

THE COST OF A HIGHER EDUCATION: POST-MINORITY CHILD SUPPORT IN NORTH DAKOTA

I. INTRODUCTION

The states are sharply divided over whether a noncustodial parent should be responsible for providing child support for his or her child's post-secondary education.¹ Several questions arise: If the court does allow post-minority child support, how does it determine a logical stopping point?² How does the court justify ordering a noncustodial parent to provide college support for his or her child when married couples have no such obligation?³ Is it warranted to deny a child an educational opportunity when the non-custodial parent has the ability to provide for such education but simply refuses to help?⁴ If the court does allow for such support, should it be limited in duration and amount?⁵

Part II of this note will provide a brief overview of how post-minority support for college expenses is handled across the United States, identifying the advantages and disadvantages of such support. Part III will provide an in-depth look at how North Dakota is managing the situation. This note will examine the history of North Dakota Century Code section 14-09-08.2 (Support for Children after Majority) and take an exhaustive look at the few, but imperative, North Dakota cases relevant to this issue.

II. FIFTY STATE OVERVIEW

In 1971, the Twenty-Sixth Amendment to the United States Constitution was adopted, which lowered the legal voting age from twenty-

1. See Nat'l Conference of State Legislatures, *Termination of Child Support and Support Beyond Majority*, <http://www.ncsl.org/programs/cyf/educate.htm> (last visited Sept. 17, 2005) (explaining that there are several approaches to post-minority support for college expenses).

2. See Robert M. Washburn, *Post-Minority Support: Oh Dad, Poor Dad*, 44 TEMP. L.Q. 319, 328 (1971) (stating that it is reasonable that a noncustodial parent's duty to pay support should terminate at some point).

3. See, e.g., Kathleen Conrey Horan, *Postminority Support for College Education—A Legally Enforceable Obligation in Divorce Proceedings?*, 20 FAM. L.Q. 589, 605 (1987) (addressing the constitutional concerns of imposing a duty of post-minority support on divorced parents when married parents have no such obligation).

4. See *Donarski v. Donarski*, 1998 ND 128, ¶ 21, 581 N.W.2d 130, 136 (asserting that a parent's ability to pay post-minority support is the most significant factor to consider when awarding such support).

5. See, e.g., *Anderson v. Anderson*, 522 N.W.2d 476, 479 (N.D. 1994) (declining to set a strict age limit on the award of post-minority child support).

one to eighteen.⁶ Most states then passed laws reducing the age of majority to eighteen for most other purposes.⁷ This change had a major impact on family law litigation: It essentially decreased the duty to pay child support by three years and eliminated child support throughout the child's college years.⁸ Whereas a twenty-one-year-old may be more or less finished with college, many eighteen-year-olds are still in high school.⁹ Prior to the change in the age of majority, courts could provide for college expenses by increasing the amount of child support as needed when the child entered college.¹⁰

Following this change to the age of majority, states were divided into effectively three different categories in terms of the way they addressed post-minority child support for college expenses: (1) jurisdictions which compelled post-minority support, even absent an agreement between the parties; (2) jurisdictions which enforced post-minority support pursuant to an agreement by the parties only; and (3) jurisdictions which neither compelled post-minority support nor enforced any agreements of such between the parties.¹¹ According to a recent study by the National Conference of State Legislatures, approximately half of the states fall into the first category, allowing their courts to award post-minority support for a child's college education regardless of whether the parties agreed to such a condition.¹² The remaining half of the states fit into the second category, allowing for the award of post-minority support for college expenses only upon agreement between the parties.¹³ Only Alaska falls within the third category, prohibiting the courts from requiring either party to pay for post-majority college support.¹⁴

6. Horan, *supra* note 3, at 590 (citing U.S. CONST. amend. XXVI, § 1).

7. *Id.*

8. *Id.*

9. *Id.* at 591.

10. *Id.*

11. *Id.*

12. See Nat'l Conference of State Legislatures, *supra* note 1 (concluding that the courts in Alabama, Colorado, Connecticut, Washington, D.C., Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Maryland, Massachusetts, Mississippi, Missouri, Montana, New Hampshire, New Jersey, New York, Oregon, Rhode Island, South Carolina, Texas, Utah, Washington, and West Virginia all have the authority to award some type of post-minority child support for college expenses past the age of majority).

13. See *id.* (concluding that the courts in Arizona, Arkansas, California, Delaware, Idaho, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Dakota, Tennessee, Vermont, Virginia, Wisconsin, and Wyoming only have the authority to award post-minority child support for college expenses upon agreement by the parties).

14. See *id.* (concluding that courts in Alaska will not allow post-minority support for college expenses).

A. ARGUMENTS IN FAVOR OF POST-MINORITY SUPPORT

The desire to provide children with a college education is a common argument in favor of post-minority support.¹⁵ A college education is indispensable to obtaining and holding a reasonably well-paid and secure employment position.¹⁶ Compared to times past when a college education was only available to a privileged few, a college education today has become an economic necessity.¹⁷ College enrollment has drastically increased over the past three decades.¹⁸ In 1980, 26 percent of eighteen-to twenty-four-year-olds attended college.¹⁹ That number increased to 32 percent in 1990.²⁰ By 2003, 41 percent of the nation's youth attended college.²¹

Years ago, children were generally more accustomed to supporting themselves at an earlier age since a college education was relatively uncommon.²² In contrast, children of today remain in school for a longer period of time, and consequently do not mature or become self-sufficient until later in life.²³ Hence, children are maturing later in life but are expected to assume responsibility earlier.²⁴ Stated in a different way, a child's employment opportunities do not improve merely because he reaches the age of majority.²⁵ If a child cannot get a suitable job without a college education, and if he is incapable of earning a living while attending school, then the extent of support should be determined by the facts of each case.²⁶ The age of the child should not be the only determinative factor the court considers when addressing the issue of post-minority support.²⁷

Just as the number of individuals attending college has increased, so has the cost of acquiring such an education.²⁸ Between 1989 and 1990, the

15. Horan, *supra* note 3, at 603.

16. *See id.* at 604 (citing French v. French, 378 A.2d 1127, 1129 (N.H. 1977)) (stating that as a result of present conditions, with rare exceptions, no individual's education is completed at age eighteen, nor in practically all professions, until well after age twenty-one).

17. *Id.* at 603 (citing Washburn, *supra* note 2, at 326).

18. Nat'l Cent. for Educ. Statistics, *Youth Indicator 22: College Enrollment* (2005), <http://www.nces.ed.gov/programs/youthindicators/Indicators.asp?PubPageNumber=22>.

19. *Id.*

20. *Id.*

21. *Id.*

22. Horan, *supra* note 3, at 604.

23. Washburn, *supra* note 2, at 329.

24. *Id.*

25. *Id.* at 328.

