

# The University of New Hampshire Law Review

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Volume 4  
Number 3 *Pierce Law Review*

Article 7

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September 2006

## New Hampshire Got it Right: Statutes, Case Law and Related Issues Involving Post- Secondary Education Payments and Divorced Parents

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### Repository Citation

Ryan C. Leonard, *New Hampshire Got it Right: Statutes, Case Law and Related Issues Involving Post-Secondary Education Payments and Divorced Parents*, 4 *Pierce L. Rev.* 505 (2006), available at [http://scholars.unh.edu/unh\\_lr/vol4/iss3/7](http://scholars.unh.edu/unh_lr/vol4/iss3/7)

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## New Hampshire Got it Right: Statutes, Case Law and Related Issues Involving Post- Secondary Education Payments and Divorced Parents

RYAN C. LEONARD\*

### I. INTRODUCTION

Divorced parents in New Hampshire can rest a little easier these days. While there are a myriad of economic reasons why a divorce can become contentious, financing a child's college education can no longer be included among those reasons. In January 2004, in a rather bold and unconventional move, the New Hampshire legislature overruled years of legal precedent and enacted a new statutory amendment that should alleviate some of the financial pressures divorced parents inevitably face. The amendment, RSA § 458:17(XI-a), is a victory for divorcees across the state because it prohibits superior court judges from issuing orders forcing divorced parents to contribute to their adult child's college expenses.<sup>1</sup>

The best interest of the child rule is consistently invoked by American courts when dealing with children in custody disputes because courts have an overriding interest in protecting a child's welfare.<sup>2</sup> Generally, this rule is applied with the best of intentions. However, the best interest of the child rule should never be considered when dealing with post-secondary education payments. By ordering divorced parents to support their adult children, courts across the country continue to violate the constitutional rights of those parents. Treating similarly situated people the same should be the goal of our legal system. Ordering divorced adults to pay or contribute to their child's college expenses, when no such order can be made of married adults, does not accomplish this goal. As a result of these unjust orders, the equal protection rights of divorced parents are consistently violated throughout this country. The New Hampshire legislature recognized the inequality of these judicial orders and recently amended the law.<sup>3</sup>

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1. N.H. Rev. Stat. Ann. § 458:17 (XI-a) (2004).

2. *E.g. Sanborn v. Sanborn*, 465 A.2d 888, 892 (N.H. 1983) (an example of a New Hampshire case that used the best interest of the child standard in a custody dispute).

3. N.H. Rev. Stat. Ann. § 458:17 (XI-a).

Now is the time for all other states that do not have similar laws currently in place to follow suit.

Over the last fifty years, divorce has become commonplace in American society with divorces doubling over that time, from 2.3 divorces per 1,000 people in 1955, to 4.6 divorces per 1,000 people in 2001.<sup>4</sup> Divorce rates now are around fifty percent nationwide.<sup>5</sup> As a result, stigmas once associated with divorce have all but disappeared. However, one stigma still remains in some states: requiring divorced parents to pay for college education expenses of their children.<sup>6</sup>

By ordering married couples to pay for their child's college education, states would be viewed as interfering with the sanctity of marriage. As a result, states do not impose limits on parents' decision-making as it relates to a child's upbringing. Therefore, every intact family is free to decide whether a child will go to college, where the child will go, how payments will be made, and who will contribute to the expenses. Even with the college tuition burden falling by about one-third since 1998, the decision about how to pay for college should be resolved by the child's parents, whether married or divorced, at the time a child is eligible to go to college since higher education expenses take a large portion out of most families' income.<sup>7</sup> Judges should not be able to order a parent who is, and always will be, unwilling to pay for college expenses to make payments solely because he or she is no longer married. Parents should be free to provide for current and future college expenses to the best of their ability at the time a child reaches the appropriate age; they should never be required to do so.

This article will use the recent New Hampshire amendment, prohibiting judges from ordering parents to pay for college expenses, as a backdrop for advocating that all states pass similar statutes. Part II of this article begins with a discussion of the state of the law in New Hampshire before the statute was amended in 2004. Next, the article discusses the relevant portions of the recent New Hampshire amendment. The article next outlines laws from various states in order to compare and contrast views from the rest of the country. In Part III, the focus shifts to the equal protection arguments both for and against divorced parents in relation to manda-

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4. Americans for Divorce Reform, *Divorce Rates*, <http://www.divorcereform.org/03statab.html> (accessed May 22, 2006).

5. *Id.* at <http://www.divorcereform.org/rates.html> (accessed May 22, 2006) (the fifty percent rate is the U.S. Census Bureau's estimate for 2002).

6. *See e.g.* 750 Ill. Comp. Stat. 513(a)(2) (2005); N.Y. Dom. Rel. Law § 240 (1-b)(c)(7) (McKinney 2003); *Hale v. Hale*, 132 P.2d 67, 69 (Cal. App. 3d Dist. 1942) (examples of states that require parents to pay for their child's college education).

7. Dennis Cauchon, *Tuition Burden Falls by a Third* (June 28, 2004) (available at [http://www.usatoday.com/news/education/2004-06-28-tuition-burden-cover-usat\\_x.htm](http://www.usatoday.com/news/education/2004-06-28-tuition-burden-cover-usat_x.htm)).

tory post-secondary education orders. Part IV of this article will analyze the laws from various states and address problems courts have either failed to address or have inadequately addressed. Finally, this article concludes by advocating in favor of the New Hampshire amendment and arguing that other states should follow New Hampshire's lead and adopt similar versions of RSA § 458:17(XI-a).

## II. COMPARISON OF POST-SECONDARY EDUCATION LAWS

### A. Pre-Amendment New Hampshire Law

Prior to January 2004, the New Hampshire legislature gave state superior court judges broad discretionary powers in relation to the support, maintenance, and custody of children of divorce.<sup>8</sup> The law, in relevant part, stated, “[i]n all cases where there shall be a decree of divorce . . . the court shall make such further decree in relation to the support, education, and custody of the children . . . and may order a reasonable provision for their support and education.”<sup>9</sup> “This provision had been part of New Hampshire law for well over a century.”<sup>10</sup>

*LeClair v. LeClair*<sup>11</sup> is the seminal New Hampshire case regarding post-secondary education support.<sup>12</sup> The parties in *LeClair* got divorced when their son Jeremy was five years old.<sup>13</sup> Subsequently, Jeremy lived with his father until the age of sixteen when he moved in with his mother.<sup>14</sup> However, communication between Jeremy's parents after the divorce was so poor that they did not discuss his college choice with each other.<sup>15</sup> Once Jeremy decided to attend college, his mother filed a petition with the superior court requesting that her ex-husband be ordered to make a reasonable contribution toward their son's college expenses.<sup>16</sup> Jeremy's father fought the petition, alleging that he did not have sufficient assets to make a substantial contribution to any expenses.<sup>17</sup>

The superior court disagreed with Mr. LeClair's arguments and, after reviewing both parties' financial situations, ordered him to contribute more

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8. *In re Breault*, 821 A.2d 1118, 1121 (N.H. 2003).

