

BUT DADDY, WHY CAN'T I GO TO COLLEGE? THE FRIGHTENING DE-KLINE OF SUPPORT FOR CHILDREN'S POST-SECONDARY EDUCATION

INTRODUCTION

Raising children is expensive.¹ A couple earning more than \$55,000 per year will spend more than \$198,000 to raise a child to age eighteen, and many children then want to go to college.² In 1990, nearly 90% of high school sophomores planned to continue their educations.³ When they went off to college for the 1992-93 school year, the average total cost for one year at a private four-year college, including tuition and living expenses, was \$17,301.⁴

As this suggests, a couple entering parenthood face increasingly daunting financial obligations.⁵ When relationships between parents fail, the assumed obligations can reach crisis proportions. Consider the following true story:

My ex-husband is a successful physician, and has the money to help our daughter with college, but has refused to give her a dime. his live in girl-friend is not much older than our daughter. unfortunately my daughter and i don't have alot, most of the assets and income were hidden before the divorce hearing, and we pretty much got zero. I only have a few years of support after a 20 year marriage because I showed i was incollege and would soon be on my own. As a result i have a hard time coming up with both our tuition. It is done, how-

¹ Ann L. Estin, *Love and Obligation: Family Law and the Romance of Economics*, 36 WM. & MARY L. REV. 989, 1076 (1995).

² Facts and Figures, CHILDREN'S DEFENSE FUND WEB PAGE, <<http://www.childrensdefense.org/facts.html#costs>> citing Expenditures on Children by Families, 1994 U.S. DEPT. AGRIC. ANN. REP., Ctr. for Nutrition and Promotion. In contrast, a couple making less than \$32,800 per year will spend \$100,290 and a couple making between the two wages will spend \$136,320. *Id.* In a single-parent family, if the parent is making less than \$32,800, that parent will spend \$97,710, and if the parent is making more than \$32,800, he or she will spend \$198,240. *Id.*

³ Trend in the Well-Being of American Youth, Youth Indicators, NAT'L CTR. FOR EDUC. STAT., U.S. DEPT. OF EDUC. 1993, Indicator 59 [hereinafter Youth Indicators].

⁴ Commissioner's Statement, *Are more young people going to college? THE CONDITION OF EDUCATION 1995*, NAT'L CTR. EDUC. STAT. [hereinafter Commissioner's Statement]. For one year at a four-year public university, the total costs were \$9,187. *Id.*

⁵ Estin, *supra* note 1, at 1076.

ever, at the sacrifice of my other two children . . . it is from their child support. We get by on surprising little, while my car continues to wear out, the house is showing its age, and I have had to foot the bill for [a] new roof, furnace, and air conditioner. In fact my first year and a half, i worked two jobs to help us along. my children have been devastated by his lack of concern for them. He continues to buy expensive cars, takes expensive cruises, and vacations, buys expensive furniture, and is building a nice home, then has the nerve to tell my children that he can't afford something because "your mother gets all my money." . . . Yes, he has the money to help with tuition, but he doesn't. . . . he has always promised my daughter support for college, but will not honor that promise. . . . good parents will always help their children, with or without the court orders, and bad parents will always figure out a way to dodge their responsibilities.⁶

Stories like this ring loud and clear through the halls of Harrisburg and other state capitals.⁷ In many cases, children in this situation never make it past high school.⁸ In attempts to increase the availability of secondary education to children in single-parent families, legislatures have passed statutes allowing courts to order divorced, separated or unmarried parents to help pay their children's post-secondary education costs.⁹

This Note examines whether such legislation violates equal protection principles.¹⁰ Part I discusses the status of the law regarding this issue, focusing on recent events in Pennsylvania, in particular on *Kline v. Curtis*.¹¹ In *Kline*, the Supreme Court of Pennsylvania reasoned that

⁶ Interview with "40-ish" in the ChatWeb, March 21, 1996.

⁷ D.C. CODE ANN. § 30-401 (1993 & Supp. 1995); HAW. REV. STAT. § 580-47 (Supp. 1995); ILL. ANN. STAT. ch. 40, para. 513 (Smith-Hurd 1993 & Supp. 1996); IND. CODE ANN. § 31-1-11.5-12 (Burns Supp. 1995); IOWA CODE ANN. § 598.1 (West 1996); MASS. GEN. LAWS ANN. ch. 208, § 28 (West 1987 & Supp. 1996); MISS. CODE ANN. §§ 93-5-223, 93-11-65 (1994); MO. REV. STAT. § 452.340(5) (Supp. 1996); N.J. STAT. ANN. § 2A: 34:23 (West Supp. 1995); N.Y. DOM. REL. LAW § 240(1-b)(c)(7) (McKinney Supp. 1996); OR. REV. STAT. § 107.108 (1990); UTAH CODE ANN. § 15-2-1 (1996); Thrasher v. Wilburn, 574 So. 2d 839 (Ala. Civ. App. 1990); Butler v. Butler, 496 A.2d 621, 622 (D.C. 1985) (providing that age of majority for child support purposes is 21); Nichols v. Tedder, 547 So. 2d 766, 768 (Miss. 1989) (holding that age of majority is 21); Bull v. Smith, 382 S.E.2d 905 (S.C. 1989); see MD. CODE ANN., FAM. LAW §§ 12-202(a)(2)(iii), 12-204(i)(1) (1991 & Supp. 1995); S.C. CODE ANN. §§ 20-3-160, 20-7-40 (Law. Co-op. 1985 & Supp. 1995); WASH. REV. CODE ANN. § 26.19.090 (West Supp. 1993); W. VA. CODE § 48-2-15d (1995).

⁸ Linda Matthews, *Divorced Father's Case Raises Difficult Issues of Who Pays Tuition*, N.Y. TIMES, Nov. 15, 1995, at B11.

⁹ See *supra* note 8.

¹⁰ See *infra* parts I-III.

¹¹ See *infra* part I.

a statute giving courts discretion to order divorced, separated or never-married parents to help pay for their children's college costs violated the Equal Protection Clause, thus concluding that parental obligations end at the child's eighteenth birthday.¹² Part II argues that this reasoning ignores the disadvantages facing children of divorced, separated, or never-married parents as compared to children of intact families in obtaining their advanced education.¹³ Part III goes one step further, arguing that all children should be able to bring an action to compel parental support for post-secondary education when appropriate circumstances exist.¹⁴

I. THE HISTORY AND CURRENT STATUS OF POST-SECONDARY EDUCATIONAL SUPPORT LAWS

For much of the Vietnam War, soldiers under twenty-one years of age lacked the power to elect those people sending them into the conflict.¹⁵ By the end of the war, however, the 26th Amendment remedied this paradox by lowering the voting age from twenty-one to eighteen.¹⁶ With this paradox remedied, however, another sprang up as state legislatures lowered to eighteen not only the voting age but also the age of majority, which encompasses more than the right to vote.¹⁷

Some states maintained twenty-one as the required age for certain activities but not for others.¹⁸ For example, in Montana, an eighteen-year-old could buy a firearm but could not buy a beer until age twenty-one.¹⁹ While some states like Montana specified the areas for which the age of majority changed,²⁰ most legislatures left the age of majority for courts to interpret.²¹

The change affected family law courts when non-custodial parents sued to lessen their child support obligations, claiming that the lower age of majority decreased their child support obligations by three years.²² Prior to the lowering of the age of majority, court decrees or

¹² *Curtis v. Kline*, 666 A.2d 265, 270 (Pa. 1995).

¹³ See *infra* part II.A.

¹⁴ See *infra* part III.

¹⁵ See U.S. CONST. amend. XXVI, § 1.

¹⁶ *Id.*

¹⁷ *E.g.*, *Shoaf v. Shoaf*, 192 S.E.2d 299, 301 (N.C. 1972) (citing recently passed N.C. GEN. STAT. § 48A).

¹⁸ *E.g.*, N.M. STAT. ANN. § 28-6-1 (Michie 1991 & Supp. 1995).

¹⁹ MONT. CODE ANN. §§ 16-3-301, 45-8-321 (1995).

²⁰ *Id.*; see also N.J. STAT. ANN. § 9:17-B-1 (West 1993) (lowering the age of majority to 18 for "basic civil and contractual rights").

²¹ Kathleen Conrey Horan, *Post-Minority Support for College Education—A Legally Enforceable Obligation in Divorce Proceedings?*, 18 N.M. L. REV. 153, 155 (1988).

²² See, *e.g.*, *Shoaf*, 192 S.E.2d at 301.

negotiated support agreements ordering support until the affected child reached majority ensured support until the child's twenty-first birthday.²³ With the change, however, non-custodial parents providing support claimed that support terminated on a child's eighteenth birthday, and the courts, whose authority to protect the child of divorce as its ward only lasts until the child's emancipation, were powerless to intervene.²⁴

For example, in 1972, in *Shoaf v. Shoaf*, the Supreme Court of North Carolina held that, as a result of a statute reducing the age of majority from twenty-one to eighteen, the father's obligation to pay support for his son terminated on the son's eighteenth birthday.²⁵ On June 11, 1970, a trial court entered a separation agreement for Peggy and Ted Shoaf, including a child support provision for their son, Jeff, until he reached majority age, which was then twenty-one.²⁶ A subsequent state statute reduced the age to eighteen, which Jeff had turned the previous January.²⁷ Ted made two more payments and then stopped, arguing Jeff was now an adult for whom he had no obligation.²⁸

In holding for Ted, the court explained that jurisdiction over children vests in a court when the children's parents separate and commence divorce proceedings.²⁹ The court further explained that this authority continues until the child is emancipated at an age to be determined by the legislature.³⁰ When the child reaches that age, the court reasoned, the child no longer suffers from the disabilities that previously mandated court protection, such as the inability to manage affairs or enjoy civic rights.³¹ As a result, the court determined, when the state reduced the age of majority to eighteen, the court lost all authority to order Ted to make child support payments to the court's former ward.³² The court held, therefore, that the legislature's change of majority age terminated support obligations at eighteen years rather than the originally anticipated twenty-one years.³³

²³ See, e.g., *infra* note 27 and accompanying text.

²⁴ See, e.g., *infra* notes 26-34 and accompanying text.

²⁵ 192 S.E.2d at 303.

²⁶ *Id.* at 301.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 302.

³⁰ *Shoaf*, 192 S.E.2d at 302.