26. *Id.*

27. *Id.*

28. *See* Nat'l Cent. for Educ. Statistics, *Youth Indicator 24: College Costs* (2005), <http://nces.ed.gov/programs/youthindicators/Indicators.asp?PubPageNumber=24>. The net cost is equal to tuition and fees, plus estimated cost of living expenses, minus all grants received by the student. *Id.*

average annual net cost at a four-year public university was \$8,900.²⁹ In the academic year 1999-2000, that figure increased to \$10,500.³⁰ Because of the growing trend of receiving a college education, custodial parents may be faced with a double dilemma of child support terminating just when their expenses for the child are reaching an all-time high.³¹ Children of divorce, as well as their custodial parents, are less likely to be in a position to afford college.³² Coincidentally, these same children have an even greater need for the education to offset some of the disadvantages stemming from the divorce.³³ This predicament leaves the child and custodial parent at a greater risk for social and economic difficulties.³⁴

The financial strains placed upon children of divorce and the custodial parents are further enhanced if the noncustodial parent's income becomes a factor in eligibility for financial aid.³⁵ The federal government does not consider the noncustodial parent's income and assets in determining a student's financial needs.³⁶ However, many private colleges do consider the noncustodial parent as a potential source of support and require a supplemental financial aid form from the noncustodial parent, which may affect the awarding of the school's own aid.³⁷ For example, Georgetown University's financial aid policy states:

[P]arental responsibility for educational costs does not cease upon divorce or separation. The University expects that both natural parents (even when divorced or separated) will provide funds for educational expenses based on their ability to contribute from their income and assets. Both natural parents will be expected to submit financial information and to provide assistance for the student's

29. *Id.*

30. *Id.*

31. Horan, *supra* note 3, at 602 (citing LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION* 278 (1985)).

32. Judith G. McMullen, *Father (or Mother) Knows Best: An Argument Against Including Post-Majority Education Expenses in Court-Ordered Child Support*, 34 *IND. L. REV.* 343, 366 (2001).

33. *Id.* Children of divorce are disadvantaged not only financially, but emotionally as well. *Id.* at 367. "Wallerstein and Blakeslee reported that in a group they studied, one third of the children were doing significantly worse five years after the divorce, when factors such as depression, behavior and learning problems were considered." *Id.* (citing JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, *SECOND CHANCES: MEN, WOMEN, AND CHILDREN A DECADE AFTER DIVORCE* 158-59 (1989)).

34. *Id.*

35. Horan, *supra* note 3, at 602-03.

36. FinAid, *Divorce and Financial Aid—Obligation to Help Pay for College*, <http://www.finaid.org/questions/divorce.phtml> (last visited Oct. 1, 2005).

37. *Id.*

college expenses commensurate with their ability rather than their willingness to contribute.³⁸

Thus, the noncustodial parent's income may increase the child's and the custodial parent's financial obligation, yet the noncustodial parent does not share the financial consequence of this fact.³⁹

Finally, the court's ability to award post-minority support mitigates the harsh economic impact of the divorce on children.⁴⁰ Providing post-minority support is intended to ensure that a child's life opportunities are not unduly diminished by the family breakdown.⁴¹ It also ensures that a parent who does not reside with a child invests in the child's future as he or she would if he or she were sharing a home with the child.⁴² By allowing post-minority child support for college expenses, the court is acting *in loco parentis* in an attempt to place the child in the position he or she would have been in but for the divorce.⁴³

It is no mystery that parents have sustained the vast burden of paying for their children's college educations.⁴⁴ In contrast to past centuries, the business of parents paying to educate their children has become the main occasion for intergenerational wealth transfer.⁴⁵ A child's education is replacing inheritance, as lifetime transfers are displacing succession on

38. Georgetown Univ. Undergraduate Bulletin 2005-2006, available at [http://www/georgetown.edu/undergrad/bulletin/expenses3.html](http://www.georgetown.edu/undergrad/bulletin/expenses3.html). Eligibility for Georgetown scholarship assistance is based on the income and assets of either the custodial parent and stepparent or the custodial parent and noncustodial parent. *Id.* A contribution will be sought from only two of the three parties, but information is collected from all three in order to determine ability to contribute towards educational expenses. *Id.*

39. *Id.*

40. Horan, *supra* note 3, at 605.

41. A.L.I., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: PROVIDING FOR A CHILD'S LIFE OPPORTUNITIES § 3.12 (2002). The A.L.I. provides:

(1) [T]he child-support rules should provide that a child not suffer loss of life opportunities that the child's parents are able to provide without undue hardship to themselves or their other dependents. (2) Life opportunities should include but not be limited to: (a) postsecondary education and vocational training; (b) preprimary, primary and secondary education; and (c) specialized education and training appropriate to the child's special talents or disabilities. . . .

Id.

42. *Id.*

43. See Horan, *supra* note 3, at 605 (citing Patrick C. Marshall, *Post-Minority Child Support in Dissolution Proceedings*, 54 WASH. L. REV. 459, 470-71 (1979)) (stating that post-minority support allows the court to mitigate the harsh impact of divorce on children). *In loco parentis* is Latin for "in the place of a parent." BLACK'S LAW DICTIONARY 803 (8th ed. 2004). It means relating to or acting as a temporary guardian or caretaker of a child, taking all or some of the responsibilities of a parent. *Id.*

44. John H. Langbein, *The Twentieth-Century Revolution in Family Wealth Transmission*, 86 MICH. L. REV. 722, 732 (1988).

45. *Id.*

death.⁴⁶ In the past, children expected transfers of the farm or estate.⁴⁷ Today, children expect help paying for their educations and do not depend upon wealth transfers at their parents' deaths.⁴⁸

B. ARGUMENTS IN OPPOSITION TO POST-MINORITY SUPPORT

One prevailing concern courts have with awarding post-minority support for college expenses is whether it is constitutionally permissible to impose such a duty on divorced parents when married parents have no such obligation.⁴⁹ The Equal Protection Clause of the United States Constitution provides that persons who are similarly situated in relation to a statute must be treated in the same manner.⁵⁰ Because the issue of post-minority child support is not related to a suspect classification,⁵¹ courts need only apply rational basis scrutiny when deciding if a statute awarding such support is constitutional.⁵² Under rational basis scrutiny, a statute is constitutional if it is rationally related to some legitimate government interest.⁵³ When considering post-minority child support, states have a legitimate interest in protecting the welfare of children and society as a whole.⁵⁴ Therefore, the argument that awarding post-minority child support is unconstitutional has been unsuccessful in most situations.⁵⁵

An additional concern is the lack of control given to the noncustodial parent who is ordered to pay support.⁵⁶ While most married parents are willing to assist their child in obtaining a higher education, the parents retain some control over their adult child and can withdraw support at any time.⁵⁷ On the other hand, a parent who has been ordered to pay college support may have no control over his or her child, specifically pertaining to

46. *Id.* at 735.

47. *Id.* at 736.

48. *Id.*

49. Horan, *supra* note 3, at 605.

50. Lindsay E. Cohen, *Daddy, Will You Buy Me a College Education? Children of Divorce and the Constitutional Implications of Noncustodial Parents Providing for Higher Education*, 66 MO. L. REV. 187, 194 (2001).

51. *See id.* (declaring that traditionally, only classifications based on race, national origin, and illegitimacy have constituted "suspect classes").

52. Childers v. Childers, 575 P.2d 201, 209 (Wash. 1978).

53. *Id.*

54. *Id.*

55. Horan, *supra* note 3, at 605. *See generally* Cohen, *supra* note 50, at 196 (stating that very few statutes allowing support for post-secondary education have been struck down as unconstitutional).

56. Horan, *supra* note 3, at 605-06.

57. *Id.* at 605 (citing Grapin v. Grapin, 450 So. 2d 853, 854 (Fla. 1984)).

the choice of school, field of study, academic performance, and living arrangements.⁵⁸

Another legitimate concern is whether it is fair to award support to a child who has not seen or interacted with the noncustodial parent in several years and does not maintain any relationship with that parent.⁵⁹ Sending a child to college is expensive and can require much sacrifice on the part of the parent.⁶⁰ A child's behavior toward, and relationship with, the noncustodial parent should be considered when deciding if the child is worthy of the additional efforts and financial burdens placed upon that parent.⁶¹

Some commentators argue that the gift of an education is a form of an intergenerational transfer of wealth, such as an inheritance, and in this country, testators are practically unrestricted in their ability to transfer their possessions or disinherit their children if they so desire.⁶² Just as a testator may prefer to spend all of his money or to leave all his property to a surviving spouse rather than to his children, a divorced parent may prefer to devote his current resources to an individual other than his child.⁶³ A testator might disinherit a child on the belief that the parent has already provided adequately for the child, or because the parent believes the child does not need the support.⁶⁴ A testator can influence his children's actions by either rewarding them for good behavior or punishing them for bad behavior.⁶⁵ In comparison, a noncustodial parent may also feel that he or she has already provided adequate support for the child.⁶⁶ However, unlike the testator, the noncustodial parent lacks control over the child.⁶⁷ Any direct incentive for the child to maintain a cordial relationship with the noncustodial parent is removed when post-minority support becomes mandatory.⁶⁸ The child is allowed to reject the noncustodial parent's value system with no ramifications.⁶⁹ It is unreasonable to deny divorced parents

58. *Id.* at 606.

