App. 2012) (noting that a successful argument was made in *Curtis* “that compelling divorced parents to pay for their adult child’s education violates equal-protection rights” (citing *Curtis*, 666 A.2d 265)), *rev’d*, *Christopher*, 145 So. 3d 60; *Jamison v. Orris*, No. FM-13-1496-06D, 2009 WL 586746, at *11 n.8 (N.J. Super. Ct. App. Div. Mar. 10, 2009) (citing the Pennsylvania Supreme Court’s holding that requiring a parent to pay violated the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution (citing 23 PA. CONS. STAT. § 4327(a) (2008); *Curtis*, 666 A.2d at 267)); *Carey v. Carey*, No. FM-08-389-02, 2006 WL 700961, at *3 (N.J. Super. Ct. App. Div. Mar. 21, 2006) (noting that “[u]nder Pennsylvania law a parent’s duty to support ends when the child reaches eighteen or finishes high school” (citing *Blue v. Blue*, 616 A.2d 628 (Pa. 1992); *Curtis*, 666 A.2d 265)); *McLeod*, 723 S.E.2d at 210 (Beatty, J., dissenting) (stating that “[i]n reaching this conclusion, I am persuaded by the factually-similar case of *Curtis v. Kline*, . . . wherein the Pennsylvania Supreme Court

Pennsylvania statute that provided potential liability to parents for support of children age eighteen years or older as unconstitutional for violating equal protection principles.⁶³ The court concluded that teenagers wishing to attend college who need financial support from their parents were treated unequally as a result of the statute.⁶⁴ The court's analysis focused on the legislature creating two different classes of children and questioned why the state should treat these classes differently.⁶⁵ To make its point, the court provided an example of a father with two children: one from a previous marriage and one from his current marriage.⁶⁶ One child lives with the father and the other child does not.⁶⁷ The statute would require the father to pay for the first child's education because of the divorce but not the second child because that child's parents are still married.⁶⁸ This example clearly illustrates the disparate treatment of children from married parents to children of divorced parents.

On October 4, 2013, the Alabama Supreme Court overruled a twenty-four-year precedent that entitled children of divorced parents to parental support for college costs.⁶⁹ A 1989 case establishing the prior law held that children of divorced parents had the same right to a college education as they would have had if the parents were still married.⁷⁰ The court also allowed college costs to be awarded to children that had reached Alabama's age of majority, nineteen.⁷¹ In overruling the precedent, the Alabama Supreme Court did not base its decision on equal protection grounds, although a concurring opinion did make a constitutional argument.⁷² Instead, the court focused on the undefined

refutes the majority's position that only children of divorce are entitled to post-majority financial support from their parents").

63. 666 A.2d at 270.

64. *Id.* at 269–70; see also Vincent A. Cirillo, Curtis v. Kline: *The Pennsylvania Supreme Court Declares Act 62 Unconstitutional—A Triumph for Equal Protection Law*, 34 DUQ. L. REV. 471, 482 (1996). The court in *Curtis* used the rational basis test and determined that because “no entitlement to postsecondary education” existed in Pennsylvania, there was no “legitimate governmental purpose” to the law providing college support to children of divorced parents and not providing the same benefit to children of married parents. Cirillo, *supra*, at 483.

65. *Curtis*, 666 A.2d at 269–70.

66. *Id.* at 270.

67. *Id.*

68. *Id.*

69. *Ex parte Christopher*, 145 So. 3d 60, 72 (Ala. 2013).

70. *Ex parte Bayliss*, 550 So. 2d 986, 995 (Ala. 1989), overruled by *Christopher*, 145 So. 3d 60.

71. *Id.*

72. *Christopher*, 145 So. 3d at 79–80 (Moore, C.J., concurring).

term “children” and the statutory definition of a “minor.”⁷³ The court ruled that it may not impose its own definition of a minor and must follow the legislature-imposed age of majority.⁷⁴

The precedent had allowed a court to consider a college student older than nineteen as a “child” and therefore entitled to college support.⁷⁵ The subjective definition of a minor used by Alabama courts is similar to New Jersey’s subjective definition of emancipation, which allows New Jersey courts to award college costs to children that have reached the New Jersey age of majority.⁷⁶

In the 2010 case of *Webb v. Sowell*, the South Carolina Supreme Court reversed its prior ruling on the constitutionality of forcing divorced parents to pay college costs.⁷⁷ The 1979 precedent had expanded the statute to award such costs.⁷⁸ In *Webb*, the court declared the statute unconstitutional under a rational basis test.⁷⁹ Less than two years later, in *McLeod v. Starnes*, with a justice change at one seat, the court revisited the statute struck down in *Webb* and upheld its constitutionality as being “rationally related to the State’s interest.”⁸⁰

D. The United States Supreme Court Is Unlikely to Weigh in on the Constitutionality of Awarding Children of Divorced Parents College Costs

In 1994, three fathers, along with the Fathers’ Rights Action Committee, filed suit against the State of New Jersey in federal district court challenging the constitutionality of ordering divorced parents to pay college costs.⁸¹ The court dismissed the suit citing the “abstention doctrine,” which allows a federal court to refuse to hear a case if the court believes the outcome of the case may interfere with another court—in

73. *Id.* at 64–67 (majority opinion).

74. *Id.* at 69–71.

75. *Bayliss*, 550 So. 2d at 994–95.

76. *See supra* Part II.A.

77. *See* 692 S.E.2d 543, 545 (S.C. 2010) (“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.”), *abrogating* *Risinger v. Risinger*, 253 S.E.2d 652 (S.C. 1979), *overruled by* *McLeod v. Starnes*, 723 S.E.2d 198 (S.C. 2012).

78. *Risinger*, 253 S.E.2d at 653.

79. *Webb*, 692 S.E.2d at 545.

80. *McLeod*, 723 S.E.2d at 204.

81. Brief on Behalf of Appellees at 2–3, 6–7, *Braid v. Camden Cty. Prob. Dep’t*, 127 F.3d 1094 (3d Cir. 1997) (No. 96-5671), 1997 WL 33768380; *see also* Jeff Golden & Robert W. Braid, *College Expenses Suit Update*, 4 ABOUT FACE NJ, no. 4, 1996, at 5.

this case the New Jersey Supreme Court.⁸² The court affirmed the lower court's decision.⁸³

The U.S. Supreme Court has not yet heard a state court appeal challenging post-majority college costs. In 2012, the Court had the opportunity to resolve the differences between the states on the constitutionality of ordering college costs to children of divorced parents, but chose to deny certiorari.⁸⁴ Therefore, the states appear to have the authority to impose such conditions on their own residents,⁸⁵ and perhaps the Court agrees that the rational basis test is the correct level of review to apply in these cases. Whatever the reasons may be, until the Court rules on the constitutionality of treating children of divorced or unmarried parents differently than children of married parents, and the resulting disparate treatment of the parents of these children, it appears that children suing their parents for college costs is a state issue for state legislatures and state courts to resolve.⁸⁶

III. RACHEL CANNING'S ARGUMENT: NEW JERSEY'S LAW ALLOWING COURTS TO AWARD COLLEGE COSTS TO CHILDREN OF DIVORCED PARENTS DISCRIMINATES AGAINST CHILDREN OF MARRIED PARENTS

Rachel Canning's argument raises the question of whether children of married parents should be entitled to court-ordered support for college costs from their parents who have the financial means to pay such costs.⁸⁷ Presumably, for Rachel Canning, or any adult child of married parents seeking court-ordered college support, four legal arguments must be successfully argued to prevail on a claim. These arguments are: (1) the child is not emancipated under New Jersey law; (2) the parents have a legal duty to support the unemancipated child; (3) parental support includes college costs because college is a necessity; and (4) ordering the parents to pay support for the unemancipated child's college costs does

82. See Brief on Behalf of Appellees, *supra* note 80, at 2, 9, 12–13.

83. *Braid*, 127 F.3d 1094.

84. See *Starnes v. McLeod*, 133 S. Ct. 198 (2012) (mem.).

85. See, e.g., *Ex parte Christopher*, 145 So. 3d 60, 71 (Ala. 2013); see also *Dowling v. Dowling*, 679 P.2d 480, 483 (Alaska 1984); *Curtis v. Kline*, 666 A.2d 265, 269 (Pa. 1995); *McLeod*, 723 S.E.2d at 204; *Risinger v. Risinger*, 253 S.E.2d 652, 653 (S.C. 1979), *abrogated by Webb v. Sowell*, 692 S.E.2d 543 (S.C. 2010); *Childers v. Childers*, 575 P.2d 201, 207 (Wash. 1978) (en banc).

86. See cases cited *supra* note 84.

87. See Certification of Rachel Canning, *supra* note 50, at 6.

not violate the Fourteenth Amendment, which protects the fundamental right to parent.⁸⁸

A. *Emancipation in New Jersey*

In New Jersey, there is no pre-determined age when emancipation occurs.⁸⁹ New Jersey is one of only seven states that does not establish by statute a fixed age for emancipation.⁹⁰ Although the legislature has established the age of eighteen as the age of majority in New Jersey,⁹¹ reaching this age “establishes prima facie, but not conclusive, proof of emancipation.”⁹² New Jersey courts recognize emancipation as when the “fundamental dependant relationship” ends between children and their parents.⁹³ In *Newburgh*, the court noted: “Whether a child is emancipated at age 18, with the correlative termination of the right to parental support, depends upon the facts of each case.”⁹⁴ In *Dolce v. Dolce*, the court stated that a determination of emancipation required “a critical evaluation of the prevailing circumstances including the child’s need[s], interests, and independent resources, the family’s reasonable expectations, and the parties’ financial ability, among other things.”⁹⁵

Courts have noted circumstances such as marriage, enlistment in the armed services, a court order when in the best interests of the child, and reaching the age of majority as examples of when emancipation may

88. See *Gac v. Gac*, 897 A.2d 1018, 1022–23 (N.J. 2006); *Kiken v. Kiken*, 694 A.2d 557, 560 (N.J. 1997); *Newburgh v. Arrigo*, 443 A.2d 1031, 1038 (N.J. 1982); *Johnson v. Bradbury*, 558 A.2d 61, 64 (N.J. Super. Ct. App. Div. 1989).