³¹ *Id.*

³² *Id.* at 303.

³³ *Id.*

Before the 26th Amendment and the subsequent state statutes, the issue of post-secondary education support raised only a few questions.³⁴ Problems occurred if parties to divorce had not made plans for the child's college education, made vague plans, assumed income that was never realized, or the child was already in college when the divorce occurred.³⁵ The post-26th-Amendment litigation, as evidenced by *Shoaf*, however, put past practices in question and past focal points—the child's preparation for life—aside.

Litigation concerning continuing enforcement of then-existing decrees hinged on whether courts interpreted statutes as prospective or interpreted child support provisions as providing support for minor children only, cutting them off from parental support at age eighteen.³⁶ Unless protected by statutes specifically allowing for prospective change,³⁷ children like Jeff Shoaf, reaching majority at eighteen, lost their minority status and the accompanying protection as "wards of the court" three years earlier than anticipated in the original separation agreement.³⁸ The courts' ability to increase child support when a child entered college thus disappeared.³⁹

In the area of child support, states have produced three responses to the change in majority age. Some states allow court-ordered post-minority support.⁴⁰ Other states enforce support orders providing for post-secondary educational expenses if included in a contract or settlement agreement approved by the court.⁴¹ The largest percentage of states, however, refuse to recognize a parental obligation to support a child beyond the child's high school graduation or, if later, reaching majority.⁴² In these states, courts lack jurisdiction over the parent-child

³⁴ See Hon. Edward M. Ginsburg and Anita W. Robboy, *Support Education After Age Eighteen*, 10 MASS. FAM. L.J. 101, 102 (1993).

³⁵ See *id.*

³⁶ See Horan, *supra* note 22. While the bulk of cases in the 1970s involved pre-26th Amendment decrees, the passage of time has rendered this issue moot. *Id.*

³⁷ E.g., FLA. STAT. ANN. § 743.07(3) (West 1986 & Supp. 1996).

³⁸ Note, *Child Support Extended*, 10 GONZ. L. REV. 933, 935 (1975).

³⁹ See *id.*

⁴⁰ See *supra* note 8.

⁴¹ MONT. CODE ANN. § 40-4-208(5) (1995); N.D. CENT. CODE § 14-09-08.2(4) (Supp. 1995); see KAN. STAT. ANN. § 60-1610(a)(A) (Supp. 1995); VA. CODE ANN. § 20-107.2 (Michie 1995).

⁴² ALASKA STAT. § 25.24.310 (1995); COLO. REV. STAT. ANN. § 14-10-115(1.5)(b)(1) (1987 & Supp. 1995); DEL. CODE ANN. tit. 13, § 501 (1993); FLA. STAT. ANN. § 743.07(2) (West 1986 & Supp. 1996); GA. CODE ANN. § 19-11-3 (1991 & Supp. 1995); IDAHO CODE § 32-706(b) (Supp. 1995); KY. REV. STAT. ANN. § 405.020 (Michie/Bobbs-Merrill Supp. 1994); MICH. STAT. ANN. § 25.222(1c) (Callaghan 1992); MINN. STAT. ANN. § 518.57 (West 1990 & Supp. 1996); NEB. REV. STAT. § 42-364 (1995); NEV. REV. STAT. ANN. § 125:230 (Michie 1993); N.M. STAT. ANN. § 40-4-11(A) (Michie 1994 & Supp. 1995); N.C. GEN. STAT. § 50-13.4(c)(2) (1995); OHIO REV. CODE ANN. § 3109.05(E) (Baldwin 1994 & Supp. 1996); OKLA. STAT. ANN. tit. 43, § 112(D) (West

relationship once the child reaches majority and thus can neither enforce support obligations nor order them.⁴³

A. A Survey of Current State Law Regarding Non-Custodial Parents' Support Obligations for Children's Post-Secondary Education Expenses

Of those states allowing for child support for post-minority expenses, court authority is either specifically granted in a statute or has been created from court interpretation of otherwise ambiguous statutory language.⁴⁴ For example, after the change of the age of majority to eighteen, in 1972, Iowa amended its statute, granting courts discretion to order support for children between eighteen and twenty-two years old attending high school or pursuing approved post-secondary education full-time.⁴⁵

By contrast, Washington passed a new statute enabling a court to order parents in a divorce proceeding to pay reasonable or necessary support to a dependent child of the marriage.⁴⁶ The previous statute only allowed court-ordered support for "minor" children of the marriage.⁴⁷ The new statute eliminated the use of "minor" from the statutory language, instead focusing on the duty of support to any dependent child of the marriage.⁴⁸ Thus, the new statute opened the door for court-ordered support during college but contained no specific authorization.⁴⁹

Supp. 1996); R.I. GEN. LAWS § 15-5-16.2(b) (1988); S.D. CODIFIED LAWS ANN. § 25-5-18.1 (1992 & Supp. 1995); TENN. CODE ANN. § 34-11-102(b) (Supp. 1995); TEX. FAM. CODE ANN. § 14.05(a) (West 1986 & Supp. 1996); WIS. STAT. ANN. § 767.25 (West 1993); *see* LA. REV. STAT. ANN. § 9:309 (West Supp. 1996); VT. STAT. ANN. tit. 15, § 658(c) (1989).

⁴³ *See* Horan, *supra* note 25, at 154.

⁴⁴ *E.g.*, IOWA CODE ANN. § 598.1(6) (West 1996); *Childers v. Childers*, 575 P.2d 201, 206-07 (Wash. 1978).

⁴⁵ IOWA CODE ANN. § 598.1(6) (West 1996) states in relevant part:

The obligations may include support for a child who is between the ages of eighteen and twenty-two years who is regularly attending an accredited school in pursuance of a course of study leading to a high school diploma or its equivalent, or regularly attending a course of vocational-technical training either as a part of a regular school program or under special arrangements adapted to the individual person's needs; or is, in good faith, a full-time student in a college, university, or community college; or has been accepted for admission to a college, university, or community college and the next regular term has not yet begun

Id.

⁴⁶ WASH. REV. CODE ANN. § 26.09.100 (West 1986).

⁴⁷ *Childers*, 575 P.2d at 204 (construing WASH. REV. CODE ANN. § 26.08.110).

⁴⁸ *Compare id.* with WASH. REV. CODE ANN. § 26.09.100 (West 1986) ("[T]he court shall order either or both parents owing a duty of support to any child of the marriage dependent upon either or both spouses to pay an amount reasonable or necessary for support.").

⁴⁹ *See* WASH. REV. CODE ANN. § 26.09.100 (West 1986).

In *Childers v. Childers*, in 1978, the Supreme Court of Washington held that the new statute allowed court-ordered support for a child's post-minority expenses.⁵⁰ Mr. Childers was a doctor in private practice, while Mrs. Childers had been primarily a homemaker, with little employment experience and no college education.⁵¹ The trial court had ordered Mr. Childers to pay child support covering tuition, books and miscellaneous educational fees for each of his three sons, whose custody had been awarded to Mrs. Childers.⁵²

The court compared the previous statute's use of "minor" with the new statute's use of "dependent," reasoning this demonstrated the legislature's intention to base child support support determinations upon dependency rather than the statutory age of majority.⁵³ As a result, the court noted, a parent's duty to pay for post-secondary educational expenses depended upon examination of the facts and circumstances of each case, specifically noting that a child's age is but one factor to be considered in determining dependency.⁵⁴ The court held, therefore, that the statute granted the court discretion to award child-support for post-secondary education expenses where appropriate.⁵⁵

More recently, state courts have construed ambiguous statutory language to award post-minority support at times other than during divorce proceedings.⁵⁶ In *Bull v. Smith*, in 1989, the Supreme Court of South Carolina held that trial courts may order parental support for post-secondary educational expenses when exceptional circumstances exist.⁵⁷ The only statute on point provided that "a husband or wife declared to be chargeable with the support of his or her spouse or children . . . may be required to pay for their support . . . as may be determined by the court."⁵⁸ Alice Bull and Keith Smith divorced and Alice initially received custody of both children. One daughter, Doreen, later moved in with Keith, who eventually was awarded custody.⁵⁹ When Doreen graduated from high school, she earned admission into Mid-

⁵⁰ 575 P.2d at 209.

⁵¹ *Id.* at 203.

⁵² *Id.* at 203-04.

⁵³ *Id.* at 204.

⁵⁴ *Id.* at 205.

⁵⁵ *Childers*, 575 P.2d at 209.

⁵⁶ See, e.g., *Bull v. Smith*, 382 S.E.2d 905, 906 (S.C. 1989).

⁵⁷ *Id.* at 906. Similarly, in *Gnirk v. Gnirk*, the Supreme Court of New Hampshire held that a trial judge could modify a support order, ordering support for post-secondary education expenses not previously included in the original divorce proceeding. 589 A.2d 1008, 1013 (N.H. 1991). Like the *Childers* court, the *Gnirk* court reasoned that the state statute's lack of a reference to "minor" gave the court the power to order support for college costs. See *id.* at 1012.

⁵⁸ S.C. CODE ANN. § 20-7-40 (Law Co-op. 1985 & Supp. 1995).

⁵⁹ *Bull*, 382 S.E.2d at 906.

land Tech for secretarial training, costing \$250 per quarter for tuition, and Keith sought a continuation of support from Alice.⁶⁰

The court reasoned that extension of child support for Doreen's training at Midland Tech hinged on whether she demonstrated a special need for the support.⁶¹ To determine whether this need and, thus, exceptional circumstances, existed, the trial court must consider several factors. These include the child's ability to do well and whether the child could otherwise go to school.⁶² The court remanded the controversy, holding that if the trial court found exceptional circumstances, it could award educational support beyond Doreen's eighteenth birthday.⁶³

The amended statutes and broad court interpretations did not discourage those parents seeking relief from child support obligations for post-secondary education expenses. Meanwhile, growing numbers of young adults pursuing education beyond high school and the continuing increase in educational costs raised the stakes.⁶⁴ Non-custodial parents shifted tactics, arguing that statutes allowing for court-ordered support for children of divorce, but not children in intact families, violated equal protection guarantees.⁶⁵ Equal protection, the non-custodial parents claimed, commands that divorced parents not be treated any differently than married parents.⁶⁶

Equal protection challenges require a review of the statute allowing court-ordered support.⁶⁷ Neither strict scrutiny nor heightened scrutiny are required as these statutes do not create classes of people

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* The factors considered are:

- (1) the characteristics of the child indicate that he or she will benefit from college;
- (2) the child demonstrates the ability to do well, or at least to make satisfactory grades;
- (3) the child cannot otherwise go to school;
- (4) the parent has the financial ability to help pay for such an education;
- (5) the availability of grants and loans;
- and (6) the ability of the child to earn income during the school year or on vacation.