59. *Id.*; see *Hambrick v. Prestwood*, 382 So. 2d 474, 477-78 (Miss. 1980) (holding that the father had no duty to pay his daughter's college expenses when the daughter had not seen her father for six to seven years and was extremely hostile toward him).

60. *Hambrick*, 382 So. 2d at 477.

61. *Id.*

62. Langbein, *supra* note 44, at 733; McMullen, *supra* note 32, at 353.

63. McMullen, *supra* note 32, at 363.

64. *Id.* at 364.

65. *Id.* at 365.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

the ability to use punishments and rewards to influence their children's behavior.⁷⁰

Another negative impact of awarding post-minority child support is the lack of notice to the noncustodial parent regarding when his or her support obligation will end.⁷¹ If child support terminates at majority, a noncustodial parent can plan his finances accordingly.⁷² However, if a custodial parent can modify that support obligation to cover higher educational expenses past the age of majority, the noncustodial parent is trapped with an unanticipated support obligation for an indefinite length of time.⁷³ Paying for post-majority expenses could jeopardize the financial goals of the noncustodial parent, such as maintaining a comfortable lifestyle or saving for retirement.⁷⁴ People today need a good deal of money to retire comfortably, and middle-aged parents may prefer to ensure their own financial security rather than spending or borrowing heavily to pay for the college education of their children.⁷⁵

Many states take the position that when an adult child is healthy and able-bodied, there is no reason why the child should not pay his or her own way through school.⁷⁶ A noncustodial parent may wish to decline to pay for the child's higher education because of the parent's belief that the child should be independent.⁷⁷ Just as married parents have the opportunity to influence their child's maturity, so should divorced parents.⁷⁸

Finally, there is the notion that voluntary support to adult children from their parents is more likely to foster a close parent/child relationship, as compared to a court-ordered obligation.⁷⁹ The goal of post-minority support is to replicate, as closely as possible, the decisions that an intact family would make, and not to make wholesale awards of college tuition.⁸⁰ The following section of this article will provide a look at North Dakota's specific views on post-minority college support.

70. *Id.* at 364-66.

71. Horan, *supra* note 3, at 606.

72. *Id.*

73. *Id.*

74. McMullen, *supra* note 32, at 364.

75. *Id.*

76. Horan, *supra* note 3, at 607.

77. McMullen, *supra* note 32, at 366.

78. *Id.*

79. Horan, *supra* note 3, at 607.

80. *Id.*

III. NORTH DAKOTA

North Dakota has an unsettled history regarding post-minority child support for college expenses.⁸¹ A lack of clarity in the legislature's intent has resulted in disparate North Dakota Supreme Court decisions regarding this issue.⁸² This section of the note provides a chronological overview of North Dakota's development of college support, taking an in-depth look at major North Dakota Supreme Court cases and various statutory enactments and amendments to North Dakota Century Code section 14-09-08.2, the provision governing post-minority support.

A. DAVIS V. DAVIS

In 1978, the North Dakota Supreme Court decided *Davis v. Davis*,⁸³ a case of first impression regarding post-minority child support for college expenses in North Dakota.⁸⁴ As part of a divorce decree, the trial court ordered the husband, the noncustodial parent, to pay \$10,000 into a trust for each of his four minor children, for the educational benefit of each child.⁸⁵ Any funds remaining in the trust were payable to the child upon attaining the age of twenty-two.⁸⁶

The North Dakota Supreme Court affirmed the trial court's decision, stating that "[t]here has been a trend toward awarding moneys for the furthering of education for children, including a college education, by the courts of the various States, even though the parents are divorced."⁸⁷ The court, relying on an *American Law Report*, stated that courts have expressly recognized the duty of a divorced parent to provide a child not only with an elementary and secondary education, but a college education as well.⁸⁸ The

81. See N.D. CENT. CODE § 14-09-08.2 (2004) (stating that the trial court is not precluded from awarding child support beyond the age of eighteen if the parties agree or if the court otherwise determines the support to be appropriate); *Zarrett v. Zarrett*, 1998 ND 49, ¶ 14, 574 N.W.2d 855, 858-59 (holding that a trial court is authorized to order child support past the age of eighteen if the court determines the support to be appropriate). *But see* *Larson v. Larson*, 2005 ND 67, ¶ 1, 694 N.W.2d 13, 14 (holding that the trial court did not have the authority to award post-minority child support for college expenses).

82. See *Donarski v. Donarski*, 1998 ND 128, ¶ 19, 581 N.W.2d 130, 136 (holding that a trial court has the authority to order post-minority child support for college expenses under appropriate circumstances). *But see* *Larson*, ¶ 1, 694 N.W.2d at 13 (holding that the trial court did not have the authority to award post-minority child support for college expenses).

83. 268 N.W.2d 769 (N.D. 1978).

84. *Davis*, 268 N.W.2d at 777.

85. *Id.*

86. *Id.*

87. *Id.* at 778.

88. *Id.* See generally E. Le Fevre, Annotation, *Education as an Element in Allowance for Benefit of Child in Decree of Divorce or Separation*, 56 A.L.R. 2D 1207, 1209 (1957) (providing

Davis court further explained that the determination to award post-minority support should be based on certain factors, including the financial condition of the parents, and the family standard of living prior to the divorce.⁸⁹ The court stated, “We are not unaware of the increasing necessity of a college education or its equivalent, as well as the tremendous escalation of the costs of securing such an education.”⁹⁰ The *Davis* decision was particularly important because it set a precedent in North Dakota for awarding post-minority child support for college expenses, absent any statutory provision granting such authority.⁹¹

B. ENACTMENT OF NORTH DAKOTA CENTURY CODE
SECTION 14-09-08.2

In 1989, the North Dakota Legislature enacted North Dakota Century Code section 14-09-08.2, which requires a noncustodial parent to continue child support payments for a child that has attained the age of majority (eighteen years old) but is still enrolled and attending high school and residing with the parent to whom the duty of support is owed.⁹² The statute provides for child support to continue until the child graduates from high school or attains the age of nineteen.⁹³ This enactment signifies the first and only North Dakota statutory provision allowing child support to continue past the age of majority.⁹⁴

C. 1991 AMENDMENT TO NORTH DAKOTA CENTURY CODE
SECTION 14-09-08.2

In 1991, the legislature amended the newly enacted statute to clear up a few minor administrative difficulties, specifically, which party is responsible for serving the affidavit stating that the child is over eighteen years of age and still in high school, and who must provide such notice to the noncustodial parent.⁹⁵ The amendment requires the clerk of court to serve an affidavit by certified mail on any person owing support for a child eighteen years of age, if that child is currently enrolled in high school, and

cases which affirm the courts' ability to award post-minority child support for a college education).

89. *Davis*, 268 N.W.2d at 778.

90. *Id.*

91. *See id.* (recognizing the duty of divorced parents to provide a child with a college education).

92. Act of Mar. 31, 1989, ch. 180, 1989 N.D. Laws 551, 551.

93. *Id.*

94. *See id.* (awarding child support beyond the age of majority if the child is still in high school).

