

DECEMBER 2014 NEWSLETTER

*POZZUOLO RODDEN, P.C.
COUNSELORS AT LAW
THE BYE-BENSON HOUSE
2033 WALNUT STREET, PHILADELPHIA, PA 19103
215-977-8200
www.pozzuolo.com*



IS A DIVORCED PARENT RESIDING IN PENNSYLVANIA OR NEW JERSEY RESPONSIBLE FOR HIS CHILD'S COLLEGE TUITION AND EXPENSES?

FIRM ANNOUNCEMENTS:

A. **DIGITAL ASSETS; ESTATE PLANNING FOR THE
TWENTY-FIRST CENTURY**

Pozzuolo Rodden, P.C. is pleased to announce that Joseph R. Pozzuolo and Kelly A. Barse, Esquire have written an Estate Planning article titled: "Digital Assets: Estate Planning for the Twenty-First Century" which will be published in the January 2015 publication of Practical Tax Strategies Journal of Thomson Reuters. A pre-publication draft of this article can be obtained by emailing: joe@pozzuolo.com.

B. NEW ASSOCIATE

Pozzuolo Rodden, P.C. would like to welcome Bill Rhodes as a new associate to the firm. He graduated from the Beasley School of Law of Temple University. Mr. Rhodes received a Bachelor of Science Degree in Crime, Law, and Justice from Penn State University.

Prior to becoming an associate at Pozzuolo Rodden, P.C., Counselors at Law, Bill Rhodes clerked for Presiding Judge Walter Marshall in Gloucester County during Judge Marshall's final year on the bench. At the culmination of his clerkship, he received the Samuel G. DeSimone award for excellence in mediation for maintaining the highest successful mediation rate in the history of the program. Mr. Rhodes has developed his advocacy skills by working as a certified legal intern at the Gloucester County Office of the Public Defender and the Philadelphia District Attorney's Office. In 2013, Bill Rhodes was among the first students to receive a certification in Trial Advocacy from Temple University.

Bill Rhodes is admitted to practice in Pennsylvania and New Jersey.

C. BLOGS

1. The following are a few of the business, tax and estate planning blogs posted on our main website www.pozzuolo.com during the past month:

- a. Wife is Prohibited From Offering any Statements Made by Decedent to Establish Common Law Marriage and Letters of Administration Were Granted to Third Party
- b. Petition to Remove Administrator Based on Favoritism and Bias is Denied
- c. Inherited IRAs Passing to a Nonspouse Beneficiary are not Entitled to an Exemption Under Federal Bankruptcy Law
- d. Court Removes Substitute Trustee of Irrevocable Trust as the Court Deems Substitute Trustee is an Alter Ego of Grantor
- e. Employment Contract Restrictive Covenant is Upheld and Enforced

Please visit our website www.pozzuolo.com for more information on these and other relevant topics.

2. The following are a few of the family law blogs posted on our family law website www.pozzuolofamilylaw.com during the past month:

- a. When Parents Agree to Share Child's College Expenses in Property Settlement Agreement Daughter Should Not Be Left With Uncertainty Regarding What Will Actually Be Paid, By Whom and When
- b. An Agreement Between Parents to Pay \$10,000 Liquidated Damages Should Either Parent Legally Challenge Child Custody or Visitation Rights is Not Unenforceable and Void as Against Public Policy

- c. Choice of Child's Pre-School is Generally Determined by Primary Residential Custodian Parent
- d. Child's Stability, Emotional Development and Nurturing are the Primary Considerations and Factors in a Motion to Relocate a Minor Child
- e. Court Must Consider Receipt of Equitable Distribution Retirement Benefits to Determine Spouse's Post Divorce Alimony Benefits

Please visit our website www.pozzuolofamilylaw.com for more information on these and other relevant topics.

QUESTION OF THE MONTH:

DO I NEED TO AMEND OR REDRAFT MY POWER OF ATTORNEY IN LIGHT OF
THE RECENT POWER OF ATTORNEY LEGISLATION?

Answer-See Page 8 of this Newsletter

Is a Divorced Parent Residing of Pennsylvania or New Jersey
Responsible for His Child's College Tuition and Expenses?