Id.

⁶³ *Id.* at 907.

⁶⁴ In 1950, 43% of high school graduates pursued further education as compared to 66% in 1992, as reflected in the increasing numbers with undergraduate degrees rising from 6% to 21%. Mel Elfin, *Does College Still Pay?*, U.S. NEWS & WORLD REP., Oct. 4, 1993, at 96. During the 1980s, total revenue from universities, colleges and professional schools more than doubled, going from \$14 billion to almost \$34 billion, and reflecting a \$6,300 average increase in tuition, room and board per student. U.S. DEP'T OF COM. STATISTICAL ABSTRACT OF THE UNITED STATES, T. 262, at 165 & 169 (112th ed. 1992).

⁶⁵ See, e.g., *Curtis v. Kline*, 666 A.2d 265 (Pa. 1995); *LeClair v. LeClair*, 624 A.2d 1350 (N.H. 1993).

⁶⁶ See *id.*

⁶⁷ E.g., *Kline*, 666 A.2d at 268.

based on race, creed, color, gender, national origin, or involve a fundamental right.⁶⁸ These statutes create, instead, social and economic classifications, reflecting people's marital status and assets. Consequently, courts only need to use rational basis review.⁶⁹ Rational basis review, the most deferential review of legislative action, requires two steps.⁷⁰ First, courts must determine whether these statutes attempt to promote any legitimate state interest or public value.⁷¹ If so, courts must determine whether the statutes and classifications created are rationally related to accomplishing those interests. In other words, courts ask whether the statute does what it was written to do.⁷²

In *LeClair v. LeClair*, in 1993, the Supreme Court of New Hampshire held that the statute authorizing court-ordered support for college expenses did not violate the state's equal protection clause.⁷³ The court held that the state has a legitimate interest in ensuring that children of non-intact homes have an equal opportunity to obtain higher education.⁷⁴ The court reasoned that the legislature could rationally conclude that children of divorce are less likely to receive financial support from both parents.⁷⁵

After her only son Jeremy's acceptance to Babson College, Ms. LeClair requested a court order for a reasonable contribution toward the impending expenses from Mr. LeClair, with whom Jeremy had resided until he was sixteen.⁷⁶ The master ordered Mr. LeClair, owner of his own business, to pay \$2,000 per academic year towards Jeremy's education, and Mr. LeClair subsequently appealed.⁷⁷

The court reasoned that the statute created two classes of parents—married and divorced.⁷⁸ Because these two classes are not based on race, creed, color, gender, national origin, or legitimacy, nor involve a fundamental right, the court determined that the classification did not create suspect classes.⁷⁹ Thus, the statute did not require strict scrutiny review.⁸⁰ The court further noted that, although married and

⁶⁸ See *id.* at 268–69.

⁶⁹ See *LeClair*, 624 A.2d at 1356.

⁷⁰ *Kline*, 666 A.2d at 269.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *LeClair*, 624 A.2d at 1357.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 1352.

⁷⁷ *Id.*

⁷⁸ *LeClair*, 624 A.2d at 1356.

⁷⁹ *Id.* at 1356–57.

⁸⁰ *Id.* The court also reasoned that the statute was not subject to a fair and substantial relation test as the classifications did not involve "important substantive rights." *Id.* at 1356. All of these

divorced parents are otherwise similarly situated under the law as to support for children seeking post-secondary education, theirs is an economic classification, entitling the statute to rational basis review only.⁸¹

In applying the first prong, the court reasoned that two legitimate state interests existed in support of the statute: the promotion of higher education and the extension of protection to children of divorce by ensuring they received opportunities otherwise unavailable due to their parents' divorce.⁸² The court also determined that the statute satisfied the second prong of rational basis review, as the statute was neither arbitrary nor without reasonable justification but instead was rationally related to protecting those interests.⁸³

The court recognized that unique problems requiring greater judicial control may exist in a divorced home, distinguishing it from intact families where financial support is an unquestioned responsibility.⁸⁴ The court concluded, accordingly, that the legislature rationally determined that children of divorce may be less likely than children in intact families to receive necessary college financial support from both parents without judicial involvement.⁸⁵ Thus, the court reasoned, considering that the courts have discretion and are not compelled to order support in all cases, the statute was rationally related to its legitimate purposes.⁸⁶

B. *Particular Problems in Pennsylvania*

More recently, however, Pennsylvania's statute allowing court-ordered support did not survive judicial review.⁸⁷ Problems first began when, in *Blue v. Blue*, in 1994, the Supreme Court of Pennsylvania held that the courts could not order divorced or separated parents to support their child's post-secondary education due to the absence of statutory authority in this area.⁸⁸ Reginald Blue had completed three

standards of review stem from the New Hampshire, not the United States, Constitution. *Id.* at 1355.

⁸¹ *Id.* at 1356. Although the court relied on the New Hampshire Constitution's equal protection clause, the court opined that, in terms of equal protection, the Federal Constitution provided no greater protection than the state constitution, thus suggesting that judicial scrutiny of the support statute would be at least as great as that received by a statute challenged under the Federal Equal Protection Clause. *Id.* at 1355.

⁸² *Id.* at 1357.

⁸³ *LeClair*, 624 A.2d at 1357.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Kline*, 666 A.2d at 270.

⁸⁸ 616 A.2d 628, 632 (Pa. 1992).

semesters at Penn State University when his father Ronald left the family to live with his girlfriend.⁸⁹ Reginald subsequently sued Ronald for support for college.⁹⁰ The trial court awarded him \$4,600 per year, provided he applied for and accepted any educational grants or loans to be deducted from Ronald's obligation.⁹¹

The Supreme Court of Pennsylvania struck down the support order, reasoning that, while the common law recognized a parental duty to support a minor child, this duty terminated at eighteen.⁹² The court reasoned that only a high school education is necessary to prepare children to reasonably support themselves.⁹³ Even if further education is needed, the court concluded, the state legislature's recognition of minor children as adults at eighteen stripped the court of discretion to award support beyond this age.⁹⁴ Thus, the court held that the trial court lacked the necessary authority to award Reginald support for his costs at Penn State.⁹⁵

The Pennsylvania General Assembly responded to the *Blue* decision by passing Act 62 of Pennsylvania Consolidated Statutes, specifically authorizing courts to order support for college expenses where equitable.⁹⁶ In Act 62, the Assembly promoted a rational and legitimate governmental interest in requiring parental assistance for higher education for children of divorced, separated, unmarried or otherwise obligated parents.⁹⁷ In addition to providing the necessary authority previously found absent by the *Blue* court, the statute carefully balanced the interests of enabling children of divorce to pursue higher education with parental interests in foreseeing a definitive end to child support obligations.⁹⁸

⁸⁹ *Id.* at 630-31.

⁹⁰ *Id.* at 629.

⁹¹ *Id.*

⁹² *Id.* at 632.

⁹³ See *Blue*, 616 A.2d at 632.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ 23 PA. CONS. STAT. ANN. § 4327 (West Supp. 1995). The statute specifically provided that "a court may order either or both parents who are separated, divorced, unmarried or otherwise subject to an existing support obligation to provide equitably for educational costs of their child whether an application for this support is made before or after the child has reached 18 years of age." 23 PA. CONS. STAT. ANN. § 4327(a).

⁹⁷ *Id.* The preamble also notes a specific intention to codify *Ulmer v. Sommerville*, 190 A.2d 182 (Pa. Super. Ct. 1963), in which the Superior Court used a two-prong test considering the financial impact of support on the parent and the child's ability and willingness to pursue a course of study, and the subsequent line of cases prior to the *Blue* decision. *Id.*

⁹⁸ Jeffrey Muriceak, Comment, *Pennsylvania's Legislative Response to Blue v. Blue: Adult Children May See Green, But Do Both Parents and Children Have Reason to Remain Blue?*, 99 DICK. L. REV. 477, 498 (1995).

At the same time, Act 62 minimized court discretion as much as possible by delineating several factors for consideration.⁹⁹ For example, Act 62 requires consideration of a child's educational costs and whether the child has the necessary ability and interest in furthering education.¹⁰⁰ In doing so, the factors reflect the statute's purpose to help only those students at a disadvantage, rather than all children of divorce or separation.¹⁰¹

Act 62 had a short life span. In *Curtis v. Kline*, in 1995, the Supreme Court of Pennsylvania held that the statute violated the Fourteenth Amendment's Equal Protection Clause.¹⁰² Before the passage of Act 62, Philip Kline filed a petition to terminate support for his two children in college.¹⁰³ After the Act passed, he amended his petition to include a constitutional challenge to Act 62.¹⁰⁴ The custodial parent, Bonita Kline Curtis, argued that the difference in treatment reflected the state's interest in protecting the intact marital family from governmental interference.¹⁰⁵ In the alternative, as the *LeClair* court acknowledged just two years ago, she claimed that the difference reflects the legislature's determination that children of non-intact families require educational advantages to overcome disadvantages resulting from the lack of an intact family.¹⁰⁶

Like the *LeClair* court, the *Kline* court reasoned that the statute did not create suspect classes or implicate an important right.¹⁰⁷ The court concluded, therefore, that Act 62 merited neither strict scrutiny nor any other heightened scrutiny.¹⁰⁸ The *Kline* court instead conducted a rational basis review but, unlike the *LeClair* court, found Act 62 unconstitutional nonetheless.¹⁰⁹

⁹⁹ See 23 PA. CONS. STAT. ANN. §§ 4327(c)-(h).

¹⁰⁰ See *id.*

¹⁰¹ See *id.*

¹⁰² 666 A.2d at 270.

¹⁰³ *Id.* at 267. The *Blue* decision may have tipped off a rush of petitions by non-custodial parents to terminate support for their children in college. Murray Dubin, *The Tuition Triangle: Divorced Fathers Rushed to File Papers After the State Supreme Court Ruled They Didn't Have to Foot Their Children's College Bills; Ex-spouses Are Alarmed; And a Delaware County Legislator Promises Action*, PHILA. INQ., Jan. 13, 1993, at F1.