95. Act of Mar. 11, 1991, ch. 151, 1991 N.D. Laws 418, 418.

the original judgment did not specifically provide for the child support to continue.⁹⁶

D. 1993 AMENDMENT TO NORTH DAKOTA CENTURY CODE
SECTION 14-09-08.2

The 1993 amendment to section 14-09-08.2 had a considerable impact on post-minority child support for college expenses.⁹⁷ The legislature added an additional subsection which provides, “This section *does not preclude* the entry of an order for child support which continues *after* the child reaches eighteen, *if the parties agree or if the court determines the support to be appropriate.*”⁹⁸ Although the legislative history is limited in regard to this addition, one statement holds particular importance: “The amendment clarifies that this is not the only basis under which support could continue after age eighteen.”⁹⁹ This subsection opens the door for awards of post-minority child support for college expenses, as it provides courts with a legal avenue created by the legislature to order such support.¹⁰⁰

E. ANDERSON V. ANDERSON

In 1994, the North Dakota Supreme Court decided *Anderson v. Anderson*,¹⁰¹ another case pertaining to the award of college support.¹⁰² This case involved a stipulated divorce agreement between Lane and Myrna Anderson.¹⁰³ The agreement provided that Lane, the noncustodial parent, would be responsible for each child’s college expenses for up to four years of college, so long as the child maintained passing grades.¹⁰⁴ Lane, however, received a break from such obligations so long as the college expenses were covered by other sources, specifically from financial gifts to the children from Lane’s parents.¹⁰⁵ The dispute arose when the oldest

96. *Id.*

97. *See* Act of Apr. 15, 1993, ch. 152, 1993 N.D. Laws 621, 623 (adding statutory language to allow the court to order child support past the age of majority in certain situations).

98. *Id.* (emphasis added).

99. *Hearing on H.B. 1181 Before the H. Human Serv. Comm.*, 1993 Leg., 53d Sess. (N.D. 1993) (statement of Blaine L. Nordwall, Director of Legal Advisory Unit, North Dakota Department of Human Services).

100. *See* N.D. CENT. CODE § 14-09-08.2(6) (2004) (granting the court authority to award post-minority support when it deems the support to be appropriate).

101. 522 N.W.2d 476 (N.D. 1994).

102. *Anderson*, 522 N.W.2d at 477.

103. *Id.*

104. *Id.*

105. *Id.*

child was required to obtain financial aid to pay for her fourth year of college after she had exhausted all the funds from her paternal grandparents' trust.¹⁰⁶ The North Dakota Supreme Court upheld the divorce judgment and ordered Lane to provide Myrna with \$12,720.44 for college support for the oldest child's fourth year of education.¹⁰⁷

Lane argued that the trial court did not have authority to award post-minority support past the age of twenty-two, pursuant to *Davis v. Davis*.¹⁰⁸ The North Dakota Supreme Court rejected this argument, declining to set a strict age limit for college support.¹⁰⁹ It instead directed the trial court to use its informed discretion.¹¹⁰

In the alternative, Lane argued that his post-minority support obligation should only require him to pay college expenses at in-state institutions where the child has been accepted.¹¹¹ The North Dakota Supreme Court, facing a question of first impression, relied on a Pennsylvania decision which stated, "We are reluctant to formulate a rule which would, in all cases, prevent a child from attending the college of his choice simply because it is more expensive than the state-supported university."¹¹² The *Anderson* court did caution, however, that the child should not have absolute discretion in selecting a college, thereby unilaterally increasing the parent's support obligation.¹¹³ Rather, the determination of whether such an additional burden should be imposed on the noncustodial parent is a matter for the trial court.¹¹⁴

The *Anderson* court, recognizing the ever increasing necessity of a college education, as well as the escalating cost of such an education, held that "[b]alancing these countervailing forces is a job for which the trial court is uniquely qualified."¹¹⁵ The *Anderson* court further advised that the trial courts should analyze the advantages offered by the more expensive college compared to the child's individual needs and abilities.¹¹⁶ Courts must then weigh these advantages against the increased hardship that would be imposed on the noncustodial parent to determine whether the additional

106. *Id.* at 478.

107. *Id.* at 480.

108. *Id.* at 479 (citing *Davis v. Davis*, 268 N.W.2d 769, 778 (N.D. 1978)).

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* (quoting *Commonwealth v. Larson*, 234 A.2d 18, 20 (Pa. Super. Ct. 1967)).

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at 479-80

expense is reasonable under the circumstances.¹¹⁷ The *Anderson* case represents the first North Dakota decision to uphold a stipulated divorce judgment where the parties agreed on the award of post-minority college support at the time of their divorce.¹¹⁸ This decision affirmed the trial courts' authority to award such support and provided a more comprehensive analysis of how the courts should approach this issue.¹¹⁹

F. JOHNSON V. JOHNSON

In 1995, the North Dakota Supreme Court issued another decision addressing post-minority child support for college expenses.¹²⁰ In *Johnson v. Johnson*,¹²¹ Carlotta and Daryl Johnson, husband and wife, entered into a stipulated divorce agreement.¹²² According to the judgment, Daryl was obligated to "pay to each child the sum of \$300.00 per month for a maximum of four years, if any child shall attend college and maintain passing grades."¹²³ For the first three years, Daryl complied with judgment for the oldest child, Corey.¹²⁴ However, because Corey refused to contact his father upon request, Daryl refused to pay and no longer felt obligated to pay for Corey's final year of college.¹²⁵

Based upon a contempt motion brought by Carlotta, the trial court issued an order to show cause against Daryl.¹²⁶ Following the order to show cause hearing, the trial court vacated the previous order to show cause, reasoning that Daryl's obligation was for "collateral support," not "direct child support," and therefore, contempt was not an appropriate method of enforcing the judgment.¹²⁷ The North Dakota Supreme Court determined that the distinction between collateral and direct support rests upon the kind of support that is ordered, not the age of the child for whom it is ordered.¹²⁸ If the support obligation permits a child or custodial parent use of family property or other in-kind, non-cash benefits, the support is

117. *Id.* at 480.

118. *See id.* (upholding the trial court's decision to require the noncustodial father to abide by his stipulated divorce agreement and provide college support to his child).

119. *See id.* (addressing the issues of duration of post-minority support as well as a child's right to choose which college institution to attend).

120. *Johnson v. Johnson*, 527 N.W.2d 663, 667 (N.D. 1995).

121. 527 N.W.2d 663 (N.D. 1995).

122. *Johnson*, 527 N.W.2d at 665.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* at 667.

“collateral” support.¹²⁹ If the support obligation is in the form of cash payments for the benefit of the child, then it is “direct” support.¹³⁰

The *Johnson* court concluded that the legislature intended for contempt proceedings to be available to enforce all provisions of a divorce judgment, including those ordering support for adult children.¹³¹ Thus, the court reversed and remanded for proceedings to determine whether Daryl should be held in contempt.¹³² Overall, the North Dakota Supreme Court’s holding in *Johnson* reaffirmed the position that post-minority child support may be awarded for college expenses upon agreement by the parties.¹³³

G. ZARRETT V. ZARRETT

In 1998, the North Dakota Supreme Court decided *Zarrett v. Zarrett*.¹³⁴ Robert and Linda Zarrett had two children together, Diana and David.¹³⁵ The couple entered into a stipulated divorce agreement in 1990, under which Linda would have physical custody of the children and Robert would pay \$1200 per month in child support.¹³⁶ This was Robert’s second divorce.¹³⁷ Pursuant to Robert’s first divorce agreement, he was ordered to “pay college expenses which include tuition, books, room and board for four (4) years of college and, thereafter, for up to four (4) years in graduate school” for his two children from his first marriage.¹³⁸

In light of Robert’s college support obligation to his children from his first marriage, Robert and Linda agreed that he would not bring a motion to modify his child support on the basis that he was paying college expenses for his children from a prior marriage.¹³⁹ The judgment did provide that either Robert or Linda were free to bring a motion to review the child support payments at any time, and for any reason, other than the fact that Robert was paying college expenses for his other children.¹⁴⁰

129. *Id.*

130. *Id.* at 667-68.