9. N.H. Rev. Stat. Ann. § 458:17(I) (1992, amended 1993, repealed 2004).

10. *LeClair v. LeClair*, 624 A.2d 1350, 1353 (N.H. 1993).

11. 624 A.2d 1350.

12. *Id.* at 1353.

13. *Id.* at 1352.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

than eight thousand dollars to Jeremy's education. In determining each party's share of the tuition costs, the superior court took the total tuition cost per year, \$22,900.00 at the time *LeClair* was decided, and subtracted the sum of: Jeremy's qualification for student loans, grants, and work study; Jeremy's expected financial contribution, including his savings, as determined by the college's financial aid office; and any contributions from Jeremy's grandparents. The end result amounted to Mr. LeClair having to pay \$8,056.00.<sup>18</sup>

Prior to 1987, RSA § 458:17 also authorized courts to order divorced parents to place money in a trust for the maintenance and education of a minor child.<sup>19</sup> In 1987, however, the New Hampshire legislature repealed and then reenacted the trust fund statute, which allowed courts to establish trusts for the education of a child who is eighteen years of age or older if the child is in college.<sup>20</sup> Relying on this legislative action, the New Hampshire Supreme Court ruled that RSA § 458:20 specifically granted superior courts the authority to order a parent to contribute toward an adult child's educational expenses.<sup>21</sup> In making this ruling, the Court found a clear intent by the legislature to recognize a superior court judge's authority to order parents, consistent with their means, to pay their child's secondary education expenses.<sup>22</sup> When making this type of order, however, the superior court can only order a divorced parent to pay a reasonable portion of the educational expenses.<sup>23</sup>

Three recent cases have clarified the New Hampshire Supreme Court's holding in *LeClair*.<sup>24</sup> In *In re Gilmore*,<sup>25</sup> the Court stated that a parent's obligation to pay child support ceases when the child turns eighteen or graduates from high school, whichever is later.<sup>26</sup> However, the New Hampshire Supreme Court took the opportunity to reaffirm the Court's decision in *LeClair* by saying that RSA § 458:35-c does not place a time limit on a parent's obligation to pay for reasonable college expenses.<sup>27</sup> The Court found that the purpose of RSA § 458:35-c was to ensure that both parents share responsibility for supporting their children according to the relative percentage of each parent's income.<sup>28</sup>

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18. *Id.* (affirming the judgment of the superior court).

19. *Id.* at 1353.

20. N.H. Rev. Stat. Ann. § 458:20 (1992).

21. *LeClair*, 624 A.2d at 1353.

22. *Id.*

23. *Azzi v. Azzi*, 392 A.2d 148, 151 (N.H. 1978).

24. See generally *In re Barrett*, 841 A.2d 74 (N.H. 2004); *In re Bredault*, 821 A.2d at 1118; *In re Gilmore*, 803 A.2d 601 (N.H. 2002) (cases decided after *LeClair* that further clarify the Court's ruling).

25. 803 A.2d 601.

26. *Id.* at 601, 603 (citing N.H. Rev. Stat. Ann. § 458:35-c (1992)).

27. *In re Gilmore*, 803 A.2d at 603.

28. *In re Barrett*, 841 A.2d at 77.

While there was no dispute over the superior court's authority to order the father to contribute to his daughter's education in *In re Gilmore*, there was an objection to paying what was considered incidental costs.<sup>29</sup> This argument allowed the Supreme Court to identify, for the first time in New Hampshire, what the Court considered "educational expenses."<sup>30</sup> The Court defined educational expenses as those that are directly related to a child's college education.<sup>31</sup> These expenses include "tuition, books, room, board, and other directly related fees."<sup>32</sup> Educational expenses do not include transportation costs, medical expenses, or clothing, which Mr. Gilmore was originally required to pay.<sup>33</sup> The *Gilmore* Court stated that defining educational expenses more broadly would essentially require a parent to pay additional child support, which would conflict with RSA § 458:35-c.<sup>34</sup>

In *In re Breault*,<sup>35</sup> the Court held that, pursuant to RSA § 458:35-c, a trial court has the authority to issue an original or modified child support order that terminates when the child graduates from college.<sup>36</sup> The New Hampshire Supreme Court again reaffirmed *LeClair* by stating that a superior court has the discretion, in both original and modified orders, to require divorced parents to contribute to their children's college education.<sup>37</sup> However, the *Breault* Court held that any order requiring divorced parents to contribute to their child's post-secondary education must be "equitable in the light of the circumstances of all of the parties."<sup>38</sup>

By the end of 2002, it was well established in New Hampshire that a superior court judge could require divorced parents to pay for their child's educational expenses as long as the order followed the requirements set forth in *LeClair*, *In re Breault*, and *In re Gilmore*.<sup>39</sup> However, imminent legislative change would soon alter the State's child support law and effectively remove some judicial discretion from the superior courts.

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29. 803 A.2d at 603.

30. *Id.* at 604.

31. *Id.*

32. *Id.*

33. *Id.* at 603.

34. *Id.* at 604.

35. 821 A.2d 1118.

36. *Id.* at 1121.

37. *Id.*

38. *Id.*

39. See generally *In re Breault*, 821 A.2d at 1121; *In re Gilmore*, 803 A.2d at 603; *LeClair*, 624 A.2d at 1353 (cases outlining the requirements imposed on divorced parents relating to payment of a child's college expenses).

### B. 2004 New Hampshire Amendment

In January of 2003, the New Hampshire legislature introduced a bill proposing to change the existing law regarding post-secondary education orders.<sup>40</sup> The previous statute, which applied before the amendment was introduced, granted superior courts the authority to order divorced parents to contribute to their child's post-secondary educational expenses.<sup>41</sup> This new bill was drafted to amend RSA § 458:17 by inserting the following provision: "No child support order shall require a parent to contribute to an adult child's college expenses or other educational expenses beyond the completion of high school."<sup>42</sup> The purpose of this provision, according to the bill's sponsor, was to remove a trial judge's discretion when ordering divorced parents to contribute to their adult child's college expenses.<sup>43</sup> Both the Senate and the House of Representatives voted in favor of the bill, and on January 1, 2004, the new child support provision took effect.<sup>44</sup> The new law is codified as RSA § 458:17(XI-a).<sup>45</sup> As a result of this new statutory amendment, *LeClair* and its progeny were overruled.