¹⁰⁴ *Kline*, 666 A.2d at 267. Kline's challenge to support for the older of the two children was eventually rendered moot by the child's graduation prior to the *Kline* decision. Linda Matthews, *Divorced Father's Case Raises Difficult Issues of Who Pays Tuition*, N.Y. TIMES, Nov. 15, 1995, at B11. As for the other, his daughter Amber, he voluntarily pays for her tuition and employs her in his business, but claims he brought the constitutional challenge because he is "not big on having the government in my face, telling me what to do." *Id.*

¹⁰⁵ *Kline*, 666 A.2d at 269.

¹⁰⁶ *Id.*; *LeClair*, 624 A.2d at 1357.

¹⁰⁷ *Kline*, 666 A.2d at 268; *LeClair*, 624 A.2d at 1356-57.

¹⁰⁸ *Kline*, 666 A.2d at 268-69.

¹⁰⁹ *Id.* at 270; *LeClair*, 624 A.2d at 1357.

The court reasoned that Act 62 divided a larger group—children needing assistance for post-secondary education costs—into two groups reflecting the marital status of their parents, children of intact families and children of divorced, separated or never-married parents.¹¹⁰ The court's rational basis analysis began and ended with this classification, a classification different than the divorced and married parents distinction drawn by the *LeClair* court.¹¹¹ But unlike that court, the *Kline* court concluded that there is no rational reason to treat the two sets of children differently and that the state cannot selectively empower only those from non-intact families.¹¹²

The court dismissed the legitimate interests offered in support of Act 62 as inconclusive, searching instead for the General Assembly's actual interests.¹¹³ The court discounted the Assembly's claim that there existed a rational and legitimate governmental interest in requiring parental assistance for higher education for children of divorced, separated, unmarried or otherwise obligated parents.¹¹⁴ The court reasoned such a conclusory statement begged the question of whether the legislature actually had a legitimate interest in treating children of non-intact families differently with respect to post-secondary education expenses.¹¹⁵

The court also found Bonita Kline Curtis's arguments for disparate treatment unpersuasive.¹¹⁶ The court noted that the group of children needing financial help with college costs includes children from both intact and non-intact families and, in both instances, one or more parents may be unwilling to help.¹¹⁷ The court reasoned that because this problem occurs in both intact and broken homes, no legitimate reason exists for favoring children of non-intact families over children from intact families with married parents.¹¹⁸

The court offered two scenarios in support of its holding that the classification is arbitrary.¹¹⁹ First, the court explained that the first child of a father could use Act 62 to compel support from him after he divorced the child's mother. If the father later re-married and produced another child, however, this second child could *not* compel

¹¹⁰ *Kline*, 666 A.2d at 269. The court specifically distinguishes this classification from that interpreted by the *LeClair* court: married parents and divorced parents. *Id.* at 270.

¹¹¹ *Id.* at 269–70.

¹¹² *Id.*

¹¹³ *Id.* at 269.

¹¹⁴ *Id.*

¹¹⁵ *Kline*, 666 A.2d at 269.

¹¹⁶ *See id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 270.

¹¹⁹ *Id.*

support for college from the father.¹²⁰ Furthermore, the court explained that the eighteen-year-old child of a deceased parent could not sue the surviving parent for support, while an eighteen-year-old child with both parents living could sue for support.¹²¹

In sum, the recent history of child support for post-secondary expenses in Pennsylvania has been tumultuous.¹²² With the *Kline* decision, Pennsylvania has joined the majority of states not allowing court-ordered support for college costs of children from non-intact families.¹²³

II. THE IMPACT OF *KLINE*

While constitutional challenges to statutes similar to Act 62 have failed in New Hampshire and other states, the *Kline* decision encourages arguments in favor of anti-support bills.¹²⁴ In New Jersey, for example, a state senator introduced a bill prohibiting courts from issuing orders forcing parents to pay for college as part of a divorce judgment shortly after the *Kline* decision.¹²⁵ If passed, and followed by other states, these bills would impede progress in protecting children of non-intact families, exacerbating the disadvantages they already confront.¹²⁶ According to John P. Paone, Jr., chairman of the New Jersey State Bar Association's Family Law Section, "It would create havoc for thousands of divorce cases providing for contribution to college [and] [t]his would send New Jersey into the Dark Ages of protecting and educating children."¹²⁷

Some people may argue that the *Kline* decision would encourage non-custodial parents to be more involved in their child's education, for they should no longer fear courts watching their every move.¹²⁸ The reality, however, is that the decision and the New Jersey bill encourage non-custodial parents to abandon their promises of support without fear of judicial supervision.¹²⁹ An enormous wave of litigation is ex-

¹²⁰ *Kline*, 666 A.2d at 270.

¹²¹ *Id.*

¹²² See *supra* notes 87-123.

¹²³ Compare *Kline*, 666 A.2d at 270 with *supra* note 8.

¹²⁴ See Dana Coleman, *Contentious College Payment Plan Moving Through Senate*, N.J. LAW., OCT. 16, 1995, at 3.

¹²⁵ *Id.*

¹²⁶ See *infra* notes 144-243.

¹²⁷ See Coleman, *supra* note 124.

¹²⁸ See *Kline*, 666 A.2d at 270.

¹²⁹ Coleman, *supra* note 124.

pected in Pennsylvania.¹³⁰ In New Jersey, the bills have already had an impact.¹³¹ According to Myra Terry, president of the New Jersey chapter of the National Organization for Women Attorneys, non-custodial parents have been holding off on including college tuition as part of divorce agreements, likely in hope that the legislature will strip courts of their authority to order the necessary support.¹³²

The *Kline* court's decision, therefore, does not encourage non-custodial parents to support their children's education, but instead encourages them to be less honorable and less responsible than they would be normally.¹³³ Child support payments typically are made to the custodial parent, who is meant to use the money for the child's needs. Non-custodial parents, frustrated by years of not controlling custodial parents' allocation of resources, may view the child's eighteenth birthday as an opportunity to regain control.¹³⁴ Convinced for years that custodial parents just added child support to their pools of money, non-custodial parents could view *Kline* as the opportunity to cut off the custodial parents, when in reality they are cutting off children.¹³⁵

In addition, with the court's decision, attorneys representing non-custodial parents must choose between compromising their ethical standards or advising clients not to support their children.¹³⁶ If they advise non-custodial parents to agree to support the children through college, the attorneys can be sued for malpractice.¹³⁷ If, in the alternative, they tell non-custodial parents they have no legal obligation to support their children's education, this statement alone can have influence.¹³⁸

These results can be expected to flow from the *Kline* court's rational basis review of Act 62.¹³⁹ But negative policy ramifications aside, the Supreme Court of Pennsylvania's rational basis review is faulty in three ways.¹⁴⁰ First, the court fails to recognize that a valid classification—children of non-intact families—exists and reflects real differences between them and children of intact families.¹⁴¹ Second,

¹³⁰ Norman Perlberger, *What Will Happen in Aftermath of Curtis; Without Act 62 as a Stick, Kids Left with Parents' Consciences*, LEGAL INTELLIGENCER, Nov. 6, 1995, at 3.

¹³¹ See Coleman, *supra* note 124.

¹³² *Id.*

¹³³ L. WERTZMAN, *THE DIVORCE REVOLUTION* 280 (1985).

¹³⁴ See *Kline*, 666 A.2d at 272 (Montemuro, J., dissenting).

¹³⁵ See *id.*

¹³⁶ WERTZMAN, *supra* note 133, at 278.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ See *supra* notes 124–43.

¹⁴⁰ *Kline*, 666 A.2d at 271 (Montemuro, J., dissenting).

¹⁴¹ See *infra* notes 145–246.

the court does not accept the government interest in education as legitimate.¹⁴² Third, the court never considers whether a rational relationship exists between Act 62 and the government's interest.¹⁴³

A. *The Need for the Classification*

The division of children into children of non-intact families and children of intact families is necessary because it reflects the differences in economics, parent interaction, academic performance, and financial aid treatment faced by the two groups.¹⁴⁴ The *Kline* court majority repeatedly suggests that the statute unjustly treats children of intact and non-intact families differently.¹⁴⁵ In doing so, the *Kline* court refuses to take responsibility for the state's granting of divorces, and consequent creation of non-intact families.¹⁴⁶ In 1988 alone, courts put more than one million children into such situations.¹⁴⁷ By allowing divorce, the state has a duty to protect the victims of the state action—the children.¹⁴⁸

The *Kline* court does recognize that Act 62 is focused on children.¹⁴⁹ The court's initial failure, however, is to then dismiss the *parents'* marital status as irrelevant.¹⁵⁰ Unlike the *LeClair* court, where the New Hampshire Supreme Court focused on whether parents were similarly situated with respect to the obligation of providing educational support,¹⁵¹ the *Kline* court assumes that children are always on equal footing because they always need financial support for college.¹⁵² The court's dismissal of the parents' marital status as irrelevant is faulty because any child support legislation necessarily involves parents' marital status.¹⁵³

Arguably, the *Kline* court's assumption that children are always on equal footing regardless of their parents' marital status also could apply to traditional needs for food, clothing and medical care, not just

¹⁴² *Kline*, 666 A.2d at 271 (Montemuro, J., dissenting).

¹⁴³ *See id.* at 273.

¹⁴⁴ *See infra* notes 146–246.

¹⁴⁵ *See Kline*, 666 A.2d at 267–70.

¹⁴⁶ *See id.*; Robert M. Washburn, *Post-Majority Support: Oh Dad, Poor Dad*, 44 TEMP. L.Q. 319, 327, 329 (1971).

¹⁴⁷ Youth Indicators, *supra* note 4, at Indicator 19.

¹⁴⁸ *Childers*, 575 P.2d at 207.

¹⁴⁹ *See Kline*, 666 A.2d at 269.

¹⁵⁰ *See id.* at 272 (Montemuro, J., dissenting).

¹⁵¹ *Id.*

¹⁵² *Id.* at 272 n.4.