131. *Id.* at 668.

132. *Id.*

133. *See id.* at 667 (determining that in appropriate circumstances a trial court may award direct or collateral support for a child over the age of majority).

134. 1998 ND 49, 574 N.W.2d 855.

135. *Zarrett*, ¶ 3, 574 N.W.2d at 856.

136. *Id.*

137. *Id.* ¶ 2.

138. *Id.*

139. *Id.* ¶ 3, 574 N.W.2d at 857.

140. *Id.*

In 1997, with the help of the Regional Child Support Enforcement Unit, Linda sought to increase Robert's support obligation.¹⁴¹ The trial court awarded Linda \$1,992 per month.¹⁴² In calculating Robert's obligation, the Child Support Enforcement Unit deducted \$33,000 from his annual income for college expenses paid on behalf of the children from his first marriage.¹⁴³ Linda argued that the deduction for college expenses should not be allowed under the child support guidelines.¹⁴⁴ Robert, on the other hand, argued that the court was correct in refusing to order the presumptively correct amount of child support because the parties' 1990 stipulation took into consideration Robert's obligation to pay college and graduate support.¹⁴⁵

The North Dakota Supreme Court found that "[t]he language of Robert's first divorce decree indicates the college and graduate school payments are in the nature of child support."¹⁴⁶ The *Zarrett* court, relying on prior North Dakota case law, further explained that an order directing payment of post-majority support, including college expenses, constitutes child support.¹⁴⁷ As such, the court concluded that the graduate school expenses that Robert was required to pay were child support.¹⁴⁸ Thus, when calculating Robert's child support obligation to Diana and David, the children from his second marriage, the trial court must take into consideration his college expense obligation from his first marriage.¹⁴⁹ The *Zarrett* decision emphasized that a noncustodial parent's payments for college or graduate school expenses are child support, and therefore, should be considered when calculating the noncustodial parent's child support obligations in multi-family support cases.¹⁵⁰

141. *Id.* ¶ 5.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* ¶ 9, 574 N.W.2d at 858.

146. *Id.* ¶ 4.

147. *Id.* (citations omitted).

148. *Id.* at 859.

149. *Id.*; see also N.D. ADMIN. CODE § 75-02-04.1-06.1 (1999) (providing a formula for calculating support when the obligor owes a duty of support to children from more than one family).

150. *Zarrett*, ¶ 14, 574 N.W.2d at 858.

H. DONARSKI V. DONARSKI

In 1998, the North Dakota Supreme Court decided *Donarski v. Donarski*,¹⁵¹ another case involving post-minority child support for college expenses.¹⁵² *Donarski* was different in that the post-minority support resulted from a contested trial rather than the parties' agreement.¹⁵³ Kenneth and Janet Donarski were married in 1974.¹⁵⁴ The couple had two children together, Nathan and BethAnn.¹⁵⁵ Kenneth also adopted Janet's daughter, Amy, from a prior marriage.¹⁵⁶ Janet filed for divorce in 1996.¹⁵⁷ At the time of the divorce, BethAnn was the only minor child involved in the action.¹⁵⁸

Because the parties were unable to settle, the trial court decided the issues of the case.¹⁵⁹ The court awarded Janet custody of BethAnn and required Kenneth to pay child support on her behalf.¹⁶⁰ In addition to Kenneth's monthly child support obligation, he was ordered to pay "one-half of BethAnn's reasonable college education expenses, including books, tuition and housing."¹⁶¹ The court went on to explain that "[r]easonable expenses are those incurred in pursuing a four year degree in consecutive years upon graduation from high school."¹⁶² On appeal, Kenneth argued that the trial court had no authority to order a parent to pay support for an adult child.¹⁶³

The North Dakota Supreme Court was divided in the *Donarski* decision.¹⁶⁴ Three of the five Justices, Justice Neumann, Justice Maring, and Justice Meschke, forming the majority, held that trial courts have authority to award post-minority child support for college expenses in

151. 1998 ND 128, 581 N.W.2d 130.

152. *Donarski*, ¶ 19, 581 N.W.2d at 136.

153. *Id.* ¶ 4, 581 N.W. at 133.

154. *Id.* ¶ 2.

155. *Id.*

156. *Id.*

157. *Id.* ¶ 4.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.* ¶ 18, 581 N.W.2d at 135.

162. *Id.*

163. *Id.* at 135-36.

164. *Id.* ¶ 27.

certain situations.¹⁶⁵ Conversely, two Justices, Chief Justice VandeWalle and Justice Sandstrom, argued strongly that trial courts do not.¹⁶⁶

1. *Majority Opinion*

In *Donarski*, the North Dakota Supreme Court affirmed the trial court's authority to order post-majority child support, including college expenses, in a divorce action under appropriate circumstances.¹⁶⁷ However, the court cautioned that a trial court's authority to award post-minority support is limited, and must be based upon full consideration of the particular circumstances of the case.¹⁶⁸ The court relied on a New Jersey decision that defined appropriate factors to consider when directing a parent to pay post-minority support for a child's college education.¹⁶⁹

In evaluating the claim for contribution toward the cost of higher education, courts should consider all relevant factors, including (1) whether the parent, if still living with the child, would have contributed toward the costs of the requested higher education; (2) the effect of the background, values and goals of the parent on the reasonableness of the expectation of the child for higher education; (3) the amount of the contribution sought by the child for the cost of higher education; (4) the ability of the parent to pay that cost; (5) the relationship of the requested contribution to the kind of school or course of study sought by the child; (6) the financial resources of both parents; (7) the commitment to and aptitude of the child for the requested education; (8) the financial resources of the child, including assets owned individually or held in custodianship or trust; (9) the ability of the child to earn income during the school year or on vacation; (10) the availability of financial aid in the form of college grants and loans; (11) the child's relationship to the paying parent, including mutual affection and shared goals as well as responsiveness to parental advice and guidance; and (12) the relationship of the education requested to any prior training and to the overall long-range goals of the child.¹⁷⁰

165. *Id.* ¶ 20, 581 N.W.2d at 136.

166. *Id.* ¶ 27, 581 N.W.2d at 137 (VandeWalle, C.J., dissenting); *id.* ¶ 37, 581 N.W.2d at 138 (Sandstrom, J., dissenting).

167. *Id.* ¶ 19, 581 N.W.2d at 136 (majority opinion); see *Zarrett v. Zarrett*, 1998 ND 49, ¶ 14, 574 N.W.2d 855, 858-59 (holding that a court is authorized to order child support past the age of eighteen if the court determines the support to be appropriate); see also N.D. CENT. CODE § 14-09-08.2(4) (1993) (stating that the court is not precluded from awarding child support beyond the age of eighteen if the parties agree or if the court determines the support to be appropriate).

168. *Donarski*, ¶ 20, 581 N.W.2d at 136.

169. *Id.* (citing *Newburgh v. Arrigo*, 443 A.2d 1031, 1038-39 (N.J. 1982)).