### C. State Laws Comparable to the Recent New Hampshire Amendment

While the New Hampshire legislature recently overturned existing case law regarding post-secondary education support, many other states have laws similar to RSA § 458:17(XI-a). For instance, in Florida, the Fourth District Court of Appeal ruled in *Klein v. Klein*<sup>46</sup> that a parent is not responsible for support after a child reaches his or her eighteenth birthday.<sup>47</sup> In *Klein*, the parties were married for sixteen years and had two children.<sup>48</sup> At all times during the marriage, the mother was totally dependent on the father for support.<sup>49</sup> As a result, the court awarded the wife a "lump sum alimony" payment as well as monthly alimony payments in order to maintain her accustomed living arrangements.<sup>50</sup> However, the court refused to extend the father's payouts to include support payments for his daughter's college expenses.<sup>51</sup> The court reasoned that since college attendance does

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40. N.H. H. 299, 158th Gen. Ct., 2d Year (2003).

41. See N.H. Rev. Stat. Ann. § 458:17(I) (1992); *LeClair*, 624 A.2d at 1353.

42. N.H. H. 299, 158th Gen. Ct., 2d Year.

43. *Id.*

44. *Id.*

45. *Id.*

46. 413 So. 2d 1297 (Fla. 4th Dist. App. 1982).

47. *Id.* at 1300.

48. *Id.* at 1298.

49. *Id.*

50. *Id.* at 1299.

51. *Id.* at 1300.

not render a child a legal dependant, courts do not have the authority to require parents to furnish their offspring with such an advanced education.<sup>52</sup>

In Ohio, the law regarding payment of post-secondary education expenses is well settled and set forth in *Bardes v. Todd*.<sup>53</sup> In *Bardes*, the court restated the rule regarding payment of post-secondary educational expenses as follows: without a specific agreement of the parties and the subsequent adoption of the agreement by a trial court, a judge generally has no authority to issue orders setting aside money for future college expenses of a minor child.<sup>54</sup> However, this rule only applies if the money would be used after the child reaches the age of majority.<sup>55</sup> In addition, the *Bardes* court stated that no case law supported a holding that attending a college of one's choice is a fundamental right guaranteed by the federal Constitution, even for the most gifted of children.<sup>56</sup>

A similar bright-line rule applies to forced post-secondary education payments in Texas. In the case of *Woodruff v. Woodruff*,<sup>57</sup> the father of a minor son attending college petitioned the court to reduce his child support payments due to a "changed condition."<sup>58</sup> The father argued that since the son was in college, and college was not a "necessity of life," the son's changed condition warranted a reduction in child support.<sup>59</sup> Under Texas law, each parent has a duty to support his or her minor children and provide them with necessities of life.<sup>60</sup> Necessities of life include food, clothing, shelter, and medical attention.<sup>61</sup>

The *Woodruff* court held that a college education does not fit under the statutory definition of necessity of life but is instead a "special advantage."<sup>62</sup> The Texas court conceded that the court could not order a divorced parent to pay for post-secondary education costs of their children under state law.<sup>63</sup> However, the court stated that if the parties voluntarily agreed to pay educational expenses, the agreement would preclude a reduction in child support.<sup>64</sup> Because of the agreement in this case, Mr. Wood-

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52. *Id.*

53. 746 N.E.2d 229, 235 (Ohio App. 1st Dist. 2000).

54. *Id.*

55. *Id.*

56. *Id.* at 234.

57. 487 S.W.2d 791 (Tex. Civ. App. 1972).

58. *Id.* at 793.

59. *Id.* at 792-93.

60. Tex. Fam. Code Ann. § 4.02 (1972).

61. *Id.*

62. 487 S.W.2d at 793.

63. *Id.*

64. *Id.*

ruff was not able to take advantage of Texas' pro-divorcee rule, and his child support payments were not reduced.<sup>65</sup>

Payment toward post-secondary education in Massachusetts, while differing from the rules in Florida, Ohio, and Texas, still favors divorced parents by placing a burden on the children to meet the strict statutory requirements.<sup>66</sup> An illustration of this strict requirement occurred in *L.W.K. v. E.R.C.*,<sup>67</sup> where the Massachusetts Supreme Judicial Court answered the question of whether a judge may posthumously set aside a lump sum payment in trust as security for future educational support of a child.<sup>68</sup> The Court found that the Massachusetts legislature explicitly provided that in some circumstances, parents have an obligation to provide educational support for their children who have attained the age of eighteen.<sup>69</sup> Similar to the previous version of RSA § 458:17(I), in Massachusetts, a judge may make appropriate orders of maintenance, support, and education for any child who has reached the age of eighteen.<sup>70</sup> However, the Massachusetts legislature restricts application of this statute to individuals who have not attained the age of twenty-one, who are domiciled in the home of a parent, and who are principally dependent upon said parent for maintenance.<sup>71</sup> Although this statute places a significant burden upon parents to support their children, unlike the laws in effect in New Hampshire and Florida, the Massachusetts statute places limitations on educational support awards if the terms of the statute are not strictly complied with.<sup>72</sup> This difference is shown in *L.W.K.* where the Court overturned the educational trust because there was no showing that the beneficiary, a ten-year-old boy, would meet the statutory requirements set forth in the Massachusetts statute.<sup>73</sup>

Four years after *L.W.K.* was decided, the Appeals Court of Massachusetts revisited the issue of assigning post-secondary education payments to divorced parents in *Ketterle v. Ketterle*.<sup>74</sup> In *Ketterle*, the father of three children objected to being assigned the responsibility of paying for the educational expenses of his three children.<sup>75</sup> The court, relying on precedent, stated, "[a]s a general rule, support orders regarding the future pay-

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65. *Id.*

66. See generally *L.W.K. v. E.R.C.*, 735 N.E.2d 359 (Mass. 2000); *Ketterle v. Ketterle*, 814 N.E.2d 385 (Mass. App. 2004) (examples of Massachusetts cases where children must meet strict statutory requirements in order for their divorced parents to be ordered to pay for their college education).

67. 735 N.E.2d 359 (Mass. 2000).

68. *Id.* at 370.

69. *Id.*

70. Mass. Gen. Laws ch. 209C § 9 (2004).

71. *Id.*

72. *L.W.K.*, 735 N.E.2d at 371.

73. *Id.*

74. 814 N.E.2d at 387.

