***PETERSEN* AND BEYOND - CASE LAW SUMMARY REGARDING POST-HIGH SCHOOL EDUCATIONAL EXPENSES**

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Post-High School Educational Expense Cases Post-*Petersen*:

The 2016 amendments to Illinois law essentially codify the *Petersen* case. Thus, the 2016 amendments provide in part, "(k) The establishment of an obligation to pay under this Section is retroactive only to the date of filing a petition. The right to enforce a prior obligation to pay may be enforced either before or after the obligation is incurred." But the previous case law following *Petersen* remains critical because the question remains of what is enforcement versus what is establishment. And Illinois case law was well as the statutory amendments have focused on what sorts of grades are presumptively required for a child to reflect an aptitude for the parents to be

obligation to contribute to post-high school educational expenses.

Timeliness of Petition – Beyond *Petersen*

***Petersen (2011)* -- Illinois Supreme Court: General Reservation Clause for Post-high School Educational Expenses Does Not Allow Obligation under ¶513 to Predate Filing of Petition**
IRMO Petersen, 2011 IL 110984 (Sept. 22, 2011)
Petersen is an important decision because as of January 1, 2016, it will essentially be codified into statutory law. The critical issue will be modification versus enforcement and this was the rule that Petersen essentially established regarding whether obligations under ¶513 are retroactive. In *Petersen*, the 1999 divorce judgment provided a standard reservation of jurisdiction clause regarding post-high school educational expenses per §513 of the IMDMA.

> The Court expressly reserves the issue of each party's obligation to contribute to the college or other education expenses of the parties' children pursuant to Section 513 of the [Illinois Marriage and Dissolution of Marriage Act].

In 2007, the ex-wife filed her petition requesting an allocation of college expenses for the children. The oldest child was a graduate of Cornell University in 2006 – attending school there from 2002. The middle child was 21 years old at the time of the hearing and had attended Wake Forest University for his first year of college (2004-05) and then transferred to the University of Texas. The youngest child was 18 years old and was in his first year of college at California Polytechnic State University. The ex-wife had not spoken to the ex-husband since 2002. Whether or not the ex-wife sent her ex-husband a letter in 2002 listing the expenses that the oldest son would incur at Cornell without a response was a contested fact. The ex-wife financed the children's college educations via loans, etc. The oldest son had already received his B.A by the time the ex-wife's petition was filed.

The parties' incomes were:

	Husband	**Wife**
2002	$94,000	
2003	$180,687	$30,170
2004	$181,939	$34,955
2005	$220,314	$35,160
2006	$294,563	$40,268

The trial court ordered the ex-husband to pay 75% of the total college expenses for all three children – **past**, present and future. Ultimately, the trial court determined the amount due from the ex-husband for past expenses was $**227,260.** The ex-husband appealed urging either that the trial court did not have jurisdiction to require him to pay college expenses prior to the filing of the ex-wife's petition.

The appellate court noted that §510(a) of the IMDMA provides in part, "...[T]he provisions of any judgment respecting maintenance or *support* may be modified only as to installments accruing subsequent to due notice by the moving party of the filing of the motion for modification."

The Illinois Supreme Court first made it clear that essentially the obligation for post-high school educational expenses falls under the general rubric of child support. The Court stated, ""there was no merit to [the former wife's] argument that college expenses do not constitute 'child support' and that, as a consequence, section 510 is inapplicable." The Supreme Court then examined whether the former wife was seeking to *modify* the original divorce decree. This is exactly the test under the amended Illinois legislation as of January 1, 2016 – modification versus enforcement.

The court looked to the definition of "modify" and ruled that the former wife *was* seeking to modify the decree – impose an obligation where no specific obligation existed before. The Court then reviewed case law and stated:

> These cases establish that Illinois decisional law has since 1986 consistently regarded the *actions pursuant to reservation clauses to be modifications* under Section 510 subject to the prohibition of retroactive support.