170. *Id.*

The North Dakota Supreme Court asserted that, of these factors, the parent's ability to pay is most significant.¹⁷¹ The court further reasoned that a parent cannot be compelled to contribute to an adult child's college expenses if the parent's financial resources are lacking.¹⁷² In essence, the trial court must consider all relevant factors in deciding whether to award post-minority child support.¹⁷³ The *Donarski* court stated, "It is essential the court consider evidence pertaining to the amount required for college costs, including books, tuition, room and board, and to determine the amount that a parent can contribute without experiencing undue hardship."¹⁷⁴

The North Dakota Supreme Court also relied on an Alabama decision, *Ex Parte Bayliss*,¹⁷⁵ for guidance to establish relevant factors for courts to consider when awarding post-minority support.¹⁷⁶ In that case, the Alabama Supreme Court concluded that a trial court may award property or income from either or both parents for the post-minority education of a child of that dissolved marriage if such support is reasonable and necessary.¹⁷⁷ The court shall consider "*primarily* the financial resources of the parents and the child and the child's commitment to, and aptitude for, the requested education."¹⁷⁸ The trial court may also consider the standard of living that the child would have enjoyed if the marriage had not been dissolved, the child's relationship with his or her parents, and the child's responsiveness to parental advice and guidance.¹⁷⁹

Turning its focus back to the facts at hand, the *Donarski* court held that the trial court's findings of fact were insufficient to justify an award of post-minority support.¹⁸⁰ Although the trial court found that Kenneth helped the two older children with their college expenses and that he had the ability to provide for a portion of BethAnn's college expenses, it failed to make specific findings on the other relevant factors to consider when awarding support.¹⁸¹ The North Dakota Supreme Court explained that, although the

171. *Id.* ¶ 21.

172. *Id.*

173. *Id.*

174. *Id.* (citing *Stanford v. Stanford*, 628 So. 2d 701, 703 (Ala. Civ. App. 1993)).

175. 550 So. 2d 986 (Ala. 1989).

176. *Donarski*, ¶ 22, 581 N.W.2d at 136-37 (citing *Ex Parte Bayliss*, 550 So. 2d at 987).

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.* ¶ 23, 581 N.W.2d at 137.

181. *Id.* Kenneth was a graduate from the University of North Dakota with a bachelor's degree in social work. *Id.* ¶ 3, 581 N.W.2d at 133. At the time of the divorce, he was employed as the Director of the Grand Forks Housing Authority. *Id.* His net monthly income was approximately \$3,200 after deducting taxes and BethAnn's health insurance. *Id.* ¶ 7.

trial court attempted to define the scope of college expenses and also imposed a consecutive four-year time limit, it placed no limit on the amount of Kenneth's obligation.¹⁸² The trial court said nothing about the cost or quality of the education.¹⁸³ For those reasons, the *Donarski* court reversed and remanded the case for additional findings of fact on the issue of post-minority child support.¹⁸⁴

2. *Chief Justice Vandewalle's Dissent*

In his dissent, Chief Justice Vandewalle argued that neither statutory law nor prior case law supported the trial court's order that Kenneth pay one-half of BethAnn's reasonable college expenses.¹⁸⁵ He analyzed the 1993 amendment to section 14-09-08.2(4), which the majority cited as granting trial courts the authority to award post-minority support for college expenses.¹⁸⁶ The Chief Justice concluded that the language "does not preclude" found in subsection 4 only relates to the language already found in section 14-09-08.2.¹⁸⁷ He argued that if the legislature had intended to require college support for adult children, it would have done so in more direct and specific language.¹⁸⁸ Chief Justice Vandewalle stated, "While I hope divorced parents would continue to support their children in seeking college educations, that is a far cry from concluding a court can impose an obligation upon the parents to do so as a matter of law."¹⁸⁹ He further observed that there are married parents who do not provide a college education for their children for a number of reasons, not all of them financial, and they have no such obligation to provide college support for their children's post-secondary education.¹⁹⁰ Therefore, according to Chief Justice Vandewalle, a child of divorced parents should not have a greater legal right to a college education than a child whose parents remain married.¹⁹¹

182. *Id.* ¶ 23, 581 N.W.2d at 137.

183. *Id.*

184. *Id.* ¶ 24.

185. *Id.* ¶ 28, 581 N.W.2d at 137 (Vandewalle, C.J., dissenting).

186. *Id.* ¶ 32, 581 N.W.2d at 138.

187. *Id.*

188. *Id.* ¶ 33.

189. *Id.* ¶ 29, 581 N.W.2d at 137.

190. *Id.*

191. *Id.*

3. *Justice Sandstrom's Dissent*

Justice Sandstrom also dissented in *Donarski*, concluding that the majority mistakenly relied on section 14-09-08.2(4) as a grant of additional authority to award post-minority support for college expenses.¹⁹² He argued that the majority's holding was contrary to the plain language of the statute and to legislative history.¹⁹³ Justice Sandstrom argued that the language "does not preclude," found in section 14-09-08.2(4), was not an additional grant of authority, but instead was enacted only to clarify section 14-09-08.2(2).¹⁹⁴ He also pointed out that the New Jersey and Alabama decisions upon which the majority relied, both involved statutory provisions recognizing the power of a court to order post-minority support.¹⁹⁵ Those statutes also defined children to mean dependent children, even if the children were over the age of majority.¹⁹⁶ North Dakota, however, defines "child" to mean "minor," and a "minor" is a person under the age of eighteen.¹⁹⁷ Therefore, the trial court did not have the authority to award such support under section 14-09-08.2.¹⁹⁸

The *Donarski* decision was important to the development of post-minority college support in North Dakota because it was the first case in which the North Dakota Supreme Court relied on section 14-09-08.2(4) of the North Dakota Century Code to affirm an award of such support.¹⁹⁹ Accordingly, this North Dakota Supreme Court decision, as well as section 14-09-08.2 of the North Dakota Century Code, appeared to grant the trial courts sound authority to award post-minority support for college expenses.²⁰⁰

192. *Id.* ¶¶ 40-41, 581 N.W.2d at 139 (Sandstrom, J., dissenting).

193. *Id.* ¶ 41.

194. *Id.* ¶¶ 41-42. North Dakota Century Code section 14-09-08.2(2) provides for payment of child support past the age of majority under the circumstances described in subsection 1 (until the child graduates from high school or obtains the age of nineteen, whichever occurs first). N.D. CENT. CODE § 14-09-08.2(2) (2004).

195. *Donarski*, ¶ 43, 581 N.W.2d at 140 (Sandstrom, J., dissenting).

196. *Id.*

197. *Id.* (citing N.D. CENT. CODE. § 14-10-01 (1999)).

198. *Id.*

199. *See id.* ¶ 19, 581 N.W.2d at 136 (majority opinion) (holding that a court has the authority to award post-minority support for college expenses under appropriate circumstances); *see also* N.D. CENT. CODE § 14-09-08.2(4) (1993) (providing that this section does not preclude the order of child support past the age of majority if the parties agree or if the court determines the support to be appropriate).

200. *Id.*

I. 1999 AMENDMENT TO NORTH DAKOTA CENTURY CODE
SECTION 14-09-08.2

In the legislative session following the *Donarski* decision, section 14-09-08.2 was amended to: (1) eliminate the possibility of a filing fee for filing an affidavit stating that an eighteen-year-old is still in high school; (2) apply the section to orders that already require payment of support after the child's majority; (3) specify treatment during summer vacations; and (4) give the obligor both knowledge of where the child is enrolled and the opportunity to ask the court to terminate support if the child leaves high school.²⁰¹

The 1999 amendment to section 14-09-08.2 was the last time the legislature addressed post-minority child support.²⁰² As of today, North Dakota Century Code section 14-09-08.2 states:

1. A judgment or order requiring the payment of child support until the child attains majority continues as to the child until the end of the month during which the child is graduated from high school or attains the age of nineteen years, whichever occurs first if:
 - a. The child is enrolled and attending high school and is eighteen years of age prior to the date the child is expected to be graduated; and
 - b. The child resides with the person to whom the duty of support is owed.
2. A judgment or order may require payment of child support after majority under substantially the circumstances described in subsection 1.
- ...