89. *Gac*, 897 A.2d at 1022–23 (quoting *Newburgh*, 443 A.2d at 1037–38).

90. Steven M. Resnick, *The New Jersey Legislature vs. the New Jersey Supreme Court: The Battle over Who Should Pay for Little Johnny’s or Little Suzy’s College Expenses*, Note, 19 WOMEN’S RTS. L. REP. 193, 195 n.38 (1998). “While in most states the emancipation of a child occurs when a child reaches the age of 18, this is not the case in New Jersey. New Jersey has the most liberal emancipation laws in the United States.” Theodore Sliwinski, *Hot Tips on Emancipation*, THEODORE SLIWINSKI, ESQ.: DIVORCE FAQ’S (May 27, 2010), <http://www.divorcelawyerofnj.com/2010/05/27/hot-tips-on-emancipation>.

91. N.J. STAT. ANN. § 9:17B-3 (West 2013).

92. *Newburgh*, 443 A.2d at 1037 (citing *Alford v. Somerset Cty. Welfare Bd.*, 385 A.2d 1275, 1278–79 (N.J. Super. Ct. App. Div. 1978); *Limpert v. Limpert*, 292 A.2d 38, 39 (N.J. Super. Ct. App. Div. 1972); *Straver v. Straver*, 59 A.2d 39, 41 (N.J. Ch. 1958)).

93. *Bishop v. Bishop*, 671 A.2d 644, 646 (N.J. Super. Ct. Ch. Div. 1995). “When a child moves beyond the sphere of influence and responsibility exercised by a parent and obtains an independent status on his or her own, generally he or she will be deemed emancipated.” *Id.*

94. 443 A.2d at 1038.

95. 890 A.2d 361, 365 (N.J. Super. Ct. App. Div. 2006) (citing *Newburgh*, 443 A.2d at 1038–39).

occur.⁹⁶ The fact that an adult child is not living with either parent is not by itself dispositive of emancipation.⁹⁷ Based upon precedent in New Jersey, it would seem likely that courts, in more situations than not, would deem an eighteen-year-old child that has spent high school preparing for college, and not the workforce, as unemancipated under New Jersey law.⁹⁸

B. Parents Have a Duty to Support Their Unemancipated Children in New Jersey

Under the common law, the duty of parents to support their child was considered a moral obligation as opposed to a legal obligation.⁹⁹ In *Grotzky v. Grotzky*, the court, when noting how the law had evolved, stated that “although there were common law expressions in our State that [the duty of parents to support their minor children] was a moral but not a legal duty, our current law clearly recognizes that it is both.”¹⁰⁰ In *Greenspan v. Slate*, cited by the court in *Grotzky*, a physician sued parents to collect a forty-five dollar bill for treating their seventeen-year-old daughter’s broken foot.¹⁰¹ The parents refused to provide the daughter with medical care and argued “that a parent is under no legal obligation to support his [or her] child.”¹⁰² The court held that the law in New Jersey required a parent to provide an infant child with necessities,

96. See, e.g., *Newburgh*, 443 A.2d at 1037 (first citing *Leith v. Horgan*, 95 A.2d 15, 15 (N.J. Super. Ct. App. Div.), *rev'd*, 100 A.2d 175 (N.J. 1953); then citing *Slep v. Slep*, 129 A.2d 317, 320 (N.J. Super. Ct. Ch. Div. 1957); and then citing N.J. Div. of Youth & Family Servs. V. V., 381 A.2d 1241, 1244 (Juv. and Dom. Rel. Ct. 1977)).

97. See *Quinn v. Johnson*, 589 A.2d 1077, 1081 (N.J. Super. Ct. Ch. Div. 1991).

98. In *Newburgh*, the New Jersey Supreme Court focused on the need for support of the child. 443 A.2d at 1037–38. This differs from the appellate division’s “sphere of influence” test cited in *Filippone v. Lee*, which appears to assess the control the parents have over the child more so than the need for financial support. See 700 A.2d 384, 387 (N.J. Super. Ct. App. Div. 1997) (quoting *Bishop v. Bishop*, 671 A.2d 644, 646 (N.J. Super. Ct. Ch. Div. 1995)).

99. See *Greenspan v. Slate*, 97 A.2d 390, 392 (N.J. 1953). “Neither the child nor any third party who ventured to supply the child with his necessities had any cause of action against the parents to enforce the duty of support which Blackstone termed ‘a principle of natural law.’” *Id.* (discussing Blackstone’s view of the parental duty to provide support for their children).

100. 277 A.2d 535, 537 (N.J. 1971) (first citing *Freeman v. Robinson*, 38 N.J.L. 383, 384 (N.J. 1876); *Alling v. Alling*, 27 A. 655, 656–57 (N.J. Ch. 1893); and then citing *Daly v. Daly*, 123 A.2d 3, 8–9 (N.J. 1956); *Greenspan*, 97 A.2d at 392).

101. *Greenspan*, 97 A.2d at 391.

102. *Id.* at 391, 393.

and if the parent failed to do so, then a third party may provide for the child and seek reimbursement from the parent.¹⁰³

Today, the question of the parental duty to support a child arises most commonly in divorce cases.¹⁰⁴ New Jersey courts view parental support as “fundamental” to ensuring a vibrant society.¹⁰⁵ This parental duty to provide support to one’s child exists regardless of the marital status of the parent.¹⁰⁶ Therefore, if a child can demonstrate that he or she is unemancipated, the child will likely be entitled to support under the law in New Jersey.¹⁰⁷

C. Parental Support Includes College Costs Because New Jersey Considers a College Education a Necessity

If the court had concluded that Rachel Canning was not emancipated, her next argument could have been that she was entitled to support for college as a necessary expense under the established law of New Jersey. In *Newburgh*, the court concluded that parents have a “duty to assure a necessary education for [their] children.”¹⁰⁸ The New Jersey Supreme Court stated:

Generally parents are not under a duty to support children after the age of majority. Nonetheless, in appropriate circumstances, the privilege of parenthood carries with it the duty to assure a necessary education for children. Frequently, the issue of that duty arises in the context of a divorce or separation proceeding where a child, after attaining majority, seeks contribution from a non-custodial parent for the cost of a college

103. *Id.* at 392–93 (citing *Tomkins v. Tomkins*, 11 N.J. Eq. 512, 517 (N.J. Ch. 1958)). In *Greenspan*, the court noted that *Van Valkinburgh v. Watson* represents “the prevailing American view.” *Id.* In that case, the New York Supreme Court stated:

A parent is under a natural obligation to furnish necessaries for his infant children; and if the parent neglect[s] that duty, any other person who supplies such necessaries is deemed to have conferred a benefit on the delinquent parent, for which the law raises an implied promise to pay on the part of the parent. But what is actually necessary will depend on the precise situation of the infant, and which the party giving the credit must be acquainted with, at his peril.

Van Valkinburgh v. Watson, 13 Johns. 480 (N.Y. Sup. Ct. 1816) (per curiam).

104. “In an intact family, the law assumes that parents will provide for the children as well as they can.” *Kiken v. Kiken*, 694 A.2d 557, 560 (N.J. 1997).

105. *See id.* at 559. “The parental obligation to support children until they are emancipated is fundamental to a sound society.” *Id.* (citing *Pascale v. Pascale*, 660 A.2d 485, 489 (N.J. 1995)).

106. N.J. STAT. ANN. § 9:17-53 (West 2013) (judgment or order; amendment of birth record; amount of support).

107. *See id.*

108. *Newburgh v. Arrigo*, 443 A.2d 1031, 1038 (N.J. 1982).

education. In those cases, courts have treated “necessary education” as a flexible concept that can vary in different circumstances.

In the past, a college education was reserved for the elite, but the vital impulse of egalitarianism has inspired the creation of a wide variety of educational institutions that provide post-secondary education for practically everyone. State, county and community colleges, as well as some private colleges and vocational schools provide educational opportunities at reasonable costs. Some parents cannot pay, some can pay in part, and still others can pay the entire cost of higher education for their children. In general, financially capable parents should contribute to the higher education of children who are qualified students. In appropriate circumstances, parental responsibility includes the duty to assure children of a college and even of a postgraduate education such as law school.¹⁰⁹

The view that a college education is a necessity can be found deep within the history of the United States. Thomas Jefferson, one of the Founding Fathers, prided himself on creating a college where students with the aptitude, but not necessarily the financial means, could attend at no cost.¹¹⁰ Although many reports and articles have been published highlighting the recent surge in tuition prices and the corresponding significant increases in student debt, studies continue to demonstrate the value of a college degree compared to only a high school education.¹¹¹ These studies appear to validate the New Jersey Supreme Court’s notion in *Newburgh* that college is a necessity.¹¹²

After the 1988 amendments to section 2A:34-23(a) of the N.J.S.A. incorporated the *Newburgh* factors, courts interpreted the legislature’s actions as concurring with the New Jersey Supreme Court’s conclusion that college costs had become a necessary expense attributable to the

109. *Id.* (citations omitted).

110. See Nick Paleologos, *Student Debt Crisis: College Is a Necessity—Not a Commodity*, WBUR: COGNOSCENTI (Aug. 21, 2013), <http://cognoscenti.wbur.org/2013/08/21/student-debt-nick-paleologos> (“In Jefferson’s vision of this republic, a college education was a necessity—not a commodity.”).