The Supreme court noted that on remand the degree to which the former wife had depleted her financial resources to pay for college could be a consideration in apportioning expenses from the date she filed her petition forward.

Practice Tip

The key language in *Petersen* was the reservation clause in the case. It had said:

> The Court expressly reserves the issue of each party's obligation to contribute to the college or other education expenses of the parties' children pursuant to Section 513 of the [Illinois Marriage and Dissolution of Marriage Act].

So, the practice tip in light of *Petersen*, its progeny and the 2016 amendments is to address the parameters of an obligation within the MSA to make certain there is not merely a reservation or to warn the client following the end of the case of the need to file a petition in time any time the issue is reserved. And in many cases one may be in the grey area as to whether the actual clause is merely a general reservation or whether what is sought is enforcement. Accordingly, we will look at the case law following *Petersen* since it remains good law.

Retroactive Obligation Allowed

***Donnelly* – Retroactive Obligation Allowed – *Petersen* Only Applies Where Facts are Analogous.**
IRMO Donnelly, 2015 IL App (1st) 142619

The Illinois Appellate Court has recently issued an important decision clarifying the ruling in *Petersen*. In *Donnelly*, the appellate court held that *Petersen's* limiting rule applies only in instances which are factually analogous to that case, i.e., where there is only a reference to the reservation of the issue of payment of college expenses in the dissolution decree, and the parties have not included terms regarding payment of college expenses in a MSA incorporated into the judgment.

In *Donnelly*, the Appellate Court was presented with the following question, which was certified from the circuit court:

> Does the holding in *Petersen*, 2011 IL 110984, preclude the court from ordering a parent to reimburse the other parent for college expenses allegedly paid prior to the date the petition is filed, whenever the parties' Judgment for Dissolution does not order a specific dollar amount or percentage to be paid, but leaves the amount to be determined at a later date?

The Appellate Court answered that it does not.

In *Donnelly*, the parties executed a marital settlement agreement *which contained a specific agreement that they would pay for their children's secondary education*, although no specific dollar amounts were stated. Instead, they agreed that "[t]he extent of the parties' obligation hereunder shall be based upon their then respective financial conditions." The MSA was thereafter incorporated into the dissolution judgment. The specific language of the agreement, as slightly paraphrased for the sake of simplicity, provided

> Pursuant to Section 513 of the Illinois Marriage and Dissolution of Marriage Act or any amendment thereto, the parties agree that they shall pay for a trade school, vocational school, college or university education for the children of the parties, which obligation is predicated upon the scholastic aptitude of each child. The extent of the parties' obligation hereunder shall be based upon their then respective financial conditions. Decisions affecting the education of the children, including the choice of the school to be attended, shall be made jointly by the parties and shall consider the expressed preference of the child in question, and neither party shall unreasonably withhold his or her consent to the expressed preference of the child in question. If the parties are unable to agree upon the school to be attended or upon any of the foregoing, then a court of competent jurisdiction shall make the determination upon proper notice and petition.

The parties' agreement to pay for these expenses as set forth in their MSA was the focus in the appellate court's analysis. *Donnelly* held that this language "not only expressly imposed the obligation to pay on both parties, but also provided that any disagreement over the respective shares to be paid would be submitted to a court of competent jurisdiction upon proper notice and petition." Because the MSA established an express obligation by the parties that they would pay these educational expenses, the Court found this language distinguishable from the express judicial reservation of the issue of the parties' obligation in *Petersen*.

Therefore, unlike the mother in *Petersen* who was attempting to modify the parties' obligations, the Court held that when the mother in *Donnelley* petitioned for contribution, she was simply attempting to enforce the prior settlement agreement. As a result, the appellate court concluded that the rule established in *Petersen* did not preclude the trial court from ordering the father to reimburse the mother for college expenses she had already paid prior to the date that the petition was filed, even where the judgment did not order a specific dollar amount to be paid – instead leaving it open for a ruling at a later date.