With college tuition at an all-time high, and a struggling job market forcing children to remain living with and reliant on their parents for longer than ever, an issue that has faced increased scrutiny in recent years is whether or not parents are obligated to contribute to the college expenses of their children. Although many parents will volunteer to contribute to their children's educational futures, it can be a troubling notion that they may be legally mandated to do so by a Court Order. Many parents are concerned by the idea of being forced to contribute to the college expenses of estranged children, of children who do not give the parents a say in academic decisions, and children pursuing enormously expensive degrees. The difference in cost between a student seeking an Associate's Degree at a local community college and a student with plans to obtain a post-graduate degree at Princeton can amount to hundreds of thousands of dollars. As a parent contemplating your financial future and the potential ramifications of divorce, it is important to understand what your financial obligations are regarding your child's academic future.

The most important factor to consider when determining whether you will be obligated to contribute to your child's future college expenses is whether or not the Court views the child as emancipated. In basic terms, emancipation is defined as the time when a child is expected to be

self-reliant and self-supporting. Typically, the duty to support a child financially, including contributing to college expenses, does not extend beyond that child's emancipation. Many parents assume that a child is automatically considered emancipated when he turns eighteen years old, or graduates from high school. Although that is the case in some states, other states have statutory definitions for emancipation which extend beyond high school, while still other states will consider whether a child is emancipated on a fact-intensive case by case basis.

New Jersey and Pennsylvania are good examples of the different ways in which a state may determine whether a child is emancipated and the varying extents to which a parent may be mandated to provide for their child beyond the age of eighteen.

Residents of Pennsylvania

In Pennsylvania, a child is typically considered emancipated when he has turned eighteen years old and has graduated from high school. Pennsylvania law does not extend child support obligations beyond the point of the child's emancipation. When a child has reached the age of eighteen and graduated from high school, whichever occurs last, the parent's child support obligations are at an end. It is important to note that the obligation to make child support payments will not terminate automatically. Pursuant to Pennsylvania Rule of Civil Procedure 1910.19, a parent shall file a petition for termination of the existing support order based on their child reaching the age of eighteen and graduating from high school.

The issue of whether a parent is obligated to contribute to the college expenses and tuition of a child enrolled in post-secondary education was addressed by the Pennsylvania Superior Court in Mackay v. Mackay. "Pennsylvania Law does not impose an obligation on parents to provide for their children's college expenses." Accordingly, Pennsylvania courts will not order parents, whether divorced or married, to contribute to an adult child's college expenses.

Although the Court will not compel contribution to college expenses, Pennsylvania parents may enter into a voluntary agreement to contribute to their child's college expenses. Mackay recognized the possibility of such an agreement, and stated, "A parent may assume financial responsibilities for a child's secondary education." As part of a divorce, the parties will often enter into a Property Settlement Agreement or Marital Settlement Agreement which outlines the financial implications of the divorce. These agreements can include a provision legally binding the divorcing parents to contribute to their children's college expenses.

There are several issues to be aware of when considering entering into a voluntary agreement to contribute to your child's college expenses. Perhaps most importantly, a legally enforceable agreement is necessary for the obligation to be binding. As addressed in Mackay, mere conversations and discussions regarding the responsibility to contribute are not enough. In addition, parents entering into a voluntary agreement are able to define the limits of the obligation. As discussed in W.A.M. v. S.P.C., parents can define the scenario in which they

agree that their child will be considered emancipated, thus terminating the obligation to contribute to college expenses, by using clear and unambiguous language in the agreement itself. For example, parents who want to ensure that their children remain diligent in their studies can include a clause in the agreement requiring a full class-load or mandating graduation within a set number of years. If the child begins attending college part time, or does not graduate within an appropriate amount of time, the child would then be considered emancipated under the terms of the agreement and the obligation to contribute to college expenses would cease.