111. See META BROWN, FED. RESERVE BANK OF N.Y., STUDENT DEBT OVERVIEW 5 (2013), https://www.newyorkfed.org/medialibrary/media/regional/Brown_presentation_GWU_2013_Q2.pdf. “Higher education is crucial to improving the skill level of American workers, especially given rising income and employment gaps between high school and college graduates.” *Id.* at 3; see also MICHAEL GREENSTONE & ADAM LOONEY, THE HAMILTON PROJECT, REGARDLESS OF THE COST, COLLEGE STILL MATTERS (Oct. 5, 2012), http://www.hamiltonproject.org/assets/legacy/files/downloads_and_links/September_2012_Jobs_Report_FINAL.pdf.

112. See 443 A.2d at 1038.

child's parents.¹¹³ Thus, if a child has achieved a level necessary to attend college and has a reasonable expectation and desire to attend college, there is generally no dispute that these costs are a necessity to the child, and parents who are financially able to contribute will be expected to do so under *Newburgh* and section 2A:34-23(a) of the N.J.S.A.

D. Awarding Children of Married Parents Court-Ordered College Costs Does Not Violate the Fundamental Right to Parent

Both the U.S. Supreme Court and the New Jersey Supreme Court have held that the Due Process Clause of the Fourteenth Amendment provides parents with the "right to make decisions concerning the care, custody, and control of their children."¹¹⁴ This includes the right to control and direct the education of their children.¹¹⁵ However, neither the U.S. Supreme Court nor the New Jersey Supreme Court has addressed the fundamental right to parent as it relates to awarding children of divorced parents college costs. In *Troxel v. Granville*, the most recent U.S. Supreme Court case centered on the fundamental right to parent, the issue at hand involved a state statute that allowed non-parents or essentially any third-party to petition the court for visitation rights.¹¹⁶ Under the statute, the court would then decide if the visitation rights were in the best interest of the child, thereby allowing a court to override a fit and sound custodial parent's right to make the decision.¹¹⁷ The Court found that the statute "infringe[d] on the fundamental right of parents to make child rearing decisions" and declared the statute unconstitutional.¹¹⁸

113. See, e.g., *Gac v. Gac*, 897 A.2d 1018, 1023 (N.J. 2006) ("The Legislature and our courts have long recognized a child's need for higher education and that this need is a proper consideration in determining a parent's child support obligation."); see also *Kiken v. Kiken*, 694 A.2d 557, 561 (N.J. 1997); *Pedrick v. Goodman*, No. FM-17-3440-92, 2008 WL 4949776, at *2 (N.J. Super. Ct. App. Div. Nov. 21, 2008) (per curiam); *Black v. Walker*, 684 A.2d 1011, 1017 (N.J. Super. Ct. App. Div. 1996).

114. *Troxel v. Granville*, 530 U.S. 57, 57 (2000) (citing *Stanley v. Illinois*, 405 U.S. 645, 651 (1972)); accord *Fawzy v. Fawzy*, 973 A.2d 347, 360 (N.J. 2009).

115. *Fawzy*, 973 A.2d at 360.

116. 530 U.S. at 64-65.

117. *Id.* at 67.

118. *Id.* at 72-73.

1. Awarding Children College Costs Infringes on an Economic Right and Not a Privacy Right.

An important distinction to make in the context of ordering parents to contribute to college costs of their children is that the courts are not ordering the child to attend college. Nor are the courts ordering which college the child attends, the type of college, or any other details regarding the arrangements made by the child in pursuit of a college degree.¹¹⁹ In these cases, the courts are only requiring the parents to provide financial assistance to support the child's desire to better him or herself through education.

Thus, an argument can be made that the state and the courts are not necessarily infringing on the right to privacy because they are not forcing parents to subject their children to enroll in college against their wishes. The argument is that the state and the courts are infringing more so on economic liberty rights, for which the judicial standard of review should be the more deferential rational basis test as opposed to strict scrutiny.¹²⁰ This argument would suggest that courts ordering college costs to children of divorced or married parents are not infringing the fundamental right to parent as the right is typically applied by the courts. At least one state supreme court has concluded that ordering parents to contribute to college costs does not infringe on the fundamental right to parent because the only infringement on the parents was economic in nature.¹²¹

119. For example, the courts seem unwilling to make any determinations regarding public versus private colleges, or living arrangements of the child while in school, such as living on campus or off campus. *See, e.g.,* Rossi v. Livingston, No. FM-12-1854-09, 2014 WL 641793, at *5 (N.J. Super. Ct. App. Div. Feb. 20, 2014), *cert. denied*, 94 A.3d 911 (N.J. 2014).

120. If a legislature's objective for an economic regulation involves the state's "police powers" or "social welfare," which broadly include any health, safety, or "general welfare" goal, "all that is required is that there be a minimally rational relation between the means chosen and the end being pursued." STEVEN L. EMANUEL, CONSTITUTIONAL LAW 170 (31st ed. 2013); *accord* Duke Power Co. v. Carolina Env'tl. Study Grp., Inc., 438 U.S. 59, 83–84 (1978); *Whalen v. Roe*, 429 U.S. 589, 597–98 (1977). However, where a law in the economic or "social welfare" area impinges on something the Court has found to be a "fundamental right," a substantially higher level of scrutiny is applied. *See* EMANUEL, *supra*, at 170–71.

121. *See* LeClair v. LeClair, 624 A.2d 1350, 1356–57 (N.H. 1993).

2. The Fundamental Right to Parent Is Not Absolute.

As noted by the New Jersey Supreme Court in *Moriarty v. Bradt*, parental authority is not absolute given certain circumstances.¹²² A state may exercise its *parens patriae*¹²³ authority to intervene in situations where it is necessary to protect a child from harm.¹²⁴ Although the circumstances allowing a court to overcome a parent's fundamental right to direct the care, custody, and control of his or her children must be more than what is in the best interest of the child,¹²⁵ the court has not defined "harm" to include or exclude financial support for college costs. In *Hoefers v. Jones*, a case involving private school tuition for two young children of divorced parents, the New Jersey Superior Court, Chancery Division, stated: "A child's education, like other childhood needs—shelter, food, clothing, health, recreation, social, cultural, to name but a few—is an obligation for which parents have been historically held accountable by statute, by Chancery Courts asserting *parens patriae* powers on behalf of the state."¹²⁶ Although the disputed issue in *Hoefers* involved private grade school tuition,¹²⁷ it is conceivable that a court could apply the same rationale to college tuition.

3. The Fundamental Right to Parent Should Not Apply to Adult Children Who Have Reached the Age of Majority.

For the most part, children who have reached eighteen years of age in New Jersey are considered adults in the eyes of the law.¹²⁸ However, courts often make exceptions to emancipation for college students that have reached eighteen years of age but are still in need of financial

122. 827 A.2d 203, 214 (N.J. 2003) (citing *Wisconsin v. Yoder*, 406 U.S. 205, 233–34 (1972); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *V.C. v. M.J.B.*, 748 A.2d 539, 548 (N.J. 2000)).

123. "*Parens patriae*—'Parent of the Country'—originates from the English common law as a prerogative of the Crown arising from the Sovereign's duty to protect infants and those of legal disability unable to protect themselves." *Hoefers v. Jones*, 672 A.2d 1299, 1308 (N.J. Super. Ct. Ch. Div. 1994) (citing *Borawick v. Barba*, 81 A.2d 766, 774 (N.J. 1951); *Parens Patriae*, BLACK'S LAW DICTIONARY (5th ed. 1979)), *aff'd*, 672 A.2d 1177 (N.J. Super. Ct. App. Div. 1996).

124. See *Moriarty*, 827 A.2d at 214 ("Situations have arisen requiring a state to exercise its *parens patriae* authority to guard children from harm." (citing *Prince*, 321 U.S. at 166–67)); see also *V.C.*, 748 A.2d at 548; *Watkins v. Nelson*, 748 A.2d 558, 564 (N.J. 2000).

125. *Watkins*, 748 A.2d at 565.

126. *Hoefers*, 672 A.2d at 1302, 1308 (citing N.J. STAT. ANN. § 2A:34-23 (1994); *State v. Perricone*, 181 A.2d 751, 758 (N.J. 1962)).

127. *Id.* at 1302.

128. See N.J. STAT. ANN. § 9:17B-3 (West 2013).

support from their parents.¹²⁹ In addition, whether a court would invoke a parent's fundamental right to parent in a college support case remains to be seen. Canning was eighteen years old when her case was first heard by the court.¹³⁰ She had already been accepted to several colleges, including the University of Vermont, her second choice for college according to court documents.¹³¹ This raises the question of whether the "fundamental right to parent" still applies to children who are legally adults and would likely be deemed emancipated under New Jersey law if they were not enrolled in college. An argument can certainly be made that the fundamental right to parent should cease upon reaching the age of majority and the resulting emancipation. Therefore, does a court ordering parents to assist with their adult child's college costs infringe on their fundamental right to parent or does it only infringe on their finances?

IV. THE PARENT'S DEFENSE: *NEWBURGH* SHOULD NOT BE EXPANDED TO INCLUDE CHILDREN OF MARRIED PARENTS

In their brief opposing the plaintiff's order to show cause, the Cannings argued that their daughter was emancipated, availing them of the duty to support her and also argued that awarding college costs "should shock the conscience of the [c]ourt" by interfering with their right to parent.¹³² Although there is no precedent in New Jersey of a court awarding college costs to an adult child of married parents, the fact that the case was not outright dismissed by the court raises the question of whether or not the daughter could have prevailed if the case had gone forward.