Practice Tip

If there is a *specific agreement that each party will pay* for their children's secondary education and provides that "any disagreement over the respective shares to be paid would be submitted to a court of competent jurisdiction upon proper notice and *motion*," this should be sufficient for there to be enforcement only per Donnelly. I emphasize that this should be by motion rather than petition because of the technical difference between the two consistent with the provisions of the 2016 family law amendments.

***Koenig* (2012) – Where MSA Recites Responsibility to Contribute to College and Graduate School, Party Entitled to Retroactive Award Despite Argument that *Petersen* Controlled**

IRMO Koenig, 2012 IL App (2d) 110503

In *IRMO Koenig*, the appellate court choose to follow limited application of the seminal *Petersen* decision, following the reasoning of the *Spircoff* third party beneficiary decision. And recall that as of January 1, 2016, the third party beneficiary case law will no longer be followed.

In *Koenig* the MSA had provided that the parties would be responsible for college, and in fact, for graduate school. The MSA set forth the length of the potential obligation for both college and graduate school. But it did not set forth the percentage regarding each parent's responsibilities to pay for post-high school educational expenses. The language will be quoted from at length because part of the language was well drafted and consistent with some of the provisions that will be included in agreements more commonly followed January 1, 2016 (although few provide for graduate school as a potential court ordered obligation):

> "7.1 The Husband and Wife shall pay for university, college or post-graduate school education for Tiffany herein *based on their respective financial abilities and resources at said time*.
>
> 7.2 For purposes of this Article, the expenses of a university, college or post-graduate school education shall include, not by way of limitation, any and all charges for tuition, room, board or lodging, and other necessary and usual expenses and transportation expenses between the school and the child's home not to exceed Five (5) round-trips per school year.
>
> 7.3 The parties' obligation under this Article shall terminate upon the last to occur of the following:
>
> (a) The child's completion of a four year undergraduate or post-graduate degree.
>
> (b) The child's discontinuance of said educational pursuit. For purposes of this Article, a child shall be deemed to have discontinued said education pursuit when said child is no longer actively engaged in a course of study which leads to university, college or post-graduate diploma or degree.
>
> 7.4 All decisions affecting Tiffany's education, including the choice of university, or college shall be made jointly by the parties and shall consider the expressed preferences of Tiffany. Neither party shall unreasonably withhold his or her

consent to Tiffany's expressed preference.

7.5 That the parties' obligation to provide for the education of Tiffany set forth in this Article is conditioned upon the following:

(a) That the child has, at the time, the desire and aptitude for a university, college or post-graduate education;
(b) That said education is limited to five (5) consecutive years beginning not more than one year after graduation from high school for a college or university degree and a total of eleven (11) years for a post-graduate degree, except that the time shall be extended in the case of serious illness or other good cause shown;
(c) That to the extent [sic] the Husband and Wife are financially able to reasonably afford to pay for the educational expenses.

7.6 That the Wife shall control the use of Tiffany's monies in existence at the time of this Agreement, together with earnings or proceeds thereon, during her minority pursuant to the Illinois Uniform Transfer to Minors Act."

On this basis, the trial court found that *Petersen* controlled and denied any retroactive application. The appellate court reversed the trial court agreeing that the case was analogous to the *Spircoff* decision. Curiously, the appellate court noted that there was no reservation under Section 513. But it does not seem that this should control because clearly the percentage allocation was, in fact, reserved. The point was that the case did not involve a general reservation as in *Petersen*.

Modification of Post-High School Educational Expenses

***Saracco* (2014) – There Must be a Substantial Change in Circumstances to Modify and Here it Was Not Shown**
IRMO Saracco, 2014 IL App (3d) 130741 (November 2014)

One issue in this case is something that SB 57 had clarified in terms of restating what was essentially existing law: More specifically, SB 57 / PA 99-90 provides at Section (f):

> Child support of children as provided in Section 513 after the children attain majority, *** may be modified upon a showing of a substantial change in circumstances.