Parents who enter into a voluntary agreement to contribute to college expenses can also protect themselves from the undesirable scenario where, subsequent to making the agreement, they become estranged from their child but are still obligated to contribute to college expenses. In Mazurek v. Russell, the agreement between the parents dictated that the children were to attend such undergraduate institutions as were reasonable and appropriate for the children, “with the parties’ mutual consent, which consent shall not be unreasonably withheld.” The father in Mazurek made his consent contingent on his son ending his “purposeful estrangement” from his father, maintaining a 3.0 GPA, and allowing his father access to his academic records. The Pennsylvania Superior Court held that withholding consent based on those reasons was not unreasonable, and thus the father was not obligated to contribute to college expenses pursuant to the voluntary agreement.

Finally, if a parent does choose to voluntarily contribute to an older child’s college expenses, the payments he makes cannot be used as credit to offset payments currently owed for younger children. The minor child’s support takes precedence over college support, and the needs of the minor dependents will not be reduced due to contributions to college expenses.

Residents of New Jersey

In New Jersey, there is no bright line rule determining when a child is considered emancipated. As the New Jersey Superior Court stated in Schumm v. Schumm, “There is no age fixed in law where a child becomes emancipated.” The status of each child is evaluated on a case by case basis.

New Jersey Courts do consider whether a child has turned eighteen to be an important factor in determining whether they are emancipated. When a child turns eighteen years old, a rebuttable presumption is created that the child is emancipated. That presumption is not conclusive, however, and can be overcome by other facts in the case. Whether or not a child is currently enrolled in college is a factor given great weight by the courts of New Jersey, and will often be used to overcome the presumption of emancipation.

One of the most important cases in determining whether a parent may be required to contribute to his child’s college expenses is Newburgh v. Arrigo. The Court in Newburgh found that in appropriate circumstances, the privilege of parenthood carried with it the duty to assure a

necessary education for children. In some circumstances, parental responsibility includes the duty to assure children of a college education and even a postgraduate education such as law school.

Newburgh offered a non-exhaustive list of the factors to be considered when determining whether a parent is obligated to contribute to his child's college expenses, and how much they are obligated to provide.

1. Whether the parent, if they were still living with the child, would have contributed toward the cost of the required higher education.
2. The effect of the background, values and goals of the parent on the reasonableness of the child's expectation 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.
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 all parties.
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.
12. The relationship of the education requested to any prior training and to the overall long range goals of the child.

The prevailing trend in New Jersey when applying these factors has been to find that in most circumstances, a child who is attending college after high school is not truly emancipated. Outside of exceptional circumstances, parents in New Jersey are generally required to contribute to their children's college expenses. There have even been cases such as the one described in Newburgh above, where parents are required to contribute beyond their child's undergraduate college up through a graduate program.

In Lantz v. Lantz, the Court considered the case of a nursing student who had completed

her full time studies and graduated from nursing school. Even though the child had completed her education, the judge determined that her emancipation should be delayed until she completed her nursing exam several months later. Finding that preparing to take a nursing exam is a full-time responsibility, the judge determined that it was reasonable to adjust the date of emancipation until after the student had taken her test.

In an even more extreme example, the Court in Ross v. Ross found that the child in question was not yet emancipated because she was currently enrolled in law school. Despite the child's distant relationship with her father and her having completed a four-year college education, after applying the Newburgh factors the Court ordered parental contribution to her further education in law school. The Court found that based on the respective incomes of the parties, the fact that the student was an only child, and her early and consistent interest in becoming a lawyer, it was likely that her parents would have financed her law school had they not gotten divorced. Following that determination, they applied the Newburgh factors and after evaluating the facts of the case, determined that she was not yet emancipated.

As seen in the Ross case, a close and intimate relationship between parent and child is not required for the Court to order parental contribution to college expenses. Although the child's relationship with the paying parent is to be considered as one of the Newburgh factors, it is not given so much weight that the absence of a relationship is adequate to avoid the requirement of paying. If the remaining Newburgh factors are applied and found to present a compelling case to mandate paying college expenses, the Court may do so even if they find no existing relationship between parent and child whatsoever.