A. *Newburgh and Section 2A:34-23(a) of the N.J.S.A. Only Apply to Children of Divorced or Unmarried Parents*

Interestingly, *Newburgh* was a claim by a son against his stepmother for a portion of his father's estate.¹³³ The son, who was over eighteen years of age at the time of his father's death, was seeking continued support from the estate while he attended college, with plans to pursue a

129. See *supra* Parts III.A, III.B.

130. See Horowitz, *supra* note 13.

131. Certification of Rachel Canning, *supra* note 50, at 5.

132. Brief in Opposition to Plaintiff's Order to Show Cause at 13, Canning v. Canning, No. FD-14-397-14 (N.J. Super. Ct. Ch. Div. Feb. 26, 2014).

133. *Newburgh v. Arrigo*, 443 A.2d 1031, 1033 (N.J. 1982).

law degree.¹³⁴ When the court discussed the parental duty to support their children “to assure a necessary education,” the court noted that this duty frequently “arises in the context of a divorce or separation proceeding where a child, after attaining majority, seeks contribution from a non-custodial parent for the cost of a college education.”¹³⁵ The court went on to cite nine different cases where a parent, on behalf of a child of divorced parents, sought college costs from the other parent.¹³⁶ Although the court did not affirmatively state that the issue of parental support arises only in divorce cases, it has been presumed that *Newburgh* applies only to non-intact families because the case has only been applied to cases where the child’s parents are divorced or have never been married.

Additionally, section 2A:34-23(a) of the N.J.S.A. specifically applies to child support resulting from the dissolution of marriage or child support outside of marriage.¹³⁷ Without a new law by the legislature, allowing a court to award college costs to a child with married parents, a court could not make such an award under the guise of section 2A:34-23(a).

B. Expanding Support for College Costs to Children of Married Families Violates the Constitutionally Protected Fundamental Right to Parent

The U.S. Supreme Court has consistently ruled that the Due Process Clause of the Fourteenth Amendment protects a parent’s right to control and direct the education of his or her children.¹³⁸ In *Troxel v. Granville*, the Court concluded that “[i]n light of . . . extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.”¹³⁹ Although the plurality in *Troxel* did not explicitly state the level of review applied by the Court, Justice Thomas noted in his concurrence that strict

134. *Id.*

135. *Id.* at 1038.

136. *Id.* (citing *Khalaf v. Khalaf*, 275 A.2d 132, 136–37 (N.J. 1971); *Limpert v. Limpert*, 292 A.2d 38, 39–40 (N.J. Super. Ct. App. Div. 1972); *Nebel v. Nebel*, 239 A.2d 266, 268–70 (N.J. Super. Ct. Ch. Div.), *aff’d*, 247 A.2d 27 (N.J. Super. Ct. App. Div. 1968) (per curiam); *Jonitz v. Jonitz*, 96 A.2d 782, 788 (N.J. Super. Ct. App. Div. 1953); *Cohen v. Cohen*, 69 A.2d 752, 754 (N.J. Super. Ct. App. Div. 1949); *Sakovits v. Sakovits*, 429 A.2d 1091, 1095 (N.J. Super. Ct. Ch. Div. 1981); *Ross v. Ross*, 400 A.2d 1233, 1235–37 (N.J. Super. Ct. Ch. Div. 1979); *Schumm v. Schumm*, 299 A.2d 423, 425–26 (N.J. Super. Ct. Ch. Div. 1973); *Hoover v. Voigtman*, 248 A.2d 136, 138–39 (Morris County Ct. 1968)).

137. N.J. STAT. ANN. § 2A:34-23(a) (West 2015).

138. *See, e.g., Troxel v. Granville*, 530 U.S. 57, 65 (2000).

139. *Id.* at 66.

scrutiny should be applied when reviewing the fundamental rights of parents.¹⁴⁰ The decision in *Troxel* affirmed that the government may not interfere with parents' right to control the upbringing and education of their children unless the government can demonstrate the legislation is needed to accomplish a compelling governmental interest.¹⁴¹

The New Jersey Supreme Court has stated: "The Fourteenth Amendment to the United States Constitution protects individuals against deprivations of life, liberty, or property, without due process of law. We have repeatedly affirmed that parental rights are fundamental and constitutionally protected."¹⁴² In *Fawzy v. Fawzy*, the court noted that parental rights include making bad decisions:

Indeed, the primary role of parents in the upbringing of their children is now established beyond debate as an enduring tradition to which we have unflinchingly given voice. Deference to parental autonomy means that the State does not second-guess parental decision making or interfere with the shared opinion of parents regarding how a child should be raised. Nor does it impose its own notion of a child's best interests on a family. Rather, the State permits to stand unchallenged parental judgments that it might not have made or that could be characterized as unwise. That is because parental autonomy includes the "freedom to decide wrongly."¹⁴³

Although states have side-stepped this fundamental right by allowing courts to intervene with decision-making affecting children in divorce cases, states typically do not permit the same intervention for intact families.¹⁴⁴ This is the primary reason why many legal experts did not believe Canning would prevail against her parents.¹⁴⁵

140. *Id.* at 80 (Thomas, J., concurring).

141. *See id.* at 89 (Stevens, J., dissenting).

142. N.J. Div. of Youth & Family Servs. v. A.R.G., 845 A.2d 106, 119 (N.J. 2004) (citing *Moriarty v. Bradt*, 827 A.2d 203, 218 (N.J. 2003)).

143. 973 A.2d 347, 358 (N.J. 2009) (citations omitted) (first citing *Wisconsin v. Yoder*, 406 U.S. 205, 232-34 (1972); *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534-35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 400-03 (1923); *Watkins v. Nelson*, 748 A.2d 558, 570 (N.J. 2000); and then quoting Janet Maleson Spencer & Joseph P. Zammit, *Mediation-Arbitration: A Proposal for Private Resolution of Disputes Between Divorced or Separated Parents*, 1976 DUKE L.J. 911, 913).

144. Horowitz, *supra* note 13.

145. *Id.* "If her parents were divorcing, she would have a good chance," said Randi Mandelbaum, a clinical law professor at Rutgers-Newark and director of a child advocacy program. "The rights of kids to college whose parents haven't divorced aren't there." *Id.*

C. *College Is Not a Necessity and Therefore the Parental Duty to Support Should Not Apply to College*

The present public policy in New Jersey recognizing a child's need for college was reiterated in *Gac v. Gac*, with the court stating: "The Legislature and our courts have long recognized a child's need for higher education . . ." ¹⁴⁶ However, many economists and academics disagree with this policy or, at a minimum, believe that a careful cost-benefit analysis should be conducted before making the financial and time commitment to pursue a college education. ¹⁴⁷ Additionally, some courts agree that college may be viewed as a necessity, but do not believe that college costs must be awarded to every child. ¹⁴⁸ If college as a necessity can be rebutted, then a parent's duty to provide financial support for college can be rebutted. Opponents of courts awarding college costs to children of divorced parents often point to the conflict between the moral and legal duty to support. ¹⁴⁹

New Jersey is not the only jurisdiction to consider a college education a necessity. Courts in Pennsylvania, ¹⁵⁰ New Hampshire, ¹⁵¹ and Maryland ¹⁵² have also made such determinations. However, a distinction can be made between the necessities of food, clothing, shelter, and perhaps even transportation as necessities that are indisputable. A strong argument can be made that college is not a true necessity but is believed to be a necessary step for one to achieve a desired goal. Should a court be in the position to blindly award college costs to a child when in 2006 only about fifty-nine percent of full-time students entering a four-

146. 897 A.2d 1018, 1023 (N.J. 2006).

147. See, e.g., Megan McArdle, *Megan McArdle on the Coming Burst of the College Bubble*, NEWSWEEK (Sept. 9, 2012, 1:00 AM) <http://www.newsweek.com/megan-mcardle-coming-burst-college-bubble-64671> ("More than half of all recent graduates are unemployed or in jobs that do not require a degree, and the amount of student-loan debt carried by households has more than quintupled since 1999.")

148. See, e.g., *Marinaro v. Marinaro*, No. FM-19-31-08, 2010 WL 3834916, at *3 (N.J. Super. Ct. App. Div. Sept. 17, 2010). "We recognize that *Newburgh* supports the idea that education *may* be considered a necessity under certain circumstances, however, a judge is not required to order every parent to contribute to college expenses." *Id.* (citing *Newburgh v. Arrigo*, 443 A.2d 1031, 1038 (N.J. 1982)).

149. See *supra* note 99 and accompanying text.

150. *Spitzer v. Tucker*, 591 A.2d 723, 726 (Pa. Super. Ct. 1991) (Cirillo, J., dissenting) ("[A] college education is increasingly viewed as a necessity . . ." (citing *Milne v. Milne*, 556 A.2d 854, 858 (Pa. Super. Ct. 1989))).

151. *French v. French*, 378 A.2d 1127, 1129 (N.H. 1977) (per curiam) (noting that "a college education is indispensable").

152. *Woody v. Woody*, 265 A.2d 467, 472 (Md. 1970) ("That a college education is a *necessity* . . . is no longer an open question in Maryland." (emphasis added)).

year college graduated within six years?¹⁵³ New Jersey believes the answer to that question is yes.

D. The Parental Duty to Support Ends when the Child Reaches the Age of Majority and Is Emancipated

In *Ort v. Ort*, the New Jersey Superior Court, Chancery Division, stated that “[m]ultiple other statutes and laws corroborate the recognition by the State of New Jersey that an eighteen-year-old is an adult.”¹⁵⁴ The court also noted that “in *Gac*, the Supreme Court implicitly acknowledged that there is a statutory mandate by the Legislature of the State of New Jersey to declare a person reaching the age of eighteen years of age to be an adult.”¹⁵⁵ Thus, reaching the age of eighteen establishes prima facie proof that the child is emancipated.¹⁵⁶

The Appellate Division, in *Filippone v. Lee*, established the present test used by New Jersey courts to determine if a child is emancipated.¹⁵⁷ In its explanation of the analysis used to determine emancipation of a child who has reached the age of majority, the court stated:

Emancipation may occur . . . by reaching an appropriate age, and although there is a presumption of emancipation at age eighteen, that presumption is rebuttable. In the end the issue is always fact-sensitive and the essential inquiry is whether the child has moved “beyond the sphere of influence and responsibility exercised by a parent and obtains an independent status of his or her own.”¹⁵⁸

The “sphere of influence and responsibility” test has been used repeatedly by New Jersey courts since *Filippone*.¹⁵⁹ As part of applying

153. *Institutional Retention and Graduation Rates for Undergraduate Students*, NAT'L CTR. FOR EDUC. STAT., http://nces.ed.gov/programs/coe/indicator_cva.asp (last updated May 2015).