75. *Id.* at 391.

ment of post-high school educational costs are premature and should not be made.”<sup>76</sup> The reason for this rule, according to the court, is that “[s]upport orders are meant to address the current and not the future needs of children.”<sup>77</sup> As a result, the court overturned the father’s support obligations for his younger children, then aged thirteen and ten.<sup>78</sup> However, because college was imminent for the oldest child, the court upheld the trial court ruling ordering Mr. Ketterle to pay for that child’s educational expenses.<sup>79</sup>

In Pennsylvania, similar to the situation in New Hampshire, the law requiring divorced parents to pay for post-secondary education was in a state of flux in the mid-1990’s.<sup>80</sup> Prior to 1995, the rule, as set forth by statute, stated that a court may order either or both parents who are divorced to provide equitably for educational costs of their child.<sup>81</sup> This rule applied whenever a parent sought a support order – regardless of whether the child had reached the age of eighteen.<sup>82</sup> Additionally, educational expense orders are only issued after a child makes a reasonable effort to apply for scholarships, grants and work-study assistance.<sup>83</sup> The Pennsylvania legislature, in making these provisions, stated that each parent shared the responsibility of providing post-secondary education support.<sup>84</sup>

*Brown v. Brown*,<sup>85</sup> however, limited the scope of this statute slightly.<sup>86</sup> In *Brown*, Robert, a law student, requested that his father continue to provide medical insurance for him while he was in school.<sup>87</sup> In addition, Robert requested that he be given a monthly allowance of \$150.00.<sup>88</sup> The court ruled against Robert because the court found that the legislature intended the Pennsylvania child support laws to limit post-secondary education to the pursuit of an undergraduate education leading to a bachelor’s degree.<sup>89</sup> Therefore, the term “college” in Pennsylvania does not include within its ambit post-graduate degrees or professional-level training.<sup>90</sup>

In 1995, the Pennsylvania Supreme Court, in the seminal case of *Curtis v. Kline*,<sup>91</sup> abolished the framework established under the Pennsylvania

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76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. 23 Pa. Consol. Stat. Ann. § 4327(a) (1994).

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. 474 A.2d 1168 (Pa. Super. 1984).

86. *Id.* at 1169.

87. *Id.*

88. *Id.*

89. *Id.* at 1170.

90. *Id.*

91. 666 A.2d 265 (Pa. 1995).

statute and *Brown v. Brown*.<sup>92</sup> In *Curtis*, the Court held that requiring parents to pay for post-secondary education was a violation of the equal protection clause of the Fourteenth Amendment of the United States Constitution.<sup>93</sup> In overruling established statutory law, the Court held that there was no rational basis for a state government to require only certain adult citizens to pay for post-secondary education expenses.<sup>94</sup> In so holding, the Court effectively voiced displeasure for the statute, which required only non-intact families to provide such expenses for their children.<sup>95</sup>

#### D. State Laws Differing from the Recent New Hampshire Amendment

Not every state shares New Hampshire's view that divorced parents should not be required to pay for a child's post-secondary education.<sup>96</sup> An example contrary to New Hampshire's view is evident in the California case *Hale v. Hale*.<sup>97</sup> In *Hale*, the parties divorced when their son was four years old, and the court entered a child support order in favor of the mother who received custody of the boy.<sup>98</sup> When the boy turned eighteen and was admitted to Princeton University, the mother petitioned the court for an increase in support to cover additional expenses that attending college would bring upon the family.<sup>99</sup>

The question the court answered in *Hale* was whether a trial court had the authority to make an order to cover the necessary expenses of higher education.<sup>100</sup> The court ruled that California law gave courts, rather than parents, the right to make ultimate decisions regarding the welfare of children when divorce proceedings have been initiated.<sup>101</sup> The court's ruling was based on the idea that when domestic relations are strained, trial courts, based on all the facts and circumstances, should determine the proper amount of support each child is entitled to receive.<sup>102</sup> If attending college is in the best interest of the child, then a trial court's support order can include the requirement that a parent pay for their child's secondary education as long as the court thinks the parent is financially secure.<sup>103</sup>

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92. *Id.* at 270.

93. *Id.*

94. *Id.* at 269-70.

95. *Id.* at 269.

96. *Hale*, 132 P.2d at 68.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 68-69.

102. *Id.* at 69.

103. *Id.*

The *Hale* court determined that there was an overriding public policy in California for all citizens to receive a college education.<sup>104</sup> According to the court, this policy was supported by the fact that many of the State's higher learning institutions were maintained at the public's expense.<sup>105</sup> This policy was affirmed seven years later in *Rawley v. Rawley*,<sup>106</sup> when the court again addressed the issue of whether a parent can be compelled to pay for their child's college education.<sup>107</sup> While the father in *Rawley* conceded that he was required to pay for maintenance and support of his child, he argued that he was under no legal duty to pay for college expenses.<sup>108</sup> In affirming *Hale*, the *Rawley* court said that as long as trial courts do not abuse their discretion, they will continue to have the ability to order a parent to pay for their child's higher education.<sup>109</sup> However, the *Rawley* court did acknowledge the California trial court's authority to modify any support order should the circumstances of either party change.<sup>110</sup>

Another state that allows courts to issue support orders requiring divorced parents to pay for post-secondary education expenses is Illinois.<sup>111</sup> In Illinois, courts are governed by the Marriage and Dissolution of Marriage Act ("the Act"), which states that "[a] court may . . . make [a] provision for the educational expenses of the child or children of the parties, whether of minor or majority age."<sup>112</sup> According to the Act, educational expenses include, among other things, room, board, dues, tuition, transportation, books, fees, registration and application costs, medical expenses, and living expenses during the school year and recess.<sup>113</sup>

The Act was relied upon in *In re Marriage of Sreenan*,<sup>114</sup> where a father appealed the trial court's ruling ordering him to pay the college education expenses of two of his children.<sup>115</sup> The father argued that because the relationship between himself and his children had deteriorated, he should not have to make any post-secondary education support payments.<sup>116</sup> The court rejected the father's argument and upheld the order requiring him to contribute to his children's educational expenses because the Act's support

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104. *Id.*

105. *Id.*

106. 210 P.2d 891 (Cal. App. 2d Dist. 1949).

107. *Id.* at 892.

108. *Id.* at 893.

109. *Id.*

110. *Id.*

111. 750 Ill. Comp. Stat. § 513(a)(2).

112. *Id.*

113. *Id.*

114. 402 N.E.2d 348 (Ill. App. 2d Dist. 1980).

115. *Id.* at 349.

116. *Id.* at 350.

obligation was not conditioned on whether a parent had a good, on-going relationship with their child.<sup>117</sup>

The “educational expenses” clause of the Act was challenged six years later in *In re Pearson*,<sup>118</sup> when a divorced father challenged the trial court’s support order that included a provision providing for the college education of his youngest child.<sup>119</sup> The father argued that the trial court erred by imposing upon him a support order that prevented him from paying his monthly expenses.<sup>120</sup> In deciding this matter, the Court looked to the Act, which outlined the relevant factors a court should consider before making an award determination.<sup>121</sup>

The guidelines set forth in the Act include: the financial resources of both parents; the standard of living the child would have enjoyed had the parties remained married; the financial resources of the child; and the child’s academic performance.<sup>122</sup> After considering all of the listed factors, the *Pearson* Court ruled that the Act’s “educational expense” clause does not mandate that divorced parents must pay for a child’s post-secondary education in all cases; the clause just exists so that courts *may* order a party to make education-related support payments.<sup>123</sup> The Court held that the legislature, in passing the Act, intended for the trial court to have broad discretion when ordering a parent to contribute to their child’s college education.<sup>124</sup>

A recent Illinois case outlined exactly how much discretion a trial court is afforded in ordering divorced parents to pay for educational expenses. In *In re Cianchetti*,<sup>125</sup> the court ordered the father to pay half of the total cost of college expenses for each of his two daughters.<sup>126</sup> The father, in challenging the trial court’s order, argued that he was not in a financial position to pay the ordered college costs, and, in addition, that a person should not be required to pay for educational expenses that he or she cannot afford.<sup>127</sup>

In ruling on the father’s arguments, the court reiterated the Illinois rule that trial court decisions to award educational expenses can only be overturned if the decisions are against the “manifest weight of the evidence.”<sup>128</sup>

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117. *Id.* at 352.