¹⁵³ *Id.* at 272.

college costs.¹⁵⁴ If the court's analysis is applied in these areas, statutes allowing courts to order subsistence support specifically for children of divorce also create unfair classifications.¹⁵⁵ In the end, such an analysis could render classifications based on parents' marital status constitutionally suspect, and, thus, subject to a higher level of scrutiny.¹⁵⁶

Typically, courts do not involve themselves in intact families unless abuse or child neglect exists. By contrast, courts and legislatures must step in when the family falls apart and support is needed.¹⁵⁷ A child's desire to continue his or her education does not mean that support is no longer necessary, or, contrary to the *Kline* court's apparent reasoning, that the parents' marital status is irrelevant.¹⁵⁸ *Kline* himself claimed he was the one receiving unequal treatment; therefore, marital status should have been pivotal in the equal protection argument.¹⁵⁹

But the disadvantages that create the need for classification often begin much earlier than when the child is preparing for college—they begin at the divorce bargaining table.¹⁶⁰ Arguably, *Kline* may encourage discussion of the child's education during custody determination. These discussions are unlikely, however, unless the children are close to high school graduation.¹⁶¹

Child support determinations rarely are ripe with bargaining, consensus and altruism, frequently turning into a trade-off between spending on adults and spending on children, not to mention the initial battles over property allocation and custody.¹⁶² During divorce negotiations, families often become short-sighted and unable to sacrifice and save for the child's education or support while the child is in college.¹⁶³ If the court is unable to order the more financially secure parent to pay support, the issue of the child's education will likely become a bargaining chip for that parent.¹⁶⁴ The *Kline* decision encourages the financially more secure parent, often the father, to use

¹⁵⁴ See *Kline*, 666 A.2d at 272 n.4 (Montemuro, J., dissenting).

¹⁵⁵ See *id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 272-73.

¹⁵⁹ *Kline*, 666 A.2d at 273 n.5 (Montemuro, J., dissenting). One amicus brief even noted that *Kline* may have lacked standing to contest the equal protection claims of children of intact families, thus making the focus of the majority's argument not properly before the court. *Id.*

¹⁶⁰ See *infra* notes 162-70.

¹⁶¹ See Ginsburg & Robboy, *supra* note 34, at 102.

¹⁶² Estin, *supra* note 1, at 1075.

¹⁶³ Ginsburg & Robboy, *supra* note 34, at 102.

¹⁶⁴ WERTZMAN, *supra* note 133, at 280; see *Childers*, 575 P.2d at 208.

financial leverage to gain custody of the children, regardless of the children's best interests.¹⁶⁵

Where the court decides to give the children to the financially less secure parent, often the mother, the court does so knowing that it may be sacrificing the children's education beyond high school.¹⁶⁶ A mother in this situation is faced with a tough decision.¹⁶⁷ She can either risk her own financial security or her children's college education.¹⁶⁸ As one commentator stated, "they have to protect themselves, but they are in a no-win situation."¹⁶⁹

The assumed risk is later reflected in the different standard of living experienced by the children and custodial parent.¹⁷⁰ There may be instances in which children of non-intact families have no greater difficulty in obtaining funds. Those instances are an exception, however, to the rule that they are at a disadvantage in gathering the resources and support necessary for education beyond the twelfth grade.¹⁷¹

Compared to the incomes of intact families, single parent family incomes are consistently lower, suggesting financial difficulties are a major obstacle in affording higher education.¹⁷² In 1991, forty-six percent of all minors in female-headed households lived in families with an annual income of less than \$10,000.¹⁷³ By contrast, about sixty-nine percent of children in married couple families lived in families with an annual income of \$30,000 or more; only twelve percent of female-

¹⁶⁵ See WEITZMAN, *supra* note 133, at 280.

¹⁶⁶ *Childers*, 575 P.2d at 208. While this author recognizes that there are a great number of single dads out there, this Note is directed towards examining the general rule, not the exception. WILLIAM E. DAVIS & EDWARD J. McCAUL, *THE EMERGING CRISIS: CURRENT AND PROJECTED STATUS OF CHILDREN IN THE UNITED STATES* 50 (Inst. Stud. At-Risk Students eds., 1991) [hereinafter *CRISIS*] (citing C. C. ROGERS & N. ZILL, *THE CHANGING AMERICAN FAMILY AND PUBLIC POLICY* (A.J. Cherlin ed., 1988)). In 1986, more than 13 million children lived with their mothers only, 76% more than in 1970, and nearly 1.6 million lived with their fathers only. *Id.* Also, disturbingly, divorced fathers'—not mothers'—groups are frequently the challengers of support obligations. Estin, *supra* note 1, at 1072. Even more disturbing is the potential for this problem to become cyclical, as noncustodial parents are even less inclined to assist with the educational expenses of daughters than of sons. *Kline*, 666 A.2d at 272 (Montemuro, J., dissenting) (citing Judith S. Wallerstein & Shanna B. Corbin, *Father-Child Relationships After Divorce: Child Support and Educational Opportunity*, 20 FAM. L.Q. 109 (1986)).

¹⁶⁷ WEITZMAN, *supra* note 133, at 280.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 280-81.

¹⁷⁰ See *infra* notes 173-201.

¹⁷¹ See Matthews, *supra* note 8.

¹⁷² *Id.*

¹⁷³ Youth Indicators, *supra* note 3, at Indicator 15.

headed households were at this level.¹⁷⁴ Thirty-seven percent of intact-family children enjoyed their parents' \$50,000-plus income.¹⁷⁵

Furthermore, children in single-parent households are far more likely to be impoverished than children in two-parent households.¹⁷⁶ In 1991, 21.1% of children in all families lived in poverty, but fifty-five percent of children in families with a female head and no husband present lived in poverty.¹⁷⁷ The situation is worst for children born to single parents, who are five times more likely to be poor than children born to married couples, and worse still when that single-parent family is headed by a female.¹⁷⁸

In a majority of mother-father relationships that either never reach, or fail to remain in, the state of marriage, the children of that union are left in the mother's custody.¹⁷⁹ As a result, when a child reaches college age, in the case where neither parent has a *de jure* obligation to support, mothers have a *de facto* responsibility.¹⁸⁰ This responsibility is given to mothers despite the fact that they likely have less money than fathers.¹⁸¹ In 1991, women's median income was more than \$9,000 lower than men's median income; men's salaries averaged forty-three percent higher than women's.¹⁸² To make matters worse, mothers also cannot expect many contributions from fathers.¹⁸³

When a child reaches college age, the mother's dilemma often grows as she is confronted by an increase not only in education expenses, but also other expenses such as the child's medical insurance, which non-custodial parents are no longer obligated to provide.¹⁸⁴ Even when children realize that their mother's resources are more limited, they are more likely to ask her than their father for support, as they

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ CRISIS, *supra* note 166, at 51 (citing D.T. ELLWOOD, POOR SUPPORT: POVERTY IN THE AMERICAN FAMILY (1988)). Of the children growing up in the 1970s and spending at least some time in a single-parent family, almost 75% spent time living in poverty, as compared to 20% of children living continuously in two-parent families. *Id.* at 51-52. Also, children from single-parent families are more than ten times as likely as children from two-parent families to spend prolonged time in poverty during the first ten years of life. *Id.*

¹⁷⁷ Youth Indicators, *supra* note 3, at Indicator 19.

¹⁷⁸ CRISIS, *supra* note 166, at 52 (citing NAT'L COMM'N ON CHILDREN 33 (1990)).

¹⁷⁹ See *infra* note 256.

¹⁸⁰ WEITZMAN, *supra* note 133, at 278.

¹⁸¹ *Id.* at 279.

¹⁸² Youth Indicators, *supra* note 3, at Indicator 18.

¹⁸³ Matthews, *supra* note 8. Only 6% of custodial parents expected former spouses to help with college costs. *Id.*

¹⁸⁴ WEITZMAN, *supra* note 133, at 278. The noncustodial parent's other obligations—i.e., medical insurance—also end at the child's eighteenth birthday, but in all likelihood the custodial parent picks up these costs. *Id.*

sense their father would rebuff any request made of him.¹⁸⁵ One survey indicated that most children thought their fathers expected a quid pro quo in return for their financial assistance.¹⁸⁶ This expectation regarding financial support may stem from the lesser emotional support children receive from non-custodial parents as compared to children of two-parent families.¹⁸⁷

The *Kline* court implied that mothers and children should save and prepare for the child's education before the child graduates from high school, in part because of the father's providing child support payments.¹⁸⁸ While this fantasy may have contributed to the *Kline* court's reasoning that children of intact families are in the same position as children of divorce in terms of their need for assistance, it often is far from reality.¹⁸⁹ In most divorced or unmarried families, parents have lower incomes and consequently less money to invest in their children.¹⁹⁰ As a result, even where support is paid regularly in divorced families, children's living standards drop significantly.¹⁹¹

The average estimated parental spending on children in intact families far exceeds the average awarded child support, which often falls below the poverty level as determined by the Social Security Administration.¹⁹² As a result, even with guidelines, child support awards are too low.¹⁹³ By contrast, children of intact families do not suffer the same decrease in financial support because they receive what children of divorce would label as pre-divorce allocations, resources based on a two-parent income.¹⁹⁴

Even where child support is sufficient, the child support obligation is rarely freely acknowledged and willingly undertaken by non-cus-

¹⁸⁵ *Id.* at 279.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ See *Kline*, 666 A.2d at 269.

¹⁸⁹ See *id.*

¹⁹⁰ Estin, *supra* note 1, at 1068.

¹⁹¹ ANDREA H. BELLER & JOHN W. GRAHAM, SMALL CHANGE: THE ECONOMICS OF CHILD SUPPORT 38-39 (1993).

¹⁹² *Id.* at 39.

¹⁹³ See *id.* A study of custody agreements and orders in two California counties noted a decline in the economic well-being of divorced mothers and children, even if support orders were fully met. ELEANOR E. MACOBY & ROBERT H. MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY 259-65 (1992).