154. 52 A.3d 1072, 1074–75 (N.J. Super. Ct. Ch. Div. 2012) (discussing N.J.S.A. section 9:17B-3, which declares an eighteen-year-old an adult).

155. *Id.* at 1075.

156. *See id.* at 1275–76; *see also* *Newburgh v. Arrigo*, 443 A.2d 1031, 1037 (N.J. 1982) (citing *Alford v. Somerset Cty. Welfare Bd.*, 385 A.2d 1275, 1278–79 (N.J. Super. Ct. App. Div. 1978); *Limpert v. Limpert*, 292 A.2d 38, 39 (N.J. Super. Ct. App. Div. 1972); *Straver v. Straver*, 59 A.2d 39, 41 (N.J. Ch. 1958)); *Alford*, 385 A.2d at 1278–79.

157. *See* 700 A.2d 384, 387 (N.J. Super. Ct. App. Div. 1997).

158. *Id.* (quoting *Bishop v. Bishop*, 671 A.2d 644, 646 (N.J. Super. Ct. Ch. Div. 1995)).

159. *See, e.g.*, *Happold v. Happold*, No. FM-08-309-09, 2014 WL 5393347, at *5 (N.J. Super. Ct. App. Div. Oct. 24, 2014) (quoting *Filippone*, 700 A.2d at 387); *Ort*, 52 A.3d at 1075 (citing *Gac v. Gac*, 897 A.2d 1018 (N.J. 2006); *Newburgh*, 443 A.2d 1031; *Dolce v.*

the test, the court must evaluate the facts and circumstances at hand, including the child's needs and resources, the "family's reasonable expectations," and the financial means of both parties.¹⁶⁰ If the court declares the child emancipated, then "the duty to provide support no longer exists."¹⁶¹

In the Canning and Ricci cases, the plaintiffs were eighteen and twenty-one, respectively, and not living with either of their parents.¹⁶² Canning was still in high school but had moved in with a friend after having a falling out with her parents.¹⁶³ Ricci was living with her grandparents after having a falling out with her mother.¹⁶⁴ According to her parents, Ricci had not spoken with either of them for two years.¹⁶⁵ If children make a choice not to reside with their parent(s) because they do not want to be subject to someone else's rules, then arguably they are choosing to be outside "the sphere of influence and responsibility" of their parents to gain "an independent status of [their] own."¹⁶⁶ In the Ricci case, "[t]he courts also ruled that Caitlyn is emancipated, except when it comes to financial support for college."¹⁶⁷ This concept of carving out emancipation for different purposes or "partial emancipation" is a relatively unused concept under New Jersey law.¹⁶⁸ This case is presently pending review by the appellate division.¹⁶⁹

Being enrolled at a post-secondary educational institution does not always mean that a child that has reached the age of majority is unemancipated.¹⁷⁰ For instance, *Bishop v. Bishop* involved a twenty-year-

Dolce, 890 A.2d 361, 365 (N.J. Super. Ct. App. Div. 2006); *Bishop*, 671 A.2d 644); *Dolce*, 890 A.2d at 365.

160. *Dolce*, 890 A.2d at 365 (citing *Newburgh*, 443 A.2d at 1038-39).

161. *Abrams v. Lombardo*, No. FM-04-1055-06, 2008 WL 4630543, at *4 (N.J. Super. Ct. App. Div. Oct. 7, 2008) (citing *Mahoney v. Pennell*, 667 A.2d 1119, 1121-22 (N.J. Super. Ct. App. Div. 1995)).

162. Horowitz, *supra* note 8; Polhamus, *supra* note 4.

163. Horowitz, *supra* note 8.

164. See Polhamus, *supra* note 16.

165. Wendy Saltzman, *Grandparents Defend Young Woman Who Sued Parents for College Tuition*, 6 ABC ACTION NEWS (Nov. 17, 2014) <http://6abc.com/education/grand-parents-defend-young-woman-who-sued-parents-for-tuition/392148>.

166. *Filippone v. Lee*, 700 A.2d 384, 387 (N.J. Super. Ct. App. Div. 1997) (quoting *Bishop v. Bishop*, 671 A.2d 644, 646 (N.J. Super. Ct. Ch. Div. 1995)).

167. Polhamus, *supra* note 16.

168. See generally *Cafaro v. Cafaro*, 191 A. 472, 472-73 (N.J. 1937) (discussing partial emancipation); *Williams v. Williams*, 219 A.2d 895, 896 (N.J. Super. Ct. App. Div. 1966) (same).

169. As of the writing of this Note, the Ricci case has been appealed by the parents and will be reviewed by the appellate division. Michael Boren, *N.J. Tuition Lawsuit Heads to New Courtroom Venue*, PHILLY.COM (Dec. 24, 2014), http://articles.philly.com/2014-12-24/news/57353623_1_caitlyn-ricci-judge-donald-stein-tuition.

170. See *Bishop*, 671 A.2d at 649.

old who was attending the U.S. Military Academy at West Point.¹⁷¹ The cadet's father was sued by the child's mother for reducing his child support payments after the child enrolled at West Point.¹⁷² Because the government provided for "virtually all" of the child's educational and other needs, the court concluded that the child had shifted his independence from his parents to the government and declared him emancipated.¹⁷³

V. LEVEL THE PLAYING FIELD FOR ALL CHILDREN BY EITHER EXPANDING OR REVERSING *NEWBURGH*

If New Jersey courts do not have the authority under a broad reading of *Newburgh*, and the legislature is unwilling to amend the law to put children of married parents on equal footing, the legislature and courts should reevaluate the legal and policy arguments used to grant college costs to children of divorced and unmarried parents and consider joining the significant majority of states that do not follow this practice.

A. *If Newburgh and N.J.S.A. 2A:34-23(a) Are to Remain the Law of New Jersey, Courts Should Have the Authority to Expand the Law to Children of Married Parents in Certain Cases*

A careful review of *Newburgh* reveals that nothing in the court's analysis or holding would require a lower court to apply *Newburgh* only in divorce cases and that the *Newburgh* factors can be applied to children of married parents seeking parental support for college.¹⁷⁴ *Newburgh* was not a divorce case; rather, it was about a son trying to share in a wrongful death insurance recovery awarded to his stepmother after his father was killed in an automobile accident.¹⁷⁵ Specifically, the court stated that, "in appropriate circumstances, the privilege of parenthood carries with it the duty to assure a necessary education for children."¹⁷⁶ The court then noted that this duty is often raised in the context of divorce cases where an adult child seeks a contribution toward college costs from a non-custodial parent.¹⁷⁷ Although the court then cited several divorce cases where a parent was ordered to contribute toward

171. *Id.* at 645.

172. *Id.* at 645–46.

173. *Id.* at 649.

174. *See supra* Part III.

175. *Newburgh v. Arrigo*, 443 A.2d 1031, 1033 (N.J. 1982).

176. *Id.* at 1038.

177. *Id.*

college costs,¹⁷⁸ the court did not state that the issue of the parental duty to provide a necessary education arises *only* in cases of divorce.

In the case of Rachel Canning, the court denied Canning's initial request for immediate weekly support but scheduled a follow-up hearing to address the key issue of whether Canning was emancipated.¹⁷⁹ If the court found Canning to be unemancipated, her chances of prevailing in receiving support for college would have increased because the parental duty of support would likely be applied by the court. In *Newburgh*, the court stated:

[The son] argued that his right to support continued while he pursued a college and law school education, but the trial court found that [he] had no right to support because he had attained age 18. Resolution of this issue centers on a parent's duty to support a child until the child is emancipated. Consequently, [the son], if unemancipated, may be entitled to share in the wrongful death recovery.¹⁸⁰

Thus, a key determination in the Canning case should have been the issue of emancipation more so than the marital status of Canning's parents. Although the court could not rely on section 2A:34-23(a) of the N.J.S.A. in a suit against married parents because the statute only applies to divorced or unmarried parents,¹⁸¹ conceivably the court could apply the *Newburgh* analysis to married parents and award college costs to a child from an intact family such as Rachel Canning.

1. Would Expanding *Newburgh* to Children of Married Parents Survive a Constitutional Challenge? The Fundamental Right to Parent Should Apply Equally to All Parents Regardless of Marital Status.

If *Newburgh* and section 2A:34-23(a) of the N.J.S.A. presumably do not infringe on any constitutional rights in the eyes of the New Jersey Supreme Court,¹⁸² then a question is raised as to why applying these laws to married parents violates the Constitution. "Although the phrase

178. See cases cited *supra* note 136.

179. Horowitz, *supra* note 8.

180. *Newburgh*, 443 A.2d at 1037.

181. Section 2A:34-23 applies to "any matrimonial action or action for dissolution of a civil union brought in this State or elsewhere, or . . . judgment of divorce or dissolution or maintenance." N.J. STAT. ANN. § 2A:34-23 (West 2015).