118. 490 N.E.2d 1274 (Ill. 1986).

119. *Id.* at 1275.

120. *Id.* at 1277.

121. *Id.* at 1275.

122. 750 Ill. Comp. Stat. 5/513(b) (2005); *In re Pearson*, 490 N.E.2d at 1275.

123. 490 N.E.2d at 1277.

124. *Id.*

125. 815 N.E.2d 17 (Ill. App. 3d Dist. 2004).

126. *Id.* at 18.

127. *Id.* at 19.

128. *Id.*

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According to the court, a ruling against the manifest weight of the evidence occurs when the opposite conclusion was clearly evident, or when a ruling was unreasonable, arbitrary, or not based on the evidence.<sup>129</sup> Adhering to the broad discretion given to the trial court, the *Cianchetti* court upheld the support order and found no abuse of discretion existed because, despite the added expense to the father's budget, the court found he was able to make similar payments in the past for high school expenses and child support.<sup>130</sup>

Similar to the Illinois Marriage and Dissolution of Marriage Act, New York has codified a rule outlining payment of educational expenses by a divorced parent.<sup>131</sup> In New York, a trial court, taking into account all of the facts and circumstances of the parties as well as the best interests of the child, may include educational expenses for post-secondary education in a basic child support order between divorced parents.<sup>132</sup> The statute also allows trial courts to determine the manner in which the non-custodial parent pays the required educational expenses, including direct payment to the educational provider.<sup>133</sup>

Prior to the enactment of this statutory provision, New York trial courts could only order a divorced parent to pay educational expenses if "special circumstances" existed.<sup>134</sup> In *Kaplan v. Wallshein*,<sup>135</sup> the court ruled that absent special circumstances or a voluntary agreement, a court could not order divorced parents to pay for college education expenses of their children.<sup>136</sup> In determining whether special circumstances existed, the court looked to three factors: the educational background of the parent; the child's academic ability; and the parent's financial ability to provide for the educational expenses.<sup>137</sup> Only when all of these factors are met, a trial court can require a divorced parent to provide the necessary expenses.<sup>138</sup>

However, once the New York legislature passed the educational expenses provision, the special circumstances requirement New York courts had previously relied upon no longer applied to divorced parents.<sup>139</sup> In *Manno v. Manno*,<sup>140</sup> the court affirmed the new statutory provision, holding that a court may properly direct a parent to contribute to a child's col-

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129. *Id.*

130. *Id.* at 21-22.

131. N.Y. Dom. Rel. Law § 240(1-b)(c)(7).

132. *Id.*

133. *Id.*

134. *See Kaplan v. Wallshein*, 57 A.D.2d 828, 829 (N.Y. App. Div. 2nd Dept. 1977).

135. 57 A.D.2d 828.

136. *See id.* at 829.

137. *See id.*

138. *See id.*

139. *Manno v. Manno*, 196 A.D.2d 488, 491 (N.Y. App. Div. 2d Dept. 1993).

140. 196 A.D.2d 488.

lege education, even in the absence of special circumstances.<sup>141</sup> The *Manno* court narrowed the scope of the new law by warning trial courts not to “imprudently exercise” their discretion in ordering college education payments.<sup>142</sup>

The *Manno* court also set forth factors that a trial court must consider before ordering educational expenses.<sup>143</sup> These factors include: the circumstances of the case; the circumstances of the respective parties; the best interests of the children; and the requirements of justice.<sup>144</sup> The court resolved *Manno* by holding that the father should not have been ordered to pay for his child’s college education expenses because the support order was too burdensome since half of the man’s take-home pay was deducted.<sup>145</sup> In reaching this conclusion, the *Manno* court followed the newly enacted statute as well as the court-imposed educational expense factors.<sup>146</sup>

The law in New Jersey regarding child support and educational expenses differs from those in Illinois and New York because New Jersey does not have a codified rule permitting trial courts to include such expenses in support orders. As a result, the New Jersey Supreme Court has given trial courts the discretion to include post-secondary education expenses when issuing support orders to divorcees.<sup>147</sup> For example, in *Khalaf v. Khalaf*,<sup>148</sup> the Court, deciding the proper support that the father should pay to his ex-wife and son, determined that college expenses can be included as part of a child support order.<sup>149</sup> *Khalaf* presented the unique situation of parents who separated while paying for their son’s college education.<sup>150</sup> After the parties separated, the father refused to continue paying his son’s college expenses.<sup>151</sup>

In deciding *Khalaf*, the Court assumed that had it not been for the separation, the son’s tuition and expenses would have continued to be provided by his parents.<sup>152</sup> While recognizing a trend towards higher education, the Court authorized mandatory education provisions in future child

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141. *Id.* at 491.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* at 492.

146. *Id.*

147. *Khalaf v. Khalaf*, 275 A.2d 132 (N.J. 1971).

148. *Id.*

149. *Id.* at 136-37.

150. *Id.* at 136.

151. *Id.*

152. *Id.*

support orders as long as the child showed a scholastic aptitude and the parents were able to afford the added expense.<sup>153</sup>

Five years after *Khalaf* was decided, the New Jersey Supreme Court, in *Newburgh v. Arrigo*,<sup>154</sup> expanded the scope of parental responsibility by including the duty to pay for a child's college and post-graduate educations.<sup>155</sup> The *Newburgh* Court viewed education as a flexible concept that varies depending on the circumstances.<sup>156</sup> Consequently, the Court stated that the influx of a wide variety of educational institutions meant that post-secondary education was available to anyone who wished to attend.<sup>157</sup> As a result of this changing atmosphere, the Court came to the conclusion that financially capable parents should be required to contribute to their children's higher education.<sup>158</sup>

In establishing this new requirement, the Court listed twelve relevant factors that should be considered when making an education expense order including: whether the parent would have contributed towards the cost of the education; the amount of contribution sought by the child; the ability of the parent to pay the requested cost; the financial resources of the child; and the child's relationship to the paying parent.<sup>159</sup> The *Newburgh* decision provides the most comprehensive set of factors a court should consider when deciding whether to order parents to pay child support in the form of post-secondary education expenses.