201. Act of Mar. 30, 1999, ch. 143, 1999 N.D. Laws 690, 690-91; see *Hearing on S.B. 2073 Before the S. Judiciary Comm.*, 1999 Leg., 56th Sess. (N.D. 1999) (statement of Blaine L. Nordwall, Director of Legal Advisory Unit, North Dakota Department of Human Services) (testifying that the regional child support enforcement office had certain concerns about the administration of section 14-09-08.2). Some of these concerns included the following: (1) some clerks were charging a filing fee for filing an affidavit stating that an eighteen-year-old is still in high school; (2) it had become common for child support orders to require payment of support past majority, using language parallel to that found in section 14-09-08.2, but which technically removed those orders from the description in subsection 1; (3) treatment concerning support during summer vacation remained inconsistent; and (4) obligors should have been permitted to bring a motion to end the support if their eighteen-year-old dropped out of high school. *Id.*

202. See N.D. CENT. CODE § 14-09-08.2 (2004) (indicating no additional changes beyond the 1999 amendment).

6. This section does not preclude the entry of an order for child support which continues after the child reaches age eighteen, if the parties agree, or if the court determines the support to be appropriate.²⁰³

It is worth noting that the 1999 amendment to section 14-09-08.2, as well as the commentary and testimony found in the legislative history regarding the amendment, make no mention of post-minority child support for college expenses.²⁰⁴ The legislative history does not refer to the *Donarski* decision, or to any other prior decision, which granted the trial courts authority to award post-minority child support for college expenses.²⁰⁵ Based upon the above factors, it could logically be inferred that the legislature supports the award of post-minority child support for college expenses.²⁰⁶ However, as the next section illustrates, the North Dakota Supreme Court had a different interpretation of the legislature's intent.

J. LARSON V. LARSON

In 2005, *Larson v. Larson*²⁰⁷ made its way to the North Dakota Supreme Court.²⁰⁸ Glenda and Jerry Larson were married in 1978 and divorced in 1997.²⁰⁹ The parties had one child together, who was twelve years old at the time of the divorce.²¹⁰ Pursuant to the parties' stipulated divorce agreement, Glenda received physical custody of the child, and Jerry was ordered to pay child support.²¹¹ There was no provision in the parties' 1997 divorce judgment addressing post-minority child support for their daughter's college education.²¹² In March 2004, prior to their child's high school graduation, Glenda petitioned the trial court to require that Jerry pay post-minority child support so long as their child attended college and graduate school.²¹³ The Larsons' daughter excelled in both academics and

203. *Id.*

204. Act of Mar. 30, 1999, ch. 143, 1999 N.D. Laws 690, 690-91.

205. S.B. 2170, 1999 Leg., 56th Sess. (N.D. 1999).

206. *See, e.g.*, *Johnson v. Johnson*, 527 N.W.2d 663, 666 (N.D. 1995) (stating that a court presumes that the legislature is aware of judicial construction of a statute, and from the legislature's failure to amend a particular statutory provision, the court presumes that it acquiesces in that construction).

207. 2005 ND 67, 694 N.W.2d 13.

208. *Larson*, ¶ 1, 694 N.W.2d at 14.

209. *Id.* ¶ 2

210. *Id.*

211. *Id.*

212. *Id.* ¶ 10, 694 N.W.2d at 16.

213. *Id.* ¶ 3.

extracurricular activities in high school and desired to attend one of eight prestigious colleges in the United States.²¹⁴

Glenda argued that Jerry's refusal to pay college support was a detriment to their child because many colleges consider the income of both parents, regardless of marital status, in determining the amount of student aid available to a child attending college.²¹⁵ The daughter's top collegiate choice stated in its application materials that it expected both natural parents, even when divorced or separated, to provide for educational expenses on the basis of each parent's ability to contribute.²¹⁶ The college also required both natural parents to submit financial information and to provide assistance for the student's college expenses based upon their ability rather than their willingness to pay.²¹⁷ Glenda argued that Jerry, an established attorney, had the ability to provide such support.²¹⁸ The trial court denied Glenda's motion seeking post-minority college support, stating that it did not have authority to amend the 1997 divorce judgment.²¹⁹

In another split decision, the North Dakota Supreme Court ruled that the trial court did not have the authority to award post-minority child support for college expenses.²²⁰ Justice Sandstrom, Chief Justice VandeWalle, and Justice Kapsner joined in the majority opinion.²²¹ Justice Maring provided a dissenting opinion.²²² Justice Neumann, a member of the court when this case was heard, resigned effective March 14, 2005, and did not participate in this decision.²²³

1. *Majority Opinion*

On appeal, Jerry first argued that the trial court had no authority to award post-minority support for college expenses, because the issue was raised and rejected during settlement negotiations for the divorce.²²⁴ The North Dakota Supreme Court rejected this argument, finding a strong public policy against parental agreements that prohibit or limit the power of a

214. *Id.* ¶ 3, 694 N.W.2d at 14-15.

215. *Id.* at 15.

216. *Id.* at 14-15.

217. *Id.*

218. Brief for Appellant at 5, *Larson v. Larson*, 2005 ND 67, 694 N.W.2d 13 (No. 20040248).

219. *Larson*, ¶ 4, 694 N.W.2d at 15.

220. *Id.* ¶ 1, 694 N.W.2d at 14.

221. *Id.* ¶ 17, 694 N.W.2d at 18.

222. *Id.* ¶ 19, 694 N.W.2d at 18 (Maring, J., Dissenting).

223. *Id.* ¶ 18.

224. *Id.* ¶ 10, 694 N.W.2d at 16.

court to modify future child support.²²⁵ Therefore, Glenda's right to petition the trial court to modify Jerry's child support obligation to include college expenses was not waived in the original divorce judgment.²²⁶

The next major issue in the *Larson* case involved the interpretation of section 14-09-08.2 and whether that statute allowed the trial court to award post-minority child support for college expenses.²²⁷ Glenda, relying heavily on *Donarski* and other prior North Dakota decisions, argued that the trial court had the authority to award post-minority support for college expenses, "if the court determined the support to be appropriate."²²⁸ The North Dakota Supreme Court rejected Glenda's argument and concluded that amended section 14-09-08.2 prohibits courts from modifying a divorce judgment to include post-minority support for college expenses.²²⁹

The court found that the 1999 amendment of section 14-09-08.2, which added a new subsection 2 providing that "[a] judgment or order may require payment of child support after majority under substantially the circumstances described in subsection 1," allows a court to award child support only under circumstances similar to those of a child who obtains the age of majority before he or she graduates from high school.²³⁰ The *Larson* court concluded that the statute did not allow a court to award post-minority child support for college expenses.²³¹ The majority, relying on the reasoning of *Donarski* dissenters, held that the "does not preclude" language of section 14-09-08.2(6) only clarifies the statutory provisions set forth in section 14-09-08.2(2).²³² The *Larson* court reasoned that the language "does not preclude," coupled with the legislature's actions after *Donarski*, indicated the legislature's intent to limit post-minority child support to circumstances substantially similar to those already expressed in the statute.²³³ The majority stated, "When the wording of a statute is clear and free of all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit."²³⁴

225. *Id.* ¶ 11 (majority opinion).

226. *Id.* ¶ 10.

227. *Id.* ¶ 12.

228. *Id.* (quoting N.D. CENT. CODE § 14-09-08.2(6) (2003)); see also *Donarski v. Donarski*, 1998 ND 128, ¶ 20, 581 N.W.2d 130, 136 (cautioning that the trial court's authority to award post-minority support must be based upon full consideration of the circumstances of the case).