The divorce judgment reserved the issue of college contribution. A post-decree order regarding one of the parties' children provided that mother would be responsible for 60% of his college expenses and father would be responsible for 40% of college expenses. The father was disabled (with his income consisting of disability income totaling $35,000) and the mother was employed earning a gross income after paying child support of $68,960.

The appellate court first noted:

> We have held that the pertinent question in determining whether to grant a petition for modification of a provision for payment of college expenses is whether the

> moving party has shown a substantial change in circumstances since entry of the original provision. *In re Marriage of Loffredi*, 232 Ill. App. 3d 709, 714 (1992).

The former husband argued that there was not a showing of an existence of a substantial change. The appellate court agreed. The appellate court ruled that the trial court erred in terminating mother's required contribution toward son's college expenses where the trial court did not specifically find a substantial change in circumstances, and the evidence did not support a substantial change. The son was an average student who accepted all available types of financial assistance. Neither his strained relationship with his mother, nor his decision not to work during college (consistent throughout college career) alone supported the finding of a substantial change in circumstances. The appellate court rejected the argument that the disparity between the parties' incomes had substantially narrowed:

> "[E]ven assuming that petitioner only recently started receiving the additional $11,000, the disparity between the parties' income is still significant. Thus, we do not believe a increase in petitioner's income from $24,000 to $35,000 purportedly since the original contribution order constitutes a "substantial change in circumstances" in light of the fact that respondent's income is still almost double that of petitioner."

Enforcement

Aptitude / Grades

***Saracco* (2014) – Cumulative Grades at Lower 2.0 Range Not Substantial Change in Circumstances**
IRMO Saracco, 2014 IL App (3d) 130741 (November 2014)

Regarding the issue of the son's grades, the appellate court commented:

> Again, we hold the manifest weight of the evidence establishes that Dino's grades were "average." Moreover, we do not believe a cumulative GPA in the lower 2.0 range constitutes a "substantial change" for purposes of modification. Dino explained his grades are Bs and Cs. There is no evidence that Dino was an A student and suddenly changed to a C student. We also find it significant that according to respondent, Dino's grades have "come up a little bit."

And there was one other snippet of interest especially in light of P.A. 99-90 amendments.

> Specifically, Dino's cumulative GPA hovered around the lower 2.0 region. *During the first hearing, the trial court noted that "there are plenty of students out there who do not have 4.0 averages that do very well in life." We agree.* While we acknowledge Dino was asked to leave St. John's for a semester, we call attention to the fact that he enrolled in three classes at a community college where he received the grade of A in all three classes. We also note that respondent acknowledges that Dino's grades have gotten better; however, they are not at the level she believes appropriate and thus believes Dino should attend a different school. The question

> of what school Dino should be attending is moot. The trial court correctly pointed out that Dino has been attending St. John's for over three years.

But PA 99-90 (effective 1/1/16) provides:

> (g) The authority under this Section to make provision for educational expenses terminates when the child either: fails to maintain a cumulative "C" grade point average, except in the event of illness *or other good cause shown*; attains the age of 23; receives a baccalaureate degree; or marries.

So, this will change things. Will the provisions of P.A. 99-90 in this regard trump provisions already in settlement agreements that may have provided a lower flood for grades? Anticipate that the "fails to maintain a cumulative 'C' average except for good cause shown" will become the standard. One wonders what the impact would be on this case.