¹⁹⁴ See Estin, *supra* note 1, at 1069. In 1981 dollars, in intact families, investment in one child from birth to 18 years of age ranged from \$58,300 per child to \$135,700 per child, averaging 38% of that spent on each adult. THOMAS J. ESPENSHADE, INVESTING IN CHILDREN 3 (1984). At 1981 prices, undoubtedly extremely higher now, a four-year public education would add another \$15,492 to those numbers. *Id.* at 32-33.

todial parents, as evidenced by the time and money put towards enforcing support orders.¹⁹⁵ In 1989, only 75.2% of women awarded child support received any payments, with 51.4% receiving the full amount and 23.8% receiving partial amounts.¹⁹⁶ As a result, many children's needs during development go unmet, leaving them less prepared when the *Kline* court, endorsing the non-custodial parents attitude, cuts off the potential for support.¹⁹⁷

In addition to the problems created by a lack of support during development, the limitation of support obligations to a child's minority years causes a downward mobility for children of divorce.¹⁹⁸ More than half of them sink to a lower socio-economic strata than either parent.¹⁹⁹ Just when they need increasing support, both financially and emotionally, from their parents to pursue an education suitable to their intellectual abilities, financial support ceases or, at best, maintains minimal levels.²⁰⁰

Originally, legislatures and courts presumed that divorced parents' interaction with their children would remain the same as it had been during the marriage.²⁰¹ That presumption has not held true.²⁰² One study in Pennsylvania indicated that four years after the divorce, a large number of non-custodial parents had little or no contact with their children.²⁰³ A second study noted that 43.7% of all children surveyed had not seen their non-custodial parent during the past year.²⁰⁴ In both divorced and never-married families, both monetary and time resources declined.²⁰⁵

Thus, courts must recognize the different levels of emotional and psychological support received by children of intact and non-intact families.²⁰⁶ When relationships between the mother and father or par-

¹⁹⁵ *Kline*, 666 A.2d at 271 (Montemuro, J., dissenting). In 1994, Pennsylvania alone spent more than \$100 million to collect more than \$840 million. *Id.* at 271 n.1.

¹⁹⁶ Youth Indicators, *supra* note 3, at Indicator 21.

¹⁹⁷ *Id.* In 1993, only about half of those children awarded support received the full amount as \$11.2 billion of the \$16.3 billion due was actually paid. *Id.* at 271 n.2.

¹⁹⁸ Wallerstein & Corbin, *supra* note 166, at 123.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 125.

²⁰¹ *Kline*, 666 A.2d at 274 (Montemuro, J., dissenting).

²⁰² *Id.*; Estin, *supra* note 1, at 1068.

²⁰³ CLAIRE BERMAN, ADULT CHILDREN OF DIVORCE SPEAK OUT: ABOUT GROWING UP WITH—AND MOVING BEYOND—PARENTAL DIVORCE 115 (1991) (citing Frank F. Furstenberg et al., *Paternal Participation and Children's Well-Being After Marital Dissolution*, 52 AM. SOC. REV. 695-701 (1987)).

²⁰⁴ *Id.* at 115-16.

²⁰⁵ Estin, *supra* note 1, at 1068.

²⁰⁶ See *infra* notes 229-43 and accompanying text.

ent and child deteriorate, the child often lacks the necessary emotional resources to reach his or her potential.²⁰⁷ For example, even though the aforementioned failures to comply with support orders and agreements may reflect the non-custodial parent's animosity towards the custodial parent, the child still suffers.²⁰⁸ Children perceive the non-custodial parents as not emotionally invested in their education, despite the non-custodial parent's social position and expressed values.²⁰⁹

In contrast, the child of the intact family enjoys the extra time and money available within that family.²¹⁰ As Professor Estin notes,

[E]conomic theories suggest that bearing and rearing children is facilitated greatly by the existence of a stable, two-parent family. Such a household can achieve the efficiencies of a division of labor that traditionally permitted mothers to develop expertise in child care while fathers specialized in the role of the provider. . . . [T]he marital family at its best allows children to share in a wide range of material and emotional benefits.²¹¹

The absence of one parent thus often places children of non-intact families at a disadvantage in receiving material and emotional benefits.²¹²

Furthermore, the excess economic pressures push parents to work harder so that they have less time to spend with their children.²¹³ In female-headed single-parent families in 1991, 68% of the mothers worked as compared to 59% of two-parent families where both parents worked.²¹⁴ A 10% differential also exists when comparing the participation of divorced and married women in the labor force.²¹⁵ While monetary support and its absence can be quantitatively valued, no measurement system exists to value the disadvantage children of non-intact families suffer as a result of the loss of physical nurturing and emotional connection due to one parent's absence and the remaining parent's increased work.²¹⁶

²⁰⁷ See *id.*

²⁰⁸ *Kline*, 666 A.2d at 272.

²⁰⁹ Estin, *supra* note 1, at 1072.

²¹⁰ *Id.* at 1002.

²¹¹ *Id.* at 1067.

²¹² See *id.*

²¹³ Beller & Graham, *supra* note 191, at 238.

²¹⁴ Youth Indicators, *supra* note 3, at Indicator 16.

²¹⁵ *Id.* at Indicator 17.

²¹⁶ Estin, *supra* note 1, at 1067.

At the same time, when the relationship between the child and the non-custodial parent has deteriorated, the child is more likely to turn to the custodial parent, usually the mother, for help with college costs.²¹⁷ The deterioration between father and child often stems from the deprivation of custody, to which fathers respond by refusing to do for children what natural instinct would ordinarily prompt them to do.²¹⁸

Mothers, however, as custodial parents, more often stay involved in their children's academic lives.²¹⁹ As a result, children view the mother's home as their home, and increasingly turn to their mother for support.²²⁰ In contrast, in many instances, children see their non-custodial parents as more distant, judgmental, and selfish, and often feel psychologically abandoned, because the parents seemingly have moved on to new lives.²²¹

Family structure also may affect children's academic potential.²²² Children of single-parent families do worse in primary and secondary school compared to children of intact families.²²³ Specifically, they receive lower scores on standardized tests, lower grades in school and drop out of school nearly twice as often as children of two-parent families.²²⁴ While finances likely also play a role, according to a Federal Department of Education study, 71% of children from intact families go to college, while only 54% of children of non-intact families go to college.²²⁵

For children of single-parent families who are academically eligible for college, the situation worsens where the child and the custodial parent cannot afford the entire cost of college, particularly when the child is interested in a private education.²²⁶ Private schools frequently use financial aid forms requiring information regarding the non-custodial parent's income, viewing that person's income and assets as a factor in determining the child's financial aid eligibility.²²⁷ The private universities expect non-custodial parents to contribute where they have

²¹⁷ WEITZMAN, *supra* note 133, at 279.

²¹⁸ *Id.* at 280 (citing *Childers*, 575 P.2d at 207).

²¹⁹ WEITZMAN, *supra* note 133, at 279.

²²⁰ *Id.*

²²¹ *Id.*

²²² CRISIS, *supra* note 166, at 53-54.

²²³ *Id.*

²²⁴ *Id.* at 54 (citing NATRIELLO ET AL., *SCHOOLING DISADVANTAGED CHILDREN: RACING AGAINST CATASTROPHE* (1990), A.M. Milne et al., *Single Parents, Working Mothers, and the Educational Achievement of School Children*, 59 SOC. EDUC. 125-39 (1986) and J.B. STEDMAN ET AL., *DROPPING OUT: THE EDUCATIONAL VULNERABILITY OF AT-RISK YOUTH* (1988)).

²²⁵ Matthews, *supra* note 8.

²²⁶ Ginsburg & Robboy, *supra* note 34, at 101; *see infra* notes 229-39.

²²⁷ Matthews, *supra* note 8.

been involved in their children's lives post-divorce.²²⁸ Thus, non-custodial parents' resources reduce children's scholarship and loan eligibility, even when those parents refuse to contribute.

The courts and college financial aid offices do not view parental contributions in the same light.²²⁹ The expected contribution is not limited to the amount contained in the court decree.²³⁰ Separation agreements and divorce judgments are considered the starting point for what each parent can afford.²³¹ The financial aid officers view those documents as "a 'political document' rather than a binding determination" of what a parent can afford.²³² They cite parents' moral obligation as sufficient incentive for a child to get support.²³³

Inclusion of a non-custodial parent's finances may compel denial of financial assistance to a child, or at least increase that child's net education costs.²³⁴ Most financial aid is affected by family income. For example, in 1992-93, a student attending a four-year public university costing \$9,200 that year received about \$1,900 in financial aid.²³⁵ Where the considered income was higher, as would be the case where children must submit their non-custodial parents' income and assets, that child received as little as \$300.²³⁶ As a result, when non-custodial parents refuse to contribute, financial aid awards are frequently insufficient.²³⁷

Given the differences facing children of non-intact families as compared to intact families, the Constitution does not require treating them as though they were in the same situation.²³⁸ The disadvantages facing children of divorced, separated or unmarried parents makes the classification necessary to protect those harmed and, in doing so, is not patently arbitrary.²³⁹ Act 62 and similar statutes do not make those children preferred citizens or confer upon them special rights; rather,

²²⁸ *Id.* In contrast, public universities expect no contribution from non-custodial parent. *Id.*

²²⁹ Ginsburg & Robboy, *supra* note 34, at 104.

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.*

²³³ Matthews, *supra* note 8.

²³⁴ See Ginsburg & Robboy, *supra* note 34, at 104.

²³⁵ Commissioner's Statement, *supra* note 4.

²³⁶ *Id.*

²³⁷ *Id.* In addition, if the child lives with a step-parent, the financial aid process frequently requires disclosure from him or her as well. Ginsburg & Robboy, *supra* note 34, at 104. A step-parent's refusal to disclose funds can leave the child further from his or her financial need for college. *Id.*

²³⁸ See *Kline*, 666 A.2d at 274 (Montemuro, J., dissenting).

²³⁹ See *id.* at 271 (citing *Frontiero v. Richardson*, 411 U.S. 677 (1973)).

they attempt to put them in the position they would have reached had their family remained intact.²⁴⁰

The *Kline* court, in declaring that a distinction between children of intact families and children of broken families does not exist, ignored the deleterious effects of the absence of one parent.²⁴¹ In the case of a divorced family, that change modifies parental behavior in ways not always foreseen.²⁴² To ignore these changes and the impact on children is not only to turn away years of precedent and policy promulgated by a more representative body but to deny opportunity to a growing segment of the population.²⁴³

B. *The Legitimacy of Interests in Promoting Educational Opportunities for Children of Non-intact Families*

States have a legitimate interest in promoting educational opportunities for children of non-intact families to ensure that they have the same preparation and opportunity in a society where education is increasingly an individual's greatest asset.²⁴⁴ The United States Supreme Court has repeatedly noted the states' interests in promoting education.²⁴⁵ The *Kline* court, however, denied any legitimate state interest in education, thereby denying educational opportunities to a large number of academically eligible children, a result impossible to reconcile with Pennsylvania's interest in education.²⁴⁶

Children of divorced parents do not cease to be victims of the divorce on their eighteenth birthdays, but the *Kline* court's decision allows their victimization to continue.²⁴⁷ The state must step in where morality fails because moral obligation will not always motivate parents.²⁴⁸ The fair policy choice is to hold the non-custodial parent responsible for educational support where that parent would have been expected to provide support but for the divorce.²⁴⁹ If the state does not make that choice, then it must recognize the equal protection problem

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.* at 274.

