MARRIAGE OF PETERSEN – ILLINOIS SUPREME COURT HOLDS COLLEGE EXPENSE PETITION A MODIFICATION PETITION

A happily married couple has no statutorily imposed legal obligation to pay college tuition and expenses for their children. In contrast, a divorced couple may have an obligation to make a contribution towards tuition and expenses for college age children under 750 ILCS 5/513. The factors of Section 513 that the court must consider when making a determination as to an award of contribution by the divorced parents for college expenses of the children include the following:

1. The financial resources of both parents;
2. The standard of living the child would have enjoyed had the marriage not been resolved;
3. The financial resources of the child; and
4. The child's academic performance.

What better time to assign a dollar amount or a percentage responsibility to each parent than at the time of the entry of the divorce judgment? At the time of entry of the divorce judgment, the parties should have completed financial discovery, or at a minimum, have exchanged the Local Rule 11.02 Financial Affidavit and supporting documentation including recent paystubs and tax returns. This information is useful in assigning a dollar amount or percentage responsibility for each spouse to pay towards college. However, often college expenses are "reserved" in the judgment when more specific obligations should have been included.

The danger of entering a divorce decree and simply "reserving" each parent's responsibility for college expenses is illustrated in the 2011 Illinois Supreme Court opinion, Marriage of Petersen, 2011 IL 110984. In the Petersen case, the parties were married in 1983 and divorced in 1999. At the time of the divorce, they had two high school children and one grade school age child: Gregory (age fifteen), Ian, (age fourteen) and Ellis (age ten). The decree simply "reserved" each party's responsibility for college education.

Gregory attended Cornell from 2002 to 2006. Ian attended Wake Forest from 2004 to 2005. In 2005, he transferred to the University of Texas.

Mother originally paid the fees for Gregory and Ian. Mother petitioned for contribution by father to these college expenses in 2007, eight years after the divorce. At that time, Gregory had graduated, Ian was in the middle of his matriculation at the University of Texas, and the youngest, Ellis, was admitted to California Polytechnic State University starting in 2007.

At the trial court level, the court ordered father to pay 75% and mother 25% of the expenses which included father having to reimburse mother for her expenses already paid

to Cornell, Wake Forest, and the University of Texas. This resulted in father owing mother $220,260.00 for past college expenses.

Father appealed and argued that there was no basis for this retroactive modification of the judgment because mother's request for college expenses was essentially seeking a modification of the judgment under 750 ILCS 510.

When the case made it to the Supreme Court, the Court framed the issue such that the real question was whether the trial court "modified" the dissolution decree as that terms is used in 750 ILCS 510. The original decree "reserved" the issue of college educational expenses. Looking at Webster's Dictionary and Black's Dictionary, the Supreme Court held that to "modify" conveys the notion of change or alteration. Further, 750 ILCS 5/510, the modification statute under the Illinois Marriage and Dissolution of Marriage Act, states:

> Any judgment respecting maintenance or support may be modified only as to installments accruing subsequent to due notice by the party seeking the change.

The Supreme Court held that the change from college expenses being "reserved" as set forth in the original decree in 1999 to a percentage responsibility for each parent (75% father and 25% mother) as was accomplished at the trial court level constituted a modification and, therefore, the modification could only be retroactive to the date of filing of the wife's petition. Thus the wife was "out of luck" with respect to her request for retroactive relief for reimbursement for college expenses she paid from 2002 until the filing of her petition in 2007. The Supreme Court held, the trial court could only order retroactive relief from the date mother filed her petition.

But the mother was not entirely without recourse. The Supreme Court also reversed the 75% father, 25% mother percentage obligations and remanded back to the trial court to refigure the percentages. The Supreme Court held that 750 ILCS 5/513 requires the court to consider the financial resources of both parents. In making that consideration, the trial court should consider that potentially mother had already depleted her resources by solely paying for Gregory's four years of college expenses and Ian's first three years. The Supreme Court suggested to the trial court that they could assign a higher percentage than 75% to the father taking into account the substantial payments mother already made.

The moral to the story is marital settlement agreements should include something other than "reserved" for college expenses particularly when the children are nearing college age. By simply reserving college, and kicking the can down the road, it almost forces parties to go back to court and incur more fees when they may not have had to do so had there been a percentage obligation already assigned at the time of divorce. Circumstances can change post divorce to justify a later modification. A percentage responsibility is a better drafted judgment than a "reservation" of parental responsibility in light of the Petersen case.