***Baumgartner* – 2014: Petition to Enforce Properly Denied when Aptitude Not Shown**
IRMO Baumgartner, 2014 IL App (1st) 120552 (March 31, 2014)
Recall the 2009 *Baumgartner* case ruling that a child being jailed was not a defense to a 513 petition. This, in a sense, is *Baumgartner II*. In this later *Baumgartner* case the appellate court affirmed the trial court's denial of the petition seeking enforcement of the provision for payment of their son's college expenses as well as affirmed the trial court's termination of that obligation. The appellate court ruled that the trial court correctly determined the son was emancipated and lacked the desire and ability to pursue a college education. Further, her request for an adjudication of indirect criminal contempt against respondent was properly dismissed in view of petitioner's failure to establish any court order that respondent violated.

The case has a good discussion regarding the college being in the nature of support and modifiable. At the time of the hearing the son was 23 years old. Pursuant to the amendments in effect as of January 1, 2016, turning age 23 is the presumptive date when post-high school educational support terminates.

The key portion of the decision regarding aptitude stated:

> Max's overall educational history from high school and through the junior colleges he attended did not indicate that he would be accepted to a four-year college or university. The evidence did not establish that Max had the ability to be accepted at a four-year college or university since he did not apply to any four-year institutions. In any event, Max's desire to further his education was not borne out by the evidence. While testifying that he wished to pursue the area of science, Max had not applied to any four-year institutions or identified the colleges or universities to which he intended to apply. While he was aware he needed to repeat the standardized academic tests, he had not taken them. Although Max was aware of the Florida plan, he never contacted Craig to find out how to use the plan, and he failed to respond to Craig's attempts to contact him regarding the Florida plan. While he testified that he was attempting to get his grade-point average up, he acknowledged that he had not investigated whether he could receive credit for any of the courses which he had previously taken.

Child Support or College:

***Razzano* – Child Support or college? Where MSA provided that Support Terminated at Age 22 So Long as Child Attending College and Parties Agreed that Support Provision was in Lieu of Obligation Under Section 513, Modification Proceeding Determined under Section 505 and Not 513**

IRMO Razzano, 2012 IL App (3d) 110608 (November 14, 2012)

So, where to place this case – as a child support modification or a post-high school educational expense case? *IRMO Razzano* involves another case in which the parties agreed to something that is quite unusual. Recent cases that similarly have enforced unusual arrangements, including the case requiring arbitration over certain limited parenting disputes *In re Marriage of Coulter* Illinois Supreme Court Decision where the court approved of the parties essentially pre-agreeing to removal.

In *Razzano*, the parties agreed that the father would pay child support until emancipation as defined in the agreement. In relevant part the emancipation provision included, "the child's reaching age twenty-two (22), so long as the child is attending college full-time, or completing college, or terminating full-time attendance at college, whichever shall first occur." The parties initially included a statement within their agreement that "the parties have made no agreement regarding the expenses of education beyond primary education." However, they crossed that provision out and replaced it with the handwritten provision: "the parties have agreed that the support provision below is in lieu of any other obligation by [the father] for education support."

The appellate court stated that the handwritten provision reflected the intent to satisfy post-high school education support in the context of child support payments thereby excluding Section 513 from consideration. The appellate court then cited *Gitlin on Divorce* and a variety of cases holding that parties can "contract out" of an obligation under Section 513. The court commented that even though Brenda's attorney at the modification hearing stated that to the best of his memory he believed the agreement had nothing to do with post-high school educational expenses, that belief did not change the impact of what the majority considered to be the unambiguous statement in the MSA itself. Accordingly, the appellate court held that the trial court did not err when it used the guidelines under Section 505 to modify the father's child support obligation rather than apply Section 513(a)(2) regarding post-high school educational expenses.