²⁴³ *Kline*, 666 A.2d at 274.

²⁴⁴ Estin, *supra* note 1, at 1071.

²⁴⁵ See, e.g., *Aguilar v. Felton*, 473 U.S. 402, 415 (1985); *Wolman v. Walter*, 433 U.S. 229, 262 (1977).

²⁴⁶ See *Kline*, 666 A.2d at 269.

²⁴⁷ *Id.*

²⁴⁸ *Id.* at 274 (Montemuro, J., dissenting).

²⁴⁹ *Childers*, 575 P.2d at 208.

for children deprived of economic and psychological advantages due to divorce.²⁵⁰ With the *Kline* court's decision, the children of divorced parents are victimized twice, first by their parents' divorce and second by the system claiming to protect them.²⁵¹

The Pennsylvania General Assembly intended Act 62 to remedy this situation by promoting education of children in non-intact families, ensuring that they have the same educational opportunities as children from intact homes.²⁵² The Assembly expressed this interest by codifying Superior Court decisions prior to *Blue*, which held that courts had discretion to order child support beyond a child's eighteenth birthday.²⁵³ The Act functions on an assumption that children of non-intact families are at a disadvantage in pursuing higher education.²⁵⁴

The *Kline* court, however, suggested that the state's claimed interest is a pretext for creating an unconstitutional discriminatory classification.²⁵⁵ The *Kline* court then rejected the underlying assumption that a state has a legitimate interest in protecting post-secondary education interests of children of divorced, separated and unmarried parents.²⁵⁶ In doing so, the court rejected more than thirty years of developed precedent, subsequently supported by the state legislature in Act 62.²⁵⁷

Of the investments made in children, education is one of the most important.²⁵⁸ In Fall 1992, college enrollment rose to 14.5 million, suggesting a college degree has become nearly a prerequisite for a career.²⁵⁹ Advanced degrees, held by at least seven percent of all persons over twenty-five years old in 1993,²⁶⁰ are required for many professions.²⁶¹

Post-secondary education is frequently the greatest asset a parent can give to a child.²⁶² A direct correlation between education and earnings exists: in 1992, the mean earning of a person with a college

²⁵⁰ See *id.* at 207; *Kline*, 666 A.2d at 274 (Montemuro, J., dissenting).

²⁵¹ *Kline*, 666 A.2d at 274 (Montemuro, J., dissenting).

²⁵² Pa. § 508, 1st Sess., Print. No. 1341 (1993); *Kline*, 666 A.2d at 274 (Montemuro, J., dissenting); see 23 PA. CONS. STAT. ANN. § 4327 (Supp. 1996) and accompanying history.

²⁵³ 23 PA. CONS. STAT. ANN. § 4327 and accompanying history.

²⁵⁴ See *id.*

²⁵⁵ See *Kline*, 666 A.2d at 269.

²⁵⁶ See *id.*

²⁵⁷ *Id.* at 271 n.3 (Montemuro, J., dissenting).

²⁵⁸ Estlin, *supra* note 1, at 1071.

²⁵⁹ All Levels of Education, DIG. EDUC. STAT. 1994.

²⁶⁰ *Id.*

²⁶¹ Ginsburg & Robboy, *supra* note 34, at 101.

²⁶² *Id.*

degree was \$32,629 and only \$18,737 for a high school graduate.²⁶³ In 1992, about 81% of adults with bachelor's degrees participated in the labor force, compared to only 66% of high school graduates.²⁶⁴ The unemployment rate also differs between the two, college graduates at 3.2% and high school graduates at 6.8%.²⁶⁵

With the increasing significance of professions and occupations as well as wealth in society, a college education will become increasingly vital.²⁶⁶ Although requiring parents to help pay for college may cause parents to sacrifice their own expenditures, educational assistance is increasingly the method of wealth transfer between generations and the necessary sacrifice must be made.²⁶⁷ In 1993, 22% of Americans over twenty-four years old had completed four or more years of college as compared to only 17% in 1980.²⁶⁸

The court implicitly pleads the case for children of non-intact families whose parents will not pay for their college education.²⁶⁹ Their situation, however, is not improved by the court's decision.²⁷⁰ The decision instead ensures that children of non-intact families are less likely to receive the necessary parental assistance in obtaining their higher education.²⁷¹ In the end, the court's decision denies educational opportunities to academically eligible children, inapposite with Pennsylvania's interest in education.²⁷²

Pennsylvania has a legitimate interest in promoting educational opportunities for children of non-intact families. For most of these children, their education will be their greatest asset.²⁷³ With this decision, however, the State's interest is undermined and the resulting educational opportunities are forever lost.

²⁶³ Educational Attainment in the United States: March 1992 & 1993, U.S. Census Bureau, Current Population Reports, Series P20-476, table 19.

²⁶⁴ Outcomes of Education, DIG. EDUC. STAT. 1994.

²⁶⁵ *Id.*

²⁶⁶ See Ginsburg & Robboy, *supra* note 34, at 101.

²⁶⁷ See John H. Langbein, *The Twentieth-Century Revolution in Family Wealth Transmission*, 86 MICH. L. REV. 722, 729-38 (1988) (suggesting that educational support is the primary wealth transfer for the middle class); Ginsburg & Robboy, *supra* note 34, at 101.

²⁶⁸ All Levels of Education, *supra* note 259.

²⁶⁹ See *Kline*, 666 A.2d at 270.

²⁷⁰ *Id.* at 274 (Montemuro, J., dissenting).

²⁷¹ See Estin, *supra* note 1, at 1071-72.

²⁷² See *Kline*, 666 A.2d at 269.

²⁷³ See Estin, *supra* note 1, at 1071.

C. *The Relationship of the Classification to its Purpose*

Because it was unable to comprehend the legitimacy of the state interest in Act 62, the *Kline* court never reached the second prong of rational basis review—whether the classification is reasonably related to accomplishing the state's interests.²⁷⁴ Because the purpose of the statute is to help those students at a disadvantage due to their non-intact families, the statute should help only disadvantaged students, not all children of divorce or separation. Act 62 appeared to do so because it required the courts to consider the facts of each case, thus reflecting the possibility of a change in circumstances, ensuring that support is based only on educational costs borne by the child and used for those costs alone, requiring that the child have the necessary ability and interest in furthering education, setting a limit on the duration of support, and restricting support only to those children making a necessary showing.²⁷⁵ The statute enables the court to make up for disadvantages by requiring that the amount of support be based on educational costs borne by the child.²⁷⁶ Although the support award is not limitless, it is also restricted to past support awards.²⁷⁷ By focusing on education costs alone, the statute renders any previous lower standard of living inconsequential and will not prevent the child from affording college.²⁷⁸

The statute is also related to its purpose because it limits the costs paid by a non-custodial parent to educational costs, including tuition, fees, books, room and board, and educational materials.²⁷⁹ Parents would not be liable for any extra living expenses—i.e., car insurance, travel expenses, health insurance and medical costs.²⁸⁰ Furthermore, Act 62 requires support only where the child actively pursues the education and the necessary support.²⁸¹

In addition to looking at the student's ability, willingness and desire to pursue and complete a course of study, a court applying Act 62 would also consider grants and scholarships the student received.²⁸² This method of determining whether there is to be support and, if so,

²⁷⁴ See *id.*

²⁷⁵ Muriceak, *supra* note 98, at 498.

²⁷⁶ 23 PA. CONS. STAT. ANN. § 4327(e) (Supp. 1996).

²⁷⁷ See *id.*

²⁷⁸ See *id.*

²⁷⁹ *Id.* at § 4327(c), (j).

²⁸⁰ See *id.*

²⁸¹ 23 PA. CONS. STAT. ANN. § 4327(e)(2)–(4).

²⁸² See *id.*

how much, ensures that the child will not be awarded any more than absolutely necessary.²⁸³ If circumstances change, non-custodial parents can request a modification or termination of support.²⁸⁴

Also, Act 62 considers non-custodial parents' beliefs that the custodial parent was not responsible for support or needlessly commingled support payments with personal funds.²⁸⁵ The statute allows the court to order either or both parents of the child to provide support for advanced education.²⁸⁶ Furthermore, the non-custodial parent has no obligation to contribute to the child's living expenses at home, unless the student resides there while attending school.²⁸⁷

Act 62 also meets an important policy goal—ensuring that there is an end to child support.²⁸⁸ Parents' potential liability ends at the student's twenty-third birthday, unless exceptional circumstances exist.²⁸⁹ In any case, the statute specifically provides that support ends when the child graduates from college.²⁹⁰

The statute does not make the payment of child support for advanced education mandatory.²⁹¹ It contains a number of factors for the judge to consider in making a determination.²⁹² Unless the situation meets the criteria, the non-custodial parent has no obligation.²⁹³

Act 62 and similar statutes are rationally related to their purpose because they demand an intensely factual analysis when determining

²⁸³ *Id.*

²⁸⁴ *Id.* at § 4327(h).

²⁸⁵ *See id.* at § 4327(g).

²⁸⁶ 23 PA. CONS. STAT. ANN. § 4327(a).

²⁸⁷ *Id.* at § 4327(g).

²⁸⁸ *Id.* at § 4327(f).

²⁸⁹ *Id.* at § 4327(f)(3).

²⁹⁰ *Id.* at § 4327(f)(2).

²⁹¹ 23 PA. CONS. STAT. ANN. § 4327(a).

²⁹² *See id.* at § 4327.

²⁹³ *Id.* at § 4327(a), (e). Section 4327(e) states:

Other relevant factors—After calculating educational costs and deducting grants and scholarships, the court may order either parent or both parents to pay all or part of the remaining educational costs of their child. The court shall consider all relevant factors which appear reasonable, equitable and necessary, including the following: (1) The financial resources of both parents; (2) The financial resources of the student; (3) The receipt of educational loans and other financial assistance by the student; (4) The ability, willingness and desire of the student to pursue and complete the course of study; (5) Any willful estrangement between the parent and student caused by the student after attaining majority; (6) The ability of the student to contribute to the student's expenses through gainful employment; the student's history of employment is material under this paragraph; (7) Any other relevant factors.