Maryland is another state that allows spousal support orders to include college educations for couples' marital children.<sup>160</sup> In *Woody v.*

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153. *Id.* at 137.

154. 443 A.2d 1031 (N.J. 1982).

155. *Id.* at 1038.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* at 1038-39. The twelve factors mentioned by the court include:

(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.*

160. 265 A.2d 467 (Md. 1970).

*Woody*,<sup>161</sup> the Court stated that a college degree is a necessity if the child's station in life justifies a higher education.<sup>162</sup> As a result, the Court held that as long as a parent is financially able to provide support for a post-secondary education, fighting this responsibility is no longer an option for a parent in Maryland.<sup>163</sup>

Similarly, in Oregon, trial courts are permitted to "set aside, alter or modify . . . [a divorce] decree as may provide for . . . the nurture and/or education [of the parties' children]."<sup>164</sup> In upholding the law, the Court ignored the argument that a child who reaches the age of majority is not eligible to receive the benefits of post-secondary education expenses.<sup>165</sup> To support the Court's decision, the Court, quoting *Blackstone's Commentaries*, eloquently stated that "[t]he last duty of parents to their children is that of giving them an education suitable to their station in life; a duty pointed out by reason and by far the greatest importance of any."<sup>166</sup>

In coming out in favor of ordering financial support for higher education, the Court in *Jackman v. Short*<sup>167</sup> took the now antiquated view that a child of divorced parents is in greater need of the help that a college education can provide than a child living in a home with marital harmony.<sup>168</sup> To the Court's credit though, the Oregon Supreme Court foreshadowed future state court rulings when the Court looked at a parent's financial ability to pay the requested education expenses before issuing a support order to that effect.<sup>169</sup>

As the previous parts of this article have illustrated, there is a major divide among state courts and legislatures on the issue of ordering divorced parents to contribute to their child's post-secondary education. While many states have drafted statutes or developed their own set of factors or circumstances trial courts must look to before ordering parents to pay for their child's higher education costs, only two states, New Hampshire and Pennsylvania, have addressed whether ordering divorced parents to make "educational expense" payments violates that parent's equal protection rights.<sup>170</sup>

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161. *Id.* at 467.

162. *Id.* at 472.

163. *Id.*

164. *Jackman v. Short*, 109 P.2d 860, 865 (Or. 1941).

165. *Id.*

166. *Id.* at 866 (quoting William Blackstone, *Commentaries* vol. 1, 424).

167. 109 P.2d 860.

168. *Id.* at 872.

169. *Id.* at 872-73.

170. *LeClair*, 624 A.2d at 1355-57; *Curtis*, 666 A.2d at 268-70.

### III. THE EQUAL PROTECTION ARGUMENT

Equal protection analysis requires courts to review the right in question utilizing one of three tests set forth by the United States Supreme Court: (1) strict scrutiny;<sup>171</sup> (2) intermediate scrutiny;<sup>172</sup> or (3) rational basis review.<sup>173</sup> The standard applied to the right in question determines which party has the burden of proof in the case.<sup>174</sup> For example, if a law that discriminates based on race is challenged, the strict scrutiny standard requires the government to prove the law serves a compelling government interest, and to show that the law is narrowly tailored to fit the compelling interest.<sup>175</sup> The next level of equal protection analysis, intermediate scrutiny, requires the government to prove that the challenged law serves an important government interest that the law is substantially related to achieving those interests.<sup>176</sup> Under rational basis review, however, the lowest level of scrutiny under equal protection challenges, the challenged law merely needs to serve a legitimate government purpose in order to pass constitutional muster.<sup>177</sup> Rational basis review is the easiest equal protection standard for a law to survive because as long as there is some legitimate government purpose, the law can be over-inclusive or under-inclusive and still be rationally related to the stated government interest.<sup>178</sup>

#### A. *Equal Protection Arguments Supporting the New Hampshire Amendment*

When the New Hampshire legislature passed RSA § 458:17(XI-a) in January 2004, one of the law's stated purposes was to remove the discretion of superior court judges to order parents to pay for a child's post-secondary education.<sup>179</sup> However, the recent New Hampshire law does not mention the fact that mandatory post-secondary education payments vio-

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171. *E.g. Loving v. Va.*, 388 U.S. 1, 11-12 (1967) (holding race, as a suspect classification, warrants the most rigid scrutiny).

172. *E.g. Craig v. Boren*, 429 U.S. 190, 197-98 (1976) (holding that gender differences, while not as suspect as race, deserve a heightened level of scrutiny).

173. *E.g. City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442 (1985) (holding that mental retardation, because it is an immutable characteristic, deserves only rational basis review and not heightened scrutiny).

174. 16 C.J.S. *Constitutional Law* § 206 (2005).

175. *See e.g. id.* at 440.

176. *Craig*, 429 U.S. at 197 (gender discrimination case).

177. *See e.g. Cleburne*, 473 U.S. at 447 (classification involving individuals who were mentally retarded).

178. *See generally e.g. id.* at 442, 454 (one of many cases that find a legitimate purpose to a law that arguably includes too many people or not enough people when applied).

179. N.H. H. 299, 158th Gen. Ct., 2d Year.

late divorced parents' equal protection rights. This argument was made and addressed by the Pennsylvania Supreme Court in *Curtis*.<sup>180</sup>

*Curtis* was a divorced father who petitioned the Court to terminate his child support obligation for his two oldest children, both of whom were attending college.<sup>181</sup> In his petition, *Curtis* challenged the Pennsylvania statute, which permitted trial courts to issue orders requiring divorced parents to pay for their children's higher education.<sup>182</sup> As a result, *Curtis* made a constitutional challenge arguing that the Pennsylvania statute was unconstitutional because it violated the Equal Protection Clause of the Fourteenth Amendment.<sup>183</sup> According to the *Curtis* Court, the essence of equal protection is to treat persons in "like circumstances" similarly, but equal protection does not require that all persons under all circumstances enjoy identical protection under the law.<sup>184</sup> States are allowed to classify different groups, and thereby treat them unequally, as long as the classifications are not arbitrary, and the classifications bear a reasonable relationship to the stated purpose of the legislation.<sup>185</sup>

The *Curtis* Court, in deciding this post-secondary education issue, applied the rational basis test because the statute, in the Court's opinion, did not implicate a suspect class or infringe upon any fundamental right.<sup>186</sup> Further, the Court stated that an individual right to post-secondary education is not provided by the United States Constitution or the Pennsylvania Constitution.<sup>187</sup> The Court found the Pennsylvania legislature's purpose in passing the statute was to require "some parental financial assistance for a higher education for children of parents who are . . . divorced."<sup>188</sup> Although the Court recognized that some young adults do in fact need financial assistance to attend higher education institutions, the Court took issue with the state "selectively . . . compel[ling]" only parents from non-intact families to provide such assistance.<sup>189</sup> As a result, the *Curtis* Court held that there was no rational basis for the State to require divorced parents to financially provide for their adult children's post-secondary education.<sup>190</sup>

To support the Court's decision, the Court discussed a conceivable hypothetical situation that demonstrated the arbitrariness of the Pennsylvania

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180. 666 A.2d at 267.