The partially dissenting opinion urged that the underlying marital settlement agreement was not clear. It urged that the cases cited by the majority were distinguishable because in each the father had previously agreed to pay educational expenses. The dissent then urged that the case is more analogous to the *In re Marriage of Petersen* decision. It urged that educational expenses are a form of support unless the trial court may also modify an award of educational expenses. It then urged that modification needed to be made under Section 513 and not Section 505. So the dissent urged that where a party seeks to impose new obligations, Section 505 is superseded by Section 513. Accordingly, the dissent urged that since the child had attained the age of majority, child support needed to turn to Section 513 to decide whether to award support to the non-minor child. It urged that Section 505 applied only to children under the age of 18 or under the age of 19 while still in high school. In summary, the dissent agreed with the majority that the trial court had the authority to modify the existing child support ordered to cover the mother's increased medical expenses because the parties defined the emancipation event in their separation agreement beyond

the time the children reached their majority. However, it urged that the trial court abused its discretion in not calculating the obligation under Section 513 of the Act.

Finally, consider Marriage of Chee as a significant post-Petersen case.

Quotes from *Chee* as the factual background stated:

> Nelia first petitioned the circuit court on December 4, 2008, when she was 54 years old, for dissolution of her 24-year marriage to Samuel, who was then 52. Samuel responded, however, that he was never legally married to Nelia, because two months before their wedding ceremony in Los Angeles, California, on October 29, 1984, he married Merlinda C. Casugay (Chee) in Malolos City, Philippines; that he was still married to Merlinda and residing with her in Pomona, California; and that his bigamous marriage should be declared null and void. Section 212 of the Marriage Act prohibits marriage prior to the dissolution of an earlier marriage of one of the parties. 750 ILCS 5/212(a)(1) (West 2008). According to section 301, a court shall enter a judgment declaring the invalidity of any marriage which is prohibited. 750 ILCS 5/301 (West 2008). Section 305 provides that a person who has gone through a marriage ceremony and cohabited with another to whom he is not legally married in the good-faith belief that he was married to that person is a putative spouse with rights of a legal spouse, such as maintenance. 750 ILCS 5/305 (West 2008). He acknowledged that while he and Nelia were purportedly married to each other, they purchased a condominium

Regarding the ultimate issue the appellate court stated:

> We also disagree with Samuel's contention that *Petersen* supports the trial judge's dismissal of Nelia's petition. *Petersen*, 403 Ill. App. 3d 839, 932 N.E.2d 1184. Samuel's application of this case is an indirect argument that the order entered on May 5, 2010, regarding Nelia's request for summary judgment was a final, appealable order which concluded the litigation. [Discussion of *Petersen* through to the appellate decision omitted.]
>
> If *Petersen* were controlling here, Samuel would not be legally liable for his children's college expenses because Nelia's petition was filed after a final judgment. In our opinion, however, the May order regarding Nelia's motion for summary judgment was not a final order because it did not resolve all the issues between the parties. *In re Marriage of Leopando*, 96 Ill. 2d 114, 449 N.E.2d 137 (1983) (until all ancillary issues are resolved, a petition for dissolution is not fully adjudicated). Nelia sought summary judgment only as to whether the marriage should be dissolved or declared void, she expressly requested adjudication of Samuel's liability for the children's education expenses, the court's order included citation to section 513, and during additional proceedings on August 5, 2010, and August 23, 2010, the parties and the court indicated the educational expenses were still outstanding and subject to the court's adjudication. The circumstances were similar to those in *In re Marriage of Bennett*, 306 Ill. App. 3d 246, 713 N.E.2d 1268 (1999), in that most of the children's educational expenses slightly predated the petition for dissolution and could have been properly considered during the

pendancy of the suit contemporaneously with other ancillary issues such as the division of marital property. Alternatively, in the event we have misconstrued the record on appeal and the summary judgment order was actually intended to be a final, appealable order which concluded the entire case, then Nelia's section 513 petition would be a timely motion to reconsider the ruling. Nelia filed the section 513 petition on June 1, 2010, before the May 5, 2010 order became final with the passage of 30 days and was properly considered while the court still had jurisdiction to consider any of its terms, including the division of assets, debts, and liability for educating the two children. Thus, under either scenario, the court could properly consider Nelia's petition for both children's educational expenses, and *Petersen* is not controlling.

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