182. See *supra* Part II.B.

‘equal protection’ does not appear in the New Jersey Constitution, it has long been recognized that Article I, paragraph 1, of the State Constitution, ‘like the fourteenth amendment, seeks to protect against injustice and against the unequal treatment of those who should be treated alike.’¹⁸³ Conceivably, expanding *Newburgh* would cure any Equal Protection Clause issues by ending the discrimination faced by children of married parents and the corresponding discrimination faced by divorced parents. However, expanding *Newburgh* may cross a line drawn by the courts and be deemed to infringe on the fundamental right to parent, even though many courts, including the New Jersey Supreme Court, take the position that the fundamental right to parent exists regardless of divorce.¹⁸⁴

Although the New Jersey Supreme Court has never addressed the constitutionality of awarding college costs to children of divorced parents, or the perceived expansion of *Newburgh* to include suits by children of divorced parents against both parents,¹⁸⁵ other states have addressed the constitutionality of similar statutes or common law. Courts in Washington, Iowa, New Hampshire, Pennsylvania, and South Carolina have applied the rational basis test to determine if the law infringed upon constitutional rights.¹⁸⁶ The Alabama Supreme Court, in reversing the court’s prior position, which allowed college costs to be awarded, redefined children reaching the age of majority as emancipated, thus changing the law.¹⁸⁷ However, in a separate concurring opinion, Chief Justice Moore included a discussion about the fundamental right to

183. *Barone v. Dep’t of Human Servs., Div. of Med. Assistance & Health Servs.*, 526 A.2d 1055, 1062 (N.J. 1987) (quoting *Greenberg v. Kimmelman*, 494 A.2d 294, 302 (N.J. 1985)). “The crucial issue in each case is ‘whether there is an appropriate governmental interest suitably furthered by the differential treatment’ involved.” *Id.* (quoting *Borough of Collingswood v. Ringgold*, 331 A.2d 262, 274 (N.J. 1975)). “In striking the balance, we have considered the nature of the affected right, the extent to which the governmental restriction intrudes upon it, and the public need for the restriction.” *Id.* (quoting *Greenberg*, 494 A.2d at 302).

184. *See supra* Part III.

185. *Cf. Johnson v. Bradbury*, 558 A.2d 61, 62 (N.J. Super. Ct. App. Div. 1989) (discussing suit by child of divorced parents).

186. *See In re Marriage of Vrban*, 293 N.W.2d 198, 201–02 (Iowa 1980); *LeClair v. LeClair*, 624 A.2d 1350, 1356–57 (N.H. 1993); *Curtis v. Kline*, 666 A.2d 265, 267–70 (Pa. 1995); *McLeod v. Starnes*, 723 S.E.2d 198, 203–04 (S.C. 2012); *Childers v. Childers*, 575 P.2d 201, 209 (Wash. 1978) (en banc). In applying the rational basis test, the New Hampshire Supreme Court concluded that the statute under review did not raise any equal protection concerns. *LeClair*, 624 A.2d at 1357. However, the New Hampshire legislature amended the law effective February 2004 to prohibit courts from ordering parents to contribute to a child’s educational expenses beyond high school. *In re Goulart*, 965 A.2d 1068, 1070 (N.H. 2009).

187. *See Ex parte Christopher*, 145 So. 3d 60, 67–71 (Ala. 2013).

parent and his opinion that courts, in “creating an entitlement to the payment of college expenses for adult children of divorced parents, did not pause to consider the weighty precedents that limit the power of government to supersede parental authority.”¹⁸⁸

The U.S. Supreme Court implied that “a [once] married father who is separated or divorced from the mother and is no longer living with his child” could not constitutionally be treated differently from a currently married father living with his child.¹⁸⁹ The New Jersey Supreme Court has also stated that divorced parents do not lose the fundamental right to parent because of the divorce.¹⁹⁰

If a child bringing suit against his or her parents argued that *Newburgh* should be expanded to children of married parents, the court would seemingly have to rely on New Jersey’s broad concept of emancipation and the parental duty of support. If the legislature would attempt to codify a provision allowing courts to impose college costs on married parents, the court would have to weigh whether to apply the fundamental right to parent to strike down the statute or the rational basis test, perhaps viewing the statute as an economic issue as opposed to a privacy issue, to uphold it.¹⁹¹ If the court applied the rational basis

188. *Id.* at 80 (Moore, C.J., concurring specially). In discussing his opinion that awarding college costs to adult aged children of divorced parents infringed on the fundamental right to parent, Chief Justice Moore noted:

The . . . Court entered into a realm of internal family decision-making that has constitutionally been recognized as insulated from State intrusion. . . . Although parents who resort to the divorce courts voluntarily surrender a portion of their decision-making autonomy, that curtailment should be no greater than necessary to resolve the dispute at issue. Courts should be wary of further disturbing the residual affection and mutual sense of responsibility between parents that may yet survive the stress of divorce. Thus, arbitrarily intruding the State into parental decision-making, even after divorce, is unwarranted and is inconsistent with the recognition that “it is a natural parent, not the state, who has a fundamental right to the care, custody, and control of a child.”

Id. at 79–80 (first citing *Pierce v. Soc’y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 535 (1925); and then quoting *Meadows v. Meadows*, 3 So. 3d 221, 235 (Ala. Civ. App. 2008) (Moore, J., concurring)).

189. See *Quilloin v. Walcott*, 434 U.S. 246, 248–49, 256 (1978) (holding that a natural father, who “never exercised actual or legal custody over his child,” has distinguishable interests from a separated or divorced father “who has not voluntarily surrendered rights in the child” and who therefore has the same right to veto adoption as any married father living with the child).

190. *Fawzy v. Fawzy*, 973 A.2d 347, 360 (N.J. 2009) (“As we have said, the . . . fundamental right of parents to make decisions regarding . . . education . . . does not evaporate when an intact marriage breaks down.”).

191. The New Jersey Supreme Court’s rational basis test states:

When a statute is challenged on the ground that it does not apply evenhandedly to similarly situated people, our equal protection jurisprudence requires that the legislation, in distinguishing between two classes of people, bear a substantial

test and maintained the same public policy that has existed in New Jersey for decades, then the court would have to conclude that a statute allowing, in certain circumstances, for courts to order college costs to children of married parents served a legitimate government interest.

Looking at the rational basis test applied by other states, it appears the only difference in applying the analysis would be that the courts could not use the argument that the child is worse off because of a divorce and would have to rely entirely on the state promoting a college education for its residents as the legitimate government interest being served.¹⁹² The greatest obstacle to this occurring would be if the court were concerned that an infringement on the fundamental right to parent existed, and, if so, would that right be a privacy right subject to strict scrutiny or an economic right subject to the rational basis test? However, based upon the language in *Fawzy v. Fawzy*,¹⁹³ and supporting language in *Quilloin v. Walcott*¹⁹⁴ and *Ex parte Christopher*,¹⁹⁵ it may be difficult for the New Jersey Supreme Court to conclude that expanding *Newburgh* violates the fundamental right to parent because that would contradict applying *Newburgh* to children of divorced parents.

relationship to a legitimate governmental purpose. The test that we have applied to such equal protection claims involves the weighing of three factors: the nature of the right at stake, the extent to which the challenged statutory scheme restricts that right, and the public need for the statutory restriction. The test is a flexible one, measuring the importance of the right against the need for the governmental restriction. Under that approach, each claim is examined “on a continuum that reflects the nature of the burdened right and the importance of the governmental restriction.” Accordingly, “the more personal the right, the greater the public need must be to justify governmental interference with the exercise of that right.” Unless the public need justifies statutorily limiting the exercise of a claimed right, the State’s action is deemed arbitrary.

Lewis v. Harris, 908 A.2d 196, 212 (N.J. 2006) (footnote omitted) (citations omitted) (first citing Caviglia v. Royal Tours of Am., 842 A.2d 125, 132–33 (N.J. 2004); Barone v. Dep’t of Human Servs., 526 A.2d 1055, 1062 (N.J. 1987); then citing Greenberg v. Kimmelman, 494 A.2d 294, 302 (N.J. 1985); Robinson v. Cahill, 303 A.2d 273, 282 (N.J. 1973); then citing Sojourner A. v. N.J. Dep’t of Human Servs., 828 A.2d 306, 314–15 (N.J. 2003); then quoting George Harms Constr. Co. v. N.J. Tpk. Auth., 644 A.2d 76, 87 (N.J. 1994); and then citing *Robinson*, 303 A.2d at 282).

192. See, e.g., *In re Marriage of Vrban*, 293 N.W.2d 198, 202 (Iowa 1980) (“Clearly higher education is a matter of legitimate state interest.”).

193. See 973 A.2d at 358–60.

194. See 434 U.S. at 255.

195. See 145 So. 3d 60, 79–80 (Ala. 2013).

2. New Jersey's Argument that *Newburgh* and the N.J.S.A. Are Necessary to Protect Only Children of Divorced and Unmarried Parents Is Flawed.

In states that allow for courts to award college costs to children of divorced parents, the common rationale supporting this policy is that children of divorced parents are put at a financial disadvantage as compared to children of intact families.¹⁹⁶ For example, the Washington Supreme Court stated:

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. . . . Where the disability is internally or externally caused, the child whose parents are still married will most often 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.¹⁹⁷

In New Jersey, the *Newburgh* factors have been interpreted by the courts as tools to offset the perceived inequities to children of divorced parents.¹⁹⁸ In *King v. King*, the appellate division noted that, “[b]y identifying a non-exclusive list of factors, the Court attempted to eliminate any educational disadvantage to the children of divorced parents.”¹⁹⁹

Most jurisdictions that believe children of divorced parents fare worse than children from intact families typically rely on information from the same sources. Often cited by courts and legislatures is a twenty-five year study performed by psychologist and researcher Judith Wallerstein.²⁰⁰

196. See, e.g., *Childers v. Childers*, 575 P.2d 201, 207–08 (Wash. 1978) (en banc).

197. *Id.* at 207.