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* at 268.

186. *Id.* at 268-69.

187. *Id.* at 268.

188. *Id.* at 269.

189. *Id.*

190. *Id.* at 269-70.

statute.<sup>191</sup> Under the statute, which the Court ultimately invalidated, the Court found it possible for a divorced parent to have two children, each from a separate marriage, with one child residing with the parent and one child not residing with the parent.<sup>192</sup> In this situation, the Court stated that the statute would require the parent to provide post-secondary education support for the second child, but would not require the parent to provide support for the first child. The Court then shifted the equal protection focus from the divorced parent to the young adult in need of education assistance.<sup>193</sup> As a result, the Court ruled that the classification detailed in the hypothetical treated similarly situated young adults in need of higher education assistance unequally.<sup>194</sup> Since no rational reason existed to treat children of divorce differently than children of marriage, the Pennsylvania Supreme Court overturned the discriminatory statute.<sup>195</sup>

#### B. *Equal Protection Arguments Contravening the New Hampshire Amendment*

Before the Pennsylvania Supreme Court's ruling in *Curtis*, and before the New Hampshire legislature amended RSA § 458:17 by removing the trial court's power to order divorced parents to contribute to their adult child's education, the law in New Hampshire was controlled by *LeClair*, which addressed the equal protection argument as it related to divorced parents.<sup>196</sup>

In *LeClair*, the Court ordered the plaintiff father, Ronald LeClair, to contribute to the costs of his adult son's college education.<sup>197</sup> In disagreeing with the lower court's order, LeClair appealed the decision arguing that the New Hampshire statute violated his, and all divorced parents', equal protection rights.<sup>198</sup> LeClair argued that ordering divorced parents to pay for an adult child's college expenses is a violation of the State and Federal Constitutions because the courts do not have the same power to issue a similar order to a married parent.<sup>199</sup> While it was unclear whether the plaintiff properly preserved the equal protection issue for appeal, the Court

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191. *Id.* at 270

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. 624 A.2d at 1355-58.

197. *Id.* at 1352.

198. *Id.* at 1355. Note that the New Hampshire statute in question when *LeClair* was decided was N.H. Rev. Stat. Ann. § 458:17(I).

199. *Id.* (The plaintiff cited Part I, Article 2 of the New Hampshire Constitution and the Fourteenth Amendment of the United States Constitution as the provisions violated by N.H. Rev. Stat. Ann. § 458:17 (I).).

decided to address the issue anyway “because similar claims may [arise] in the future.”<sup>200</sup>

In deciding the equal protection issue, the Court relied on the New Hampshire State Constitution because the Federal Constitution did not offer greater protection under the equal protection provisions.<sup>201</sup> The Court, before deciding which level of scrutiny to apply to this issue in New Hampshire, asked whether the state action in question treated similarly situated persons differently.<sup>202</sup> The Court ruled that under the New Hampshire statute, married parents and divorced parents were similarly situated.<sup>203</sup> Additionally, the Court stated that under New Hampshire law, equal protection does not forbid group classifications, but requires courts to examine the individual rights affected as well as the purpose and scope of the created classifications.<sup>204</sup>

The *LeClair* Court first considered the “strict scrutiny” test, which puts the onus on the government to show a compelling state interest to determine the classification’s validity.<sup>205</sup> In order for strict scrutiny to apply in New Hampshire, the suspect classification must be based on “race, creed, color, gender, national origin, or legitimacy” or affect a fundamental right.<sup>206</sup> The Court, relying on precedent, stated that decisions regarding custody and the rearing of minor children involve fundamental rights.<sup>207</sup>

The *LeClair* Court next addressed the “rational basis” test, where state legislation is presumed to be valid and will be upheld if the classification drawn by the statute is rationally related to a legitimate state interest.<sup>208</sup> According to New Hampshire precedent, if no suspect class or fundamental or substantive is right involved, rational basis review is applied, especially when economic classifications are at issue.<sup>209</sup> The *LeClair* Court then cited *Couture v. Couture*,<sup>210</sup> where the New Hampshire Supreme Court held that the classification between divorced parents with minor children and divorced adults without minor children in an alimony scheme should be addressed under the rational basis test.<sup>211</sup>

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200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.* at 1355-56 (citing *State v. LaPorte*, 587 A.2d 1237, 1239 (N.H. 1991) and *Merrill v. City of Manchester*, 466 A.2d 923, 927 (N.H. 1983)).

207. *Id.* at 1356 (citing *Provencal v. Provencal*, 451 A.2d 374, 377 (N.H. 1982)).

208. *Id.*

209. *Id.* (quoting *Petition of State Employees' Assn. v. Goulette*, 529 A.2d 968, 971 (1987)).

210. 471 A.2d 1191 (N.H. 1984).

211. *Leclair*, 624 A.2d at 1356 (citing *Couture*, 471 A.2d at 1192).

After outlining both equal protection options, the *LeClair* Court, in analogizing the case to *Couture*, chose to apply rational basis review of the New Hampshire statute because LeClair's argument rested primarily on an economic issue.<sup>212</sup> However, the Court did not find any fundamental or important substantive right under the New Hampshire Constitution infringed by the statute.<sup>213</sup> The Court found that the statute's objective was to ensure that children of divorced parents would not be unjustly deprived of opportunities they otherwise would have received had their parents not divorced.<sup>214</sup> Based on the statute's policy, the Court held that New Hampshire had a legitimate state interest in providing educational opportunities to children whose families were no longer intact.<sup>215</sup>

The *LeClair* Court's ruling was based on the long-standing power of New Hampshire superior courts' judges to oversee financial arrangements of divorced families, including support decisions.<sup>216</sup> The Court distinguished between intact families, where financial support of the family unit is the unquestioned responsibility of an intact family, and divorced families, where conflicts and disputes often necessitate the court's role in making financial orders.<sup>217</sup> This distinction, in the Court's eyes, supported the legislature's decision to require divorced parents to contribute to their adult child's post-secondary education because children of divorce may be less likely than children of intact families to receive financial support from both of their parents.<sup>218</sup>

Two years after *LeClair* was decided, *Curtis* addressed the *LeClair* Court's decision to uphold the New Hampshire statute based on a legitimate state interest.<sup>219</sup> The *Curtis* Court did not follow the rationale in *LeClair*, in part, because the Court disagreed with the classification the *LeClair* Court applied to the post-secondary education issue.<sup>220</sup> In the eyes of the *Curtis* Court, the issue was not whether the classification treated married parents and divorced parents differently, but whether similarly situated young adults in need of financial assistance may be treated differently.<sup>221</sup> By applying the same rational basis test as the *LeClair* Court applied, *Curtis* struck down the Pennsylvania law permitting trial courts to issue orders

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212. *Id.*

213. *Id.* at 1356-57.