With the strong tendency for New Jersey Courts to mandate that parents contribute to their children's college expenses, an obvious question arises- what if my child gets accepted by an extremely expensive Ivy League school? The differences in the cost of attending a quality public university and Harvard can be astronomical. The Court considered this dilemma in Nebel v. Nebel, in which it established the "Rutgers Rule." In Nebel, the child's father was ordered to contribute to his Ivy League bound son's college expenses. However, his obligation was limited to his share of the cost of attending a quality public university, such as Rutgers.

The Rutgers Rule is not applied automatically. In Finger v. Zenn, the Court distinguished the case before them from Nebel based on factors such as the parents' high income and the child's acumen for and long term plans to seek advanced private education. The Court held that when the factual circumstances are appropriate, parents can be ordered to pay more than the cost of a Rutgers education. As with all New Jersey emancipation matters, it is important to remember each situation is analyzed on a case by case basis

How Do I Limit My Obligation?

In Pennsylvania, avoiding a legally mandated obligation to contribute to your child's

college expenses is simple. If you do not enter into a legally binding agreement to financially support your child once he has reached the age of eighteen and graduated college, you will not be required to do so. If you do choose to enter into such a voluntary agreement, make sure to specify the terms of the agreement in clear and unambiguous language. You are able to dictate the definition of key terms such as “emancipation” within the agreement itself, thus creating an end point or limitation to your obligation to contribute to expenses. If you are concerned that you will be cut out of your child’s future academic experiences and decisions but will still be required to pay for them, remember Mazurek v. Russell and include a clause which allows you to deny your consent based on reasonable grounds.

In New Jersey, you will not be able to avoid Court mandated contributions to college expenses simply by declining to enter a voluntary agreement. If there is no provision addressing a child’s college expenses in your and your ex-spouse’s Property Settlement Agreement (“PSA”), the Court can still hold a hearing where they examine the Newburgh factors and order an appropriate contribution. Because determining emancipation in New Jersey is done in a fact-intensive, case by case basis, you will be better off including specific terms regarding emancipation in your PSA. If you and your ex-spouse agree in a PSA that you consider your child to be emancipated when they graduate college, begin full time employment, or move out on their own, it can go a long way to demonstrating a lack of intent or agreement to support your child to the extreme extents ordered in Lantz and Ross.

Please feel free to contact this office and meet with one of our experienced attorneys to further discuss these issues including your potential obligation to contribute to your child’s college expenses and successfully drafting a Property or Marital Settlement Agreement.

QUESTION OF THE MONTH:

DO I NEED TO AMEND OR REDRAFT MY POWER OF ATTORNEY IN LIGHT OF THE RECENT POWER OF ATTORNEY LEGISLATION?

The answer to this question depends on what your current power of attorney says and the extent of the powers you want your attorney in fact to have. The laws passed by the Pennsylvania legislature provide for several updates to the Pennsylvania power of attorney law and most of the provisions do not take effect until January 1, 2015. The only part that is effective immediately concerns the reliance by third parties on a power of attorney that is void, invalid or terminated.

If your power of attorney was executed before January 1, 2015, it will be grandfathered in and will still be a valid power of attorney. Therefore, the changes in the law regarding signing

and witnessing the power of attorney, the notice to the principal, and the acknowledgement by the agent would not need to be updated in your current power of attorney. However, other changes to the law may necessitate a review and possible update.

Before the changes, your agent simply had a fiduciary relationship with you as the principal. Now you as the principal have the option of modifying certain of the agent's duties to you as principal. However, you cannot modify the following requirements:

- 1) That the Agent acts in accordance with the principal's reasonable expectations to the extent actually known by the agent and, otherwise, in the principal's best interest;
- 2) That the Agent must act in good faith; and,
- 3) That the Agent can only act within the scope of authority granted in the power of attorney.

You do have the option of modifying the following default powers or duties:

- 1) To act loyally for the principal's benefit;
- 2) To keep the agent's funds separate from the principal's funds;
- 3) To not create a conflict of interest;
- 4) To act with care, competence and diligence;
- 5) To keep records of transactions;
- 6) To cooperate with your health care surrogate; and,
- 7) To preserve your estate plan to the extent possible.

If you would like to change or modify any of these default duties, you should update your power of attorney.