198. See, e.g., *King v. King*, No. FM-08-3-99, 2007 WL 4441240, at *2 (N.J. Super. Ct. App. Div. Dec. 20, 2007).

199. *Id.* (citing *Newburgh v. Arrigo*, 443 A.2d 1031, 1038–39 (N.J. 1982)) (referring to the twelve *Newburgh* factors).

200. William V. Fabricius et al., *Divorced Parents' Financial Support of Their Children's College Expenses*, 41 FAM. CT. REV. 224, 225–26 (2003). The Wallerstein study followed 131 children of divorced parents that attended college predominantly in the early 1980s. *Id.* at 225.

The Wallerstein study reported that approximately thirty percent of these children received support from one or both parents, compared to almost ninety percent of children from intact families receiving support.²⁰¹ In order to rectify the perceived harm to children from divorced parents, Wallerstein called for legislation mandating college support from fathers.²⁰² However, some argue that Wallerstein's "data ha[s] serious limitations as a basis for policy" and that the "sample's representativeness" is questionable because it was not randomly chosen.²⁰³

In fact, a more recent study conducted by staff at Arizona State University showed a strong correlation between fathers that share legal custody and the amount these fathers pay toward college costs.²⁰⁴ Because the parents of the children in the Wallerstein study were divorced during the 1970s, it can be presumed that the mother received sole legal custody of the children in a significant majority of the cases.²⁰⁵ Today, more parents share in legal custody of the children after divorce.²⁰⁶ This fact, combined with the results of the Arizona State University study, would suggest that non-custodial fathers provide more college support than indicated by Wallerstein.²⁰⁷

Another renowned sociologist that influenced divorce laws was Dr. Lenore J. Weitzman.²⁰⁸ Dr. Weitzman concluded that, after divorce, a woman's standard of living decreased by an average of seventy-three percent, while a man's standard of living increased by an average of forty-two percent.²⁰⁹ In 1996, Dr. Weitzman's research was disputed, and a new analysis claimed that the changes to the standard were much smaller than reported.²¹⁰ Dr. Richard R. Peterson reported that the standard of living for women dropped an average of twenty-seven percent, while the standard of living for men after divorce increased by an average of ten percent.²¹¹ Interestingly, when confronted with the new

201. *Id.* at 226. Wallerstein also argued that the majority of fathers who had the means to pay did not provide assistance with their child's tuition, although this determination used a much smaller sample size. *Id.*

202. *Id.*

203. *Id.*

204. *See id.* at 234.

205. *See id.* at 226.

206. *See id.*

207. *See id.* at 234–35.

208. *See* Felicia R. Lee, *Influential Study on Divorce's Impact Is Said to Be Flawed*, N.Y. TIMES, May 9, 1996, at C6.

209. *Id.*

210. *Id.*

211. *Id.*

analysis, Dr. Weitzman acknowledged “that her conclusions . . . were probably incorrect.”²¹²

It has been over thirty-three years since *Newburgh* was decided by the Supreme Court of New Jersey. Since then, the cost of a college education has more than doubled using constant dollars.²¹³ If certain states, including New Jersey, choose to continue to treat children of divorced parents differently than children of married parents, because of perceived inequities attributable to divorce, perhaps these states should consider commissioning a study to determine if these inequities actually exist today.

3. The Same Policy Arguments for College Support Should Apply to All Children Regardless of Their Parents’ Marital Status.

States that allow for children of divorced parents to be awarded college costs by the courts typically do so under the guise of the public policy of promoting the pursuit of higher education.²¹⁴ If the New Jersey legislature and courts believe that the state has a legitimate interest in children of divorced and unmarried parents attending college, the argument can be easily made that the state has the same legitimate interest in ensuring that all of its resident children are afforded a college education. Children from married families do not appear any better able to afford college than children from divorced parents, as student loan debt in the United States has nearly tripled between 2004 and 2012 to almost a trillion dollars.²¹⁵

In *Pedrick v. Goodman*, the New Jersey Superior Court, Appellate Division, stated: “[W]e steadfastly adhere to a public policy that advances the protection and support of children who strive to secure a college degree, regardless of a broken relationship with their parents.”²¹⁶ In

212. *Id.*

213. Table 330.10. *Average Undergraduate Tuition and Fees and Room and Board Rates Charged for Full-time Students in Degree-granting Postsecondary Institutions, by Level and Control of Institution 1963–64 Through 2012–13*, NAT’L CTR. FOR EDUC. STAT., U.S. DEP’T OF EDUC., <https://nces.ed.gov/programs/digest/d13/> (follow table 330.10 hyperlink).

214. See, e.g., *Hoefers v. Jones*, 672 A.2d 1299, 1313 (N.J. Super. Ct. Ch. Div. 1994) (“I conclude that the public policy of this state in regard to education, as well as all child support components, allows its courts substantial discretion.”), *aff’d*, 672 A.2d 1177 (N.J. Super. Ct. App. Div. 1996) (per curiam).

215. See DONGHOON LEE, FED. RESERVE BANK OF N.Y., HOUSEHOLD DEBT AND CREDIT: STUDENT DEBT 2 (2013). “Due to increasing enrollment and the rising cost of higher education, student loans play an increasingly important role in financing higher education.” *Id.*

216. No. FM-17-3440-92, 2008 WL 4949776, at *3 (N.J. Super. Ct. App. Div. Nov. 21, 2008) (per curiam).

Pedrick, the father petitioned the court to relieve him of child support and the college tuition obligations of his youngest child because, he argued, the child was an adult and chose not to have a relationship with him.²¹⁷ Like all of the cases that deal with courts ordering college support, *Pedrick* involved divorced parents disputing college support for children who had reached the legal age of majority but were not considered emancipated by the courts.²¹⁸ However, the language used by the appellate division in *Pedrick* could have just as easily been quoted by a New Jersey court in Rachel Canning's case.

B. If Public Policy Concerns Prohibit the Expansion of Newburgh, the Legislature Should Reverse Newburgh by Amending N.J.S.A. 2A:34-23(a) to Emancipate Children when Reaching the Age of Majority

In a poll conducted by NJ.com after the Rachel Canning story appeared in the news, over ninety-five percent of the approximately 20,000 respondents believed that parents should not be required to pay for the high school and college education of their eighteen-year-old child.²¹⁹ Many of the media outlets covering Canning's story portrayed her in a negative light for bringing a lawsuit against her parents.²²⁰ Caitlyn Ricci also received hostile treatment by the media for suing her parents, especially because she is twenty-one years old and has not spoken with either parent in years.²²¹ Because the Canning and Ricci cases have received national attention, New Jersey has been openly criticized for its laws that allow these suits to proceed.²²²

217. *Id.* at *1.

218. *See id.*

219. Naomi Nix, *Poll: Should Parents Be Required to Pay for an 18-year-old's Tuition?*, NJ.COM (Mar. 4, 2014, 7:00 PM), http://www.nj.com/morris/index.ssf/2014/03/poll_should_parents_be_required_to_pay_for_18-year-olds_tuition.html (click "View Results").

220. *See, e.g.*, Irving DeJohn, *Spoiled New Jersey Teen Rachel Canning Drops Lawsuit Against Parents*, N.Y. DAILY NEWS (Mar. 18, 2014, 10:46 AM), <http://www.nydailynews.com/news/national/spoiled-new-jersey-teen-rachel-canning-drops-lawsuit-parents-article1.1725361> ("The brat had slung mud on Sean and Elizabeth Canning's parenting skills, blaming them for her bulimia and alleging that her father was perverted.")

221. Andrea Peyser, *It's Time to Teach This Brat a Lesson*, N.Y. POST (Dec. 18, 2014, 9:49 PM), <http://nypost.com/2014/12/18/its-time-to-teach-this-brat-a-lesson>. "Are young people in the Garden State more likely than those who grow up elsewhere to turn into entitled, spoiled brats? . . . Drop the case, Caitlyn, and show some respect to your parents. Judges and grandparents need to butt out, too. This madness must end." *Id.*

222. *See, e.g.*, *Jersey's Jaded Justice*, N.Y. POST (Dec. 27, 2014, 2:42 AM), <http://nypost.com/2014/12/27/jerseys-jaded-justice> ("Though Miss Ricci is legally an adult, under New Jersey's *ridiculous system* her parents are required by law to pay for college, even though she is not living at home and refuses to abide by their rules. It gets worse: In New Jersey, this *stupid standard* applies only to parents who are divorced." (emphasis added)).

Courts in New Jersey have “substantial discretion” when deciding whether college costs should be awarded to children of divorced or non-married parents, even after the introduction of the *Newburgh* factors and the legislature amending N.J.S.A. 2A:34-23 to incorporate these factors.²²³ Although this discretion is not without limits, trial court judges do have a great deal of latitude when applying the *Newburgh* factors.²²⁴ This discretion can cause its own set of issues, such as the disparate treatment by courts of children seeking college costs from parents, but these disparities are outside the scope of this Note.

Awarding college costs to children from divorced parents under *Newburgh* and N.J.S.A. 2A:34-23(a) accomplishes two goals in the eyes of the state: (1) to mitigate the financial harm incurred by children in divorce because of the non-custodial parent’s (typically the father’s) unwillingness to pay for college and (2) to ensure that its citizens can pursue the benefit of higher education.²²⁵ However, realistically in today’s society, these policy goals should not only be applicable to children of divorced parents, but to all children, as the costs of a college education have affected the masses. Perhaps these circumstances would explain the public’s opinion in the Rachel Canning and Caitlyn Ricci cases, and the call from many for the New Jersey legislature to overturn *Newburgh*. Reversing *Newburgh* as the current law in New Jersey would eliminate the disparate treatment experienced by children of married parents and would eliminate the constitutional debates over equal protection and the fundamental right to parent.