214. *Id.* at 1357.

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. 666 A.2d at 270.

220. *Id.*

221. *Id.*

requiring divorced parents to provide for their adult child's post-secondary education.<sup>222</sup>

The reason for the opposing ruling, according to the *Curtis* Court, was that certain young adults who needed financial assistance to attain a higher education, namely children of divorce, should not be the only children who have the legal means to overcome their financial difficulties (by going to court and getting a court order against their parent(s)).<sup>223</sup> The *Curtis* Court ruled that the Pennsylvania statute unconstitutionally violated the equal protection rights of young adults because those children whose parents were still married had no access to the same judicial involvement, which could grant them the financial assistance.<sup>224</sup> As a result, the *Curtis* Court held that "no rational reason [existed for why] those similarly situated with respect to needing funds for [post-secondary] education, should be treated unequally."<sup>225</sup>

#### IV. ANALYSIS: ADVOCATING IN FAVOR OF THE NEW HAMPSHIRE AMENDMENT

The New Hampshire law prohibiting judges from ordering divorced parents to pay for higher education costs, and thereby removing judicial discretion, is the model that all states, which permit judicial discretion when making these types of orders, should adopt. Not only do post-secondary education orders violate the equal protection rights of the divorced parents, but as *Curtis* pointed out, the equal protection rights of children from intact families is also violated.<sup>226</sup> The simplest solution is for all states to remove judicial discretion from the college decision when dealing with divorced families. Parents should be able to decide whether they are willing, and financially able, to pay for their children's college education without any outside influences.

One of the unresolved issues between the states is what exactly constitutes "educational expenses," and what judges can order parents to pay for. In New Hampshire, prior to the 2004 amendment, educational expenses were defined as "tuition, books, room, board, and other directly related fees."<sup>227</sup> However, in addition to the "educational expenses" outlined by the New Hampshire courts, Illinois permits judges to go further by allow-

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222. *Id.*

223. *Id.* at 269-70.

224. *Id.*

225. *Id.* at 270.

226. *Id.*

227. *In re Gilmore*, 803 A.2d at 604.

ing them to order parents to pay for college dues and fees, transportation expenses, registration and application costs, medical expenses, and living expenses incurred during the school year or during school recess.<sup>228</sup> If a child turned eighteen and decided against going to college, courts would have no power to order parents to make these types of financial contributions. But, since some states have determined that parents not only have a responsibility but an obligation to provide for their child's college education, those states have permitted courts to make educational support orders despite the fact that the orders clearly violate the equal protection rights of those parents.

Two additional problems remain: (1) what happens when parents cannot afford to make the court ordered education contribution while continuing to pay the monthly expenses they incur; and (2) what happens if the policy of an intact family provided that the children are solely responsible for paying their own way through college, but the parents subsequently divorce?

The first issue has been discussed in some state court opinions. In Illinois, an appeals court ignored a parent's request to remove an order requiring him to pay for his children's college education because the court found the trial court did not abuse the court's discretion in making the order.<sup>229</sup> The Illinois appeals court followed state policy and required the father to make post-secondary education payments rather than consider his situation and what the added expenses would do to his standard of living. In most states that permit courts to issue educational orders, the financial limitations of the parents are considered before an order is made.

In Texas, however, a parent's finances are never considered by the court because parents are only required to provide their children with the "necessities of life," which include food, clothing, shelter and medical attention.<sup>230</sup> The Texas format is much more sensible because it not only ensures children are adequately provided for, but it allows parents, and not courts, to determine whether they can afford to pay for college expenses. More importantly, however, the Texas law allows parents to decide whether they want to pay for those expenses. Since college educations are not considered fundamental rights in this country, a parent's desire and financial capability should be the overriding factors in determining whether to pay for their child's college expenses.

The second issue has only been addressed in New Jersey where courts are required to consider whether a parent *would have* contributed towards

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228. 750 Ill. Comp. Stat. 5/513(a)(2).

229. *In re Marriage of Cianchetti*, 815 N.E.2d at 22.

230. *Woodruff*, 487 S.W.2d at 793.

the cost of a child's college education.<sup>231</sup> Courts make the most egregious equal protection violations in these situations. Imagine a family where for the entirety of childhood, the child's parents encouraged the child to go to college, but always told the child that they would not provide any financial help, either for personal reasons or financial reasons. If this were the stated family policy and the child always knew it, why should a court be allowed to issue an order requiring one or both divorced parents to contribute to their child's college education just because they got divorced? This example demonstrates a clear violation of a person's equal protection rights since a court cannot step into an intact family and issue the same type of order. So while considering a parent's intent about paying for college prior to divorce is a step in the right direction, parents in similar situations should never be forced to pay for college expenses.

In addition to infringing the equal protection rights of parents who are divorced, states that allow judges to issue educational orders also violate the equal protection rights of children of intact families. Since post-secondary education is not a fundamental right, courts, when issuing orders for children of divorce, infringe on the rights of children from intact families since they have no remedy if their parents are unwilling to pay for college. As the *Curtis* Court points out, there is no rational reason why similarly situated young adults who are in need of educational funds should be denied them just because their parents have stayed together.<sup>232</sup> As a result, states that allow courts to issue educational orders are actually punishing children whose parents cannot afford to pay for their college expenses, for whatever reason, because the children's parents remained married. Therefore, states, like California, that have a policy for all citizens to receive college educations are indirectly rewarding divorce by not permitting all children to have access to the courts should their parents decide not to pay for post-secondary education expenses.

## V. CONCLUSION

Given all of the potential problems with courts issuing educational orders, not to mention the different standards in states across the country, all states should follow New Hampshire's lead and pass laws removing judicial discretion from all post-secondary education issues. The result would be that parents would only have to pay for college if they volunteered to do so. Following New Hampshire would not only prevent future litigation in

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

232. 666 A.2d at 270.

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this area, but further problems between children receiving the funds and their resentful parents could be avoided since parents would not be forced to pay expenses they either could not afford or would never have volunteered to pay in the first place. In addition, children across the country would be treated exactly the same since the remedies currently available only to children of divorce would be eliminated. If the goal of all state legal systems is to treat all people the same, regardless of where they live or what their marital status is, only one option exists: for all states to remove judicial discretion and give parents the option of deciding whether or not to pay for their child's college expenses.