Under the previous version of the law, the only specific powers you needed to expressly delegate were the power to make gifts and the power to have a third party act for the agent. The new version of the law requires that you specifically and expressly give your agent the following powers:

- 1) To create, amend, revoke or terminate a trust;
- 2) To make a gift;
- 3) To create or change rights of survivorship;

- 4) To create or change beneficiary designations;
- 5) To delegate authority granted under the power of attorney;
- 6) To waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan;
- 7) To exercise fiduciary powers that the principal has authority to delegate; and,
- 8) To disclaim property, including a power of appointment.

If you would like your agent to have any of these powers, your current power of attorney should be reviewed to determine whether these powers are specifically granted and, if they are not, your current power of attorney needs to be amended or a new power of attorney should be drawn up.

Finally, the power to make gifts under a power of attorney has been revised. Under the new law, your agent has the inherent authority to make limited gifts (equal in year 2015 to the \$14,000 federal annual exclusion for gift tax) to persons other than permissible donees without your express authority and the gifts must be in the principal's best interests. Your power of attorney must explicitly limit whom you want gifts made to and in what amount.

An experienced estate planning attorney should be consulted for all questions or concerns about how the new power of attorney law affects your current power of attorney and whether a new one needs to be drafted.

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- If there are any legal questions you would like this office to answer in the future, please email the question to us at info@pozzuolo.com. Each month, the question with the most relevance to our privately held business clients, advisors, and friends will be answered in our monthly newsletter. The questions can relate to any of the areas practiced by this office including business planning and transactions, corporate law, commercial litigation, employment law and litigation, commercial real estate and development, construction law and litigation, estate planning, estate administration, tax and pension law, family law litigation.
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PUBLICATIONS

All of the following professional publications and past newsletters written by attorneys of this office are available by clicking here: http://pozzuolo.com/Pubs_Articles.shtml

Corporate/Tax Articles

- Bankruptcy - How To Prevent It And How To Cope With It Should It Happen To Your Business
- Deferred Compensation Rewards And Retains Key Employees
- Design Buy-Sell Agreements For Maximum Utility
- How An S Corporation Avoids The Double Taxation Incurred When Excessive Compensation Is Treated As A Dividend

- How Mortgage Lenders Should Draft Broker Agreements To Avoid RESPA Violations
- How To Look, Act And Sound Like A Professional Corporation
- How to Structure a Suitable Buy-Sell Agreement
- How To Use Non-Qualified Deferred Compensation Arrangements As A Business, Retirement And Tax Planning Tool
- Money Purchase Pension Plan Falls Out Of Favor
- Protecting A Client's Business From Unfair Competition Using Restrictive Covenants
- Structuring Loans From Qualified Plans - How To Handle The Strict Tax Rules
- What Type of Qualified Corporate Retirement Plan Best Serves Your Business, Tax And Retirement Needs
- Why An Employment Contract Is Mandatory

Estate Planning Articles

- Adapt Estate Planning Strategies to Fit the Needs of Same-Sex Couples
- College Funding Tool Offers Estate Planning Advantage
- Diversify Strategies For An Effective Estate Plan
- Divorce and Estate Planning
- Divorce Raises The Need For Performing An Estate Planning Review
- Drafting The Durable Power Of Attorney For Wealth Protection Purposes
- Estate Planning For Pet Owners
- Remarriage Situations Can Raise Special Estate Planning Considerations
- Six Proven Estate Planning Techniques
- Special Needs Trust - An Estate Planning Tool For The Disabled
- The Limited Liability Company -A Sophisticated Tool For Estate Planning
- Using Trusts To Maximize Family Protection And Minimize Estate Tax
- Why Living Wills- Advance Directives Are An Essential Part Of Estate Planning

Actual resolution of legal issues depends upon many factors, including variations of facts and state laws. This newsletter is not intended to provide legal advice on specific subjects. It is to provide insight into legal developments and issues. You should always consult with legal counsel before taking any action on matters covered in our updates.

This newsletter is courtesy of Pozzuolo Rodden, P.C.

To subscribe, unsubscribe, or for any questions, please contact us at INFO@POZZUOLO.COM.