229. *Larson*, ¶ 16, 694 N.W.2d at 18.

230. *Id.* ¶ 14, 694 N.W.2d at 17 (citing N.D. CENT. CODE § 14-09-08.2(2)).

231. *Id.*

232. *Id.* ¶ 15 (citing *Donarski*, ¶ 42, 581 N.W.2d at 139).

233. *Id.*

234. *Id.* ¶ 14 (quoting *Ralston v. Ralston*, 2003 ND 160, ¶ 5, 670 N.W.2d 334, 335).

2. *Justice Maring's Dissent*

Justice Maring wrote a dissenting opinion, arguing that the trial court did have the authority to award post-minority child support for college expenses based upon the analysis set forth in *Donarski*.²³⁵ Justice Maring asserted that in 1998, the *Donarski* court determined under section 14-09-08.2 that a trial court has the authority to order post-minority support, including college education expenses, under appropriate circumstances.²³⁶ If the legislature truly intended to limit a trial court's authority to award post-minority child support in situations other than those described in section 14-09-08.2(1), the legislature would have amended section 14-09-8.2(6) to explicitly reflect that, or it would have eliminated altogether that part of subsection 6 which states "or if the court determines the support to be appropriate."²³⁷

Justice Maring stated, "We interpret statutes to give meaning and effect to every word, phrase, and sentence, and do not adopt a construction which would render part of the statute mere surplusage."²³⁸ When a statute's language is ambiguous, because it has more than one rational meaning, the court may consider extrinsic aids, including legislative history, to ascertain the legislature's intent.²³⁹ Justice Maring continued by noting that although the legislative history was limited, there was no indication that the 1999 amendment to section 14-09-08.2 was in response to the *Donarski* decision.²⁴⁰ The legislative history available indicated that the addition of subsection 2 was completely unrelated to the issue of post-minority child support for college expenses.²⁴¹

III. CONCLUSION

North Dakota Century Code section 14-09-08.2, which pertains to post-minority child support, is ambiguous.²⁴² Although the issue of post-minority support for college expenses has been addressed by the North Dakota

235. *Id.* ¶ 30, 694 N.W.2d at 21 (Maring, J., dissenting).

236. *Id.* ¶ 20, 694 N.W.2d at 18; see *Donarski*, ¶ 20, 581 N.W.2d at 136 (providing that the trial court has the authority to award post-minority college support in certain situations).

237. *Larson*, ¶ 22, 694 N.W.2d at 18 (Maring, J., Dissenting) (citing N.D. CENT. CODE § 14-09-08.2 (2004)).

238. *Id.* ¶ 27, 694 N.W.2d at 20 (quoting *State v. Buchholz*, 2005 ND 30, ¶ 6, 692 N.W.2d 105, 106).

239. *Id.*

240. *Id.* ¶ 28.

241. *Id.*

242. See, e.g., *Larson*, ¶¶ 12-15, 694 N.W.2d at 16-17 (majority opinion) (providing conflicting interpretations regarding section 14-09-08.2); *Donarski v. Donarski*, 1998 ND 128, ¶¶ 32-33, 581 N.W.2d 130, 138 (providing conflicting interpretations regarding section 14-09-08.2).

Supreme Court in a number of cases, the statute remains silent.²⁴³ The only relevant statutory language pertinent to college support authorizes the court to provide post-minority support after the age of eighteen “if the parties agree, or if the court determines the support to be appropriate.”²⁴⁴ What does the North Dakota Legislature intend to achieve with this subsection?²⁴⁵ What are the North Dakota Legislature’s objectives regarding post-minority child support for college expenses? The answers are not clear.

Prior to the *Larson* decision, Judy DeMers, a former member of both the North Dakota House of Representatives and the Senate, who co-sponsored the bill regarding post-minority child support, clarified the legislature’s intentions regarding post-minority college support.²⁴⁶ DeMers explained that in the early 1990s, the legislature wanted to recognize that both custodial and noncustodial parents have a continuing responsibility to children older than eighteen, especially if they are enrolled in college or technical school.²⁴⁷ The *Larson* Court, however, declined to recognize an individual legislator’s retrospective recollection as determinative legislative intent.²⁴⁸ Ms. DeMers’ interpretation, had it been recorded in the legislative history, would have provided sufficient clarity as to legislative intent.²⁴⁹

Due to the lack of legislative clarity, the North Dakota Supreme Court has provided conflicting rulings on the issue of post-minority child support for college expenses.²⁵⁰ If and when the North Dakota Legislature decides

243. See N.D. CENT. CODE § 14-09-08.2 (2004) (failing to make any reference regarding college expenses).

244. *Id.* § 14-09-08.2(6).

245. See *Larson*, ¶¶ 12-15, 694 N.W.2d at 16-17 (conveying that the language of the statute, coupled with the legislature’s actions following *Donarski*, indicates the legislature’s intent to limit post-minority support to circumstances similar to those already expressed in the statute). For additional guidance with statutory interpretation in North Dakota, see Pub. Serv. Comm’n v. Wimbledon Grain Co., 2003 ND 104, ¶ 28, 663 N.W.2d 186, 196 (articulating that the law is what the legislature says, not what is unsaid); see also *Rodenburg v. Fargo-Moorhead YMCA*, 2001 ND 134, ¶ 29, 632 N.W.2d 407, 418 (stating that the “justice, wisdom, necessity, utility and expediency of legislation are questions for legislation, and not for judicial determination”).

246. Erin Hemme Froslic, *College Bound*, THE FORUM (Fargo, N.D.), Jan. 16, 2005, at A1.

247. *Id.*

248. *Larson v. Larson*, No. 200402048 (N.D. Jan. 26, 2005) (order denying request for taking judicial notice); see also Appellant’s Request for Taking of Judicial Notice at 2, *Larson v. Larson*, 2005 ND 67, 694 N.W.2d 13 (No. 20040248) (giving meaning to a single legislator’s commentary regarding a particular bill).

249. See S.B. 2170, 1999 Leg., 56th Sess. (N.D. 1999) (failing to provide legislative interpretation of post-minority child support for college expense).

250. See *Larson*, ¶ 16, 694 N.W.2d at 18 (holding that a trial court does not have the authority to amend a divorce agreement to award post-minority child support for college expenses). But see *Donarski*, ¶ 20, 581 N.W.2d at 136 (holding that a trial court does have the authority to award post-minority child support for college expenses in certain situations); *Davis v. Davis*, 268 N.W.2d at 778 (holding that divorced parents have a duty to provide a child with a college education).

to grant courts explicit authority to award such support, it is unlikely that noncustodial parent's support obligations would be extended more than a few years past the age of majority.²⁵¹ However, an increase in the number of years a child receives support is likely to increase the number of North Dakota high school graduates able to receive a post-secondary education. As the need for a college education escalates, so does the need for the North Dakota Legislature to make a clear decision regarding post-minority child support for college expenses.

As it stands today, until the legislature expresses itself clearly otherwise, a noncustodial parent will only be required to provide post-minority support for a college education if the parties agree to such a provision in their divorce decree.²⁵²

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251. See Horan, *supra* note 3, at 606 (stating that a noncustodial parent would be faced with an unanticipated support obligation, for an indefinite length of time, if the courts allow the award of post-minority child support for college expenses).

252. See Larson, ¶ 16, 694 N.W.2d at 18 (concluding that section 14.09.08.2 of the North Dakota Century Code prohibits a trial court from modifying a divorce judgment to include post-minority child support). But see Donarski, ¶ 20, 581 N.W.2d at 136 (asserting that a trial court's authority to award post-minority support is limited and must be based upon full consideration of the particular circumstances of each case); Davis, 268 N.W.2d at 778 (holding that divorced parents have a duty to provide a child with a college education).

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