Id. at § 4327(e).

who contributes and how much.²⁹⁴ Given that cases vary factually, the weight given to each factor may differ from case to case.²⁹⁵ The child's academic ineptitude or the poverty of the non-custodial parent may render other factors inconsequential.²⁹⁶ Of course, there will be situations in which children barely fall short of the criteria to receive support from their non-custodial parent, just as there are situations in which children of intact families do not receive the necessary support to go to college.²⁹⁷ Act 62 and its fellow statutes provide, however, for equality in opportunity, not necessarily uniformity.²⁹⁸

III. A BROADER SOLUTION: MAKING THE ACTION AVAILABLE TO ALL CHILDREN

If the *Kline* court's view is increasingly accepted, either courts or legislatures, or both, must entitle all children—regardless of family status—to educational support from parents to avoid the potential harm of this decision.²⁹⁹ The *Kline* court might have been more accepting of a legislative entitlement to post-secondary education or a general requirement that parents, regardless of marital status, assist their children in obtaining such an education.³⁰⁰ This legislation could avoid the equal protection problem in *Kline* while promoting a legitimate state interest.³⁰¹ Instead of limiting the opportunity to sue for support to children of non-intact families, this should be an option for all children.³⁰²

The *Kline* court held that the Equal Protection Clause is violated by a statute that treats children of divorce in need of assistance differently than children of married families in need of assistance.³⁰³ If the state legislature passed a statute also permitting children of intact families to sue either or both parents, the difference bothering the *Kline* court would disappear.³⁰⁴ The *Kline* court seemed accepting of a

²⁹⁴ See *id.*; Ginsburg & Robboy, *supra* note 34, at 102.

²⁹⁵ *Id.*

²⁹⁶ See *id.*

²⁹⁷ *Kline*, 666 A.2d at 273 (Montemuro, J., dissenting).

²⁹⁸ *Id.*

²⁹⁹ See Ginsburg & Robboy, *supra* note 34, at 101.

³⁰⁰ See *Kline*, 666 A.2d at 269.

³⁰¹ See *id.*

³⁰² See *infra* note 311 (discussing the value of higher education).

³⁰³ *Kline*, 666 A.2d at 270.

³⁰⁴ See *id.* For a broader discussion of this concept, see generally David L. Sage II, Note, *Post Secondary Education: Why Can't Johnny Read Even Though His Parents Are Happily Married*, 29 J. FAM. L. 923 (1991).

legal entitlement to higher education for children.³⁰⁵ The court specifically limited its ruling to instances where there is an "absence of an entitlement on the part of any individual to post-secondary education, or a generally applicable requirement that parents assist their adult children in obtaining such an education."³⁰⁶

The state's interest in the education of its citizens is commonly accepted by courts as a legitimate interest that satisfies rational basis review.³⁰⁷ Public state universities and community colleges abound in this country, evidence of each state's interest in educating its citizens. A statute requiring parents to assist their children in obtaining post-secondary education would likely increase the education of the populace. Furthermore, the availability of the action would ensure that parents passed on education to their children, possibly the greatest asset conveyed in today's society.³⁰⁸

Statutes eradicating the classification deemed offensive by the *Kline* court could provide factors for courts to use to determine if the child deserved support and, if so, how much.³⁰⁹ The use of factors and judicial discretion would ensure that the statute is rationally related to its purpose—to provide support for children's advanced education where the parents can reasonably afford it but refuse to do so.³¹⁰ Because of the larger group of children that would be helped by the statute, additional factors might be necessary.³¹¹ For example, courts might want to consider whether a parent would contribute absent a

³⁰⁵ See *Kline*, 666 A.2d at 269–70.

³⁰⁶ *Id.*

³⁰⁷ *Id.* at 273 (Montemuro, J., dissenting).

³⁰⁸ See Ginsburg & Robboy, *supra* note 34, at 101.

³⁰⁹ See, e.g., 23 PA. CONS. STAT. ANN. § 4327(e).

³¹⁰ See *supra* notes 258–81.

³¹¹ See, e.g., *Newburg v. Arrigo*, 443 A.2d 1031, 1038 (N.J. 1982). The New Jersey Supreme Court considered 12 factors:

(1) whether the non-custodial parent would contribute to the child's education absent the divorce (easily changeable to whether the parent would contribute absent a court order); (2) the reasonableness of the child's higher education expectations in relationship to the background, values, and goals of the parent; (3) the cost of the requested education; (4) the ability of the . . . parent to pay the costs; (5) the relationship of the requested contribution to the kind of education sought by the child; (6) the financial resources of the parents; (7) the commitment and aptitude of the child for the requested education; (8) the financial resources of the child; (9) the ability of the child to earn income during school year or on vacation; (10) the availability of financial aid to the student; (11) the relationship between the child and the parents, including mutual affection and shared goals as well as responsiveness to parental advice and guidance; and (12) the relationship of the education, the prior training and future goals of the child.

Id. at 1038–39.

court order and the reasonableness of the child's goals in light of the background, goals and values of the parents.³¹²

Also, most parents, even Kline, want their children to earn a college degree.³¹³ They would rather avoid, however, the personal cost of that education.³¹⁴ But why should married parents, especially those with college degrees, be able to avoid the cost when they do not feel an obligation to help their children prepare for society?

A statute creating an entitlement to post-secondary education for all children would ensure that what is presumed by the financial aid system is carried out for both children of intact and non-intact families.³¹⁵ In either situation, the parent from whom the college financial aid officer expects a contribution will be required to provide that support. If vigorously enforced, parents, aware of the legal obligation, may be more likely to contribute more than what the financial officer would find necessary, thus reducing the burden on the financial aid system, the judicial system and the system of federally subsidized loans and federal and state grants.

The strongest, most likely argument in opposition to such a statute is that it would infringe upon the constitutional privacy of intact families regarding the education of children.³¹⁶ At the moment, courts are allowed into the family only where there has been abuse, neglect or the family is falling apart.³¹⁷ While the legislatures' ability to control a child's education has been limited, the legislatures' ability to create a cause of action for children of financially-able-but-unwilling parents has not been precluded.³¹⁸

The United States Supreme Court's *Wisconsin v. Yoder* and *Pierce v. Society of Sisters* can be distinguished in that both cases involved a question of restricting parental choice for their minor child's education.³¹⁹ Any statute would only apply to majority-aged persons. In addition, protection of privacy in adult relationships is typically limited to

³¹² *Id.* at 1038.

³¹³ As of fall, 1995, Kline was paying for his daughter's tuition voluntarily, even helping her buy a car. Matthews, *supra* note 8, at B11.

³¹⁴ See Estin, *supra* note 1, at 1080.

³¹⁵ See *supra* notes 229-39 (discussing financial aid procedures).

³¹⁶ *Kline*, 666 A.2d at 273 (Montemuro, J., dissenting).

³¹⁷ *Id.*

³¹⁸ *Id.* (citing *Wisconsin v. Yoder*, 406 U.S. 205, 235 (1972) (holding that state cannot compel school attendance beyond eighth grade where family's religious beliefs are compromised)); *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 534-35 (1925) (holding that state could not compel public school attendance for all children between the ages of 8 and 16).

³¹⁹ See *Yoder*, 406 U.S. at 234-35; *Pierce*, 268 U.S. at 534-35.

intimate male-female relationships, as evidenced by *Griswold v. Connecticut*, *Eisenstadt v. Baird* and *Bowers v. Hardwick*.³²⁰

Many of the reasons for supporting children of non-intact families in their pursuit of education apply to children of intact families.³²¹ While a statute allowing court-ordered support for college in certain circumstances may disrupt some families, the idea is worth contemplation.³²² If nothing else, the *Kline* court likely would be satisfied.³²³

CONCLUSION

Children, lacking representation, are possibly the weakest members of society. As such, their weakness must be recognized, lest basic principles of fairness be sacrificed. While the classification created by Act 62 does discriminate, it does so because of the disadvantage that exists, a disadvantage that compels courts to rule with equity, not uniformity.

The *Kline* court's holding, however, pushes society closer to the view that only parental self-interest compels support of children.³²⁴ This view supports treating the parent-child relationship similarly to a consumer-product relationship.³²⁵ When the non-custodial parent loses interest in the child, he can cast that child aside to pick up a new item of interest.³²⁶ The *Kline* decision gives support to this view.³²⁷

This view is gaining support elsewhere as well.³²⁸ The recent bills in New Jersey, a state where courts have interpreted ambiguous statutes to allow court-ordered support, represent further steps in the wrong direction. The time has come, instead, for steps in the other direction.

The responsibility of raising a child "requires a 'personal commitment' to how the child turns out."³²⁹ If children of non-intact families cannot benefit from the sense of responsibility and altruism driving married parents, then they should at least have the opportunity to improve their lives themselves with further education. The growing view that children going through divorce are commodities to be bar-

³²⁰ See, e.g., *Bowers v. Hardwick*, 478 U.S. 186, 194-95 (1986); *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965).

³²¹ See *supra* notes 309-17 and accompanying text.

³²² See *supra* notes 301-22 and accompanying text.

³²³ See *Kline*, 666 A.2d at 270 & n.5.

³²⁴ See *id.* at 269.

³²⁵ See Estin, *supra* note 1, at 1080.

³²⁶ *Id.*

³²⁷ See *Kline*, 666 A.2d at 270.

³²⁸ See *supra* notes 124-27 and accompanying text.

³²⁹ Estin, *supra* note 1, at 1081.

gained and traded, encouraged by the *Kline* court, begins with the difference in resources between children of non-intact families and children of intact families. If this concept and the fate of children in single-parent families are accepted, instead of focusing on leveling the playing field ahead of children on their eighteenth birthdays, the law will allow the loss of skills, morals and talents that occurred during the child's development to remain lost forever.³³⁰

CHARLES F. WILLSON³³¹

³³⁰ *Id.* at 1087.

³³¹ Special thanks to Prof. Sanford N. Katz. This article is dedicated to my favorite single mom and her son.

BOSTON COLLEGE LAW REVIEW

VOLUME XXXVII

1995–1996

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NEWTON CENTRE, MASSACHUSETTS

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