Perhaps the clearest way to reverse the current law would be for the New Jersey legislature to deem, by statute, that a child becomes emancipated upon reaching the age of majority. This would, in effect, eliminate a court’s ability to award college costs to an adult child that is eighteen years of age or older. Furthermore, reversing *Newburgh* by establishing a hard cutoff for emancipation would likely reduce litigation in addition to leveling the playing field for all children.

223. See *Martin v. Martin*, No. FM-05-0045-09, 2014 WL 2131664, at *1 (N.J. Super. Ct. App. Div. May 23, 2014) (quoting *Jacoby v. Jacoby*, 47 A.3d 40, 44 (2012)).

224. “The trial court has ‘substantial discretion’ in deciding the issue of contribution to college expenses. ‘If consistent with the law, [the] award will not be disturbed unless it is manifestly unreasonable, arbitrary, or clearly contrary to reason or to other evidence, or the result of whim or caprice.’” *Id.* at *1 (alteration in original) (citations omitted) (quoting *Jacoby*, 47 A.3d at 44).

225. See *Gac v. Gac*, 897 A.2d 1018, 1023 (N.J. 2006) (“The Legislature and our courts have long recognized a child’s need for higher education”); Monica Hof Wallace, *A Federal Referendum: Extending Child Support for Higher Education*, 58 KAN. L. REV 665, 691 (2010) (“[P]ublic policy supports an educated populace.”).

C. *A Sensible Alternative: Bring Back the Rutgers Rule; Set Emancipation at Age Twenty-one; and Prohibit Children from Suing Parents Who Are in Agreement*

If the New Jersey Legislature wants to keep the status quo and neither expand nor reverse *Newburgh* and N.J.S.A. 2A:34-23(a), there are alternatives that the legislature should consider to help close the gap in disparate treatment between children of divorced and married parents.

1. Bring Back the “Rutgers Rule.”

Certain states that allow courts to award college costs to children of divorced parents impose limits on the amount of support the children can expect from their parents.²²⁶ For example, a “Rutgers Rule” was followed by New Jersey courts for many years. The Rutgers Rule, established in *Nebel v. Nebel*, limited the dollar amount of court orders awarding college costs to the tuition and costs of attending New Jersey’s state university system.²²⁷ Although not favored by all, the Rutgers Rule established a ceiling on college costs allowing parents to have a better sense of the financial liability imposed by the court or through a separation agreement.²²⁸ If a child desired to attend a private school at a higher cost, he or she would be expected to make up the difference through savings or loans.²²⁹

The Appellate Division eliminated the Rutgers Rule in *Finger v. Zenn*.²³⁰ The court stated that “to the extent that *Nebel* is read to hold that there is a ceiling on a college contribution by a divorced spouse to the cost of a state university or any public or private college, it is specifically disapproved.”²³¹ The court in *Finger* focused on the defendant’s ability to pay towards his son’s education at the George Washington University, noting that the defendant earned over \$200,000 per year and owned a home worth more than \$700,000.²³² Having the

226. For example, New York courts typically uphold caps limiting awards of college costs to the tuition charged at a university that is part of the State University of New York (“SUNY”) system. See *Gretz v. Gretz*, 971 N.Y.S.2d 312, 313 (App. Div. 2013); *Fersh v. Fersh*, 817 N.Y.S.2d 95, 96 (App. Div. 2006). New York courts have also imposed a SUNY cap without it being stipulated in an agreement. See, e.g., *Holliday v. Holliday*, 828 N.Y.S.2d 96, 97–98 (App. Div. 2006).

227. 239 A.2d 266, 270 (N.J. Super. Ct. Ch. Div.), *aff’d*, 247 A.2d 27 (N.J. Super. Ct. App. Div. 1968).

228. See *id.*

229. See *id.*

230. 762 A.2d 702, 706 (N.J. Super. Ct. App. Div. 2000).

231. *Id.*

232. *Id.* at 705.

ability to pay for a private college and wanting to pay for it may be two different things. Should courts be in a position to not only force parents to pay for college, but to force them to pay top dollar such as in *Rossi*?²³³ Perhaps the legislature should explore reinstating the Rutgers Rule in all cases, subject to certain exceptions specifically memorialized by statute.

2. Set Emancipation at Age Twenty-one.

A key component of *Newburgh* is that New Jersey does not have a fixed age of emancipation and the power to emancipate a child is given only to the courts.²³⁴ Sometimes this provision of New Jersey law can be taken advantage of by a child suing their parents for college costs. For instance, Caitlyn Ricci was twenty-one years old when the court awarded her \$16,000 toward her first-year tuition at Temple University.²³⁵ Many other states that allow courts to order college costs impose a fixed age as to when the child is on his or her own, regardless of if the child is still enrolled in college.²³⁶ For example, in New York, without prior stipulation by the parents, college costs can only be awarded by the courts to children up to age twenty-one.²³⁷ These limitations make sense as they impose responsibilities on the child to finish college in the traditional time frame of four years and not waste an opportunity provided by the parents. New Jersey's system of not imposing a firm age limitation should be reviewed by the legislature, and it should strongly consider bringing the state more in line with other states that award college costs to children of divorced parents.

233. See *supra* text accompanying notes 22–28.

234. See *supra* Part III.A.

235. See Polhamus, *supra* note 4.

236. See, e.g., *In re Marriage of Crocker*, 971 P.2d 469, 471 (Or. Ct. App. 1998), *aff'd*, 22 P.3d 759 (Or. 2001). “ORS 107.108 grants a privilege, i.e., the right to seek and obtain an order compelling the payment of child support, to one class of citizens—qualifying children between ages 18 and 21 whose parents are divorced or separated—that is not granted to children in like circumstances whose parents are married.” *Id.*

237. *Schonour v. Johnson*, 811 N.Y.S.2d 533, 534 (App. Div. 2006) (“Absent an agreement, a court may not direct a parent to pay support in the form of college expenses on behalf of a child who has attained the age of 21 years.” (citing *Calvello v. Calvello*, 800 N.Y.S.2d 429 (App. Div. 2005); *Miller v. Miller*, 750 N.Y.S.2d 112, 114 (App. Div. 2002); *In re Setford v. Cavanagh*, 572 N.Y.S.2d 591 (App. Div. 1991); *Maroney v. Maroney*, 570 N.Y.S.2d 339 (App. Div. 1991))).

3. The Legislature Should Prohibit Children from Suing Parents Who Are in Agreement.

In both the Canning and Ricci cases, the parents were in agreement in denying their child financial assistance with college costs.²³⁸ This is an important distinction from the more common circumstance of children seeking parental support from non-custodial parents.²³⁹ As a result of the court ordering Caitlyn Ricci's parents to pay towards their daughter's college costs, Assemblyman Chris J. Brown promised to introduce legislation limiting the ability of children to sue their parents for college costs.²⁴⁰

The distinction of a child suing both parents that are seemingly in agreement with each other is significant under New Jersey case law. In *Fawzy v. Fawzy*, the New Jersey Supreme Court discussed how parents do not lose the fundamental right to parent upon divorce.²⁴¹ In fact, the court stated that, in matters of a non-intact family, the court should only intervene where the parents cannot agree on issues such as the health and education of the children.²⁴² This binding precedent, applied to the Canning and Ricci cases, would appear to prohibit the courts from intervening in the parties' disputes over college costs. However, the court proceeded to award Ricci college costs to be split between her divorced parents.²⁴³ Although this award may be overturned by the appellate division, the parents are still required to pay legal costs to defend themselves.²⁴⁴ If the legislature were to eliminate a child's ability to sue

238. See *supra* Part I.

239. See *supra* Part I.

240. Kevin McArdle, *Bill Would Shield Divorced Parents from Forced Tuition Rulings*, N.J. 101.5 (Nov. 21, 2014, 9:00 AM), <http://nj1015.com/bill-would-prevent-divorced-parents-from-paying-college-tuition>.

245. 973 A.2d 347, 360 (N.J. 2009).

As we have said, the entitlement to autonomous family privacy includes the fundamental right of parents to make decisions regarding custody, parenting time, health, education, and other child-welfare issues between themselves, without state interference. That right does not evaporate when an intact marriage breaks down. It is for that reason, as the parties conceded, that when matrimonial litigants reach a settlement on issues regarding child custody, support, and parenting time, as a practical matter the court does not inquire into the merits of the agreement. It is only when the parents cannot agree that the court becomes the default decision maker.

Id.

242. *Id.*

243. Polhamus, *supra* note 16.

244. "Maura McGarvey set up a GoFundMe page to fund a court appeal of a Superior Court judge's ruling, which orders McGarvey and her ex-husband Mike Ricci to contribute \$16,000 for their daughter's tuition at Temple University." Michelle Caffrey, *Mother of*

parents who are in agreement, this provision would eliminate cases like Rachel Canning and Caitlyn Ricci that raise the public's ire and would help to maintain leverage with the parents in raising their children.

VI. CONCLUSION

It has been thirty-three years since *Newburgh* was decided. Since then, many states have had to grapple with the issue of whether to allow courts to award college costs to children of divorced parents.²⁴⁵ Most recently, Alabama overturned a twenty-four-year-old precedent ending the courts' authority to award college costs, and South Carolina saw-sawed on the issue, reversing itself within just a two-year period.²⁴⁶ With the recent high-publicity cases entering the courts in New Jersey, the time may have come for the state to review its laws, decide what is best for its residents, and make any changes deemed necessary to level the playing field for all children in the state.

Temple Student who Sued Parents for Tuition Raising Funds for Appeal, NJ.COM (Dec. 12, 2014, 7:00 PM), http://www.nj.com/gloucester-county/index.ssf/2014/12/mother_of_temple_student_who_sued_parents_for_tuition_raising_funds_for_appeal.html.

245. See *supra* Part II.C.

246. See *Ex parte* Bayliss, 550 So. 2d 986, 995 (Ala. 1989), *overruled by Ex parte* Christopher, 145 So. 3d 60, 72 (Ala. 2013).