is interesting to note, however, that in doing this, the legislature did not pass one sweeping act. Instead it was done on a situation by situation basis. So far as we have been able to determine, no act was passed nor have there been any judicial holdings limiting a child's right to educational support upon reaching 18. Ordinarily when a child comes of age the duty of the father to support a child ends. *Commonwealth ex rel. Welsh v. Welsh*, 222 Pa. Super 585, 296 A.2d 891 (1972).

Our courts have held that if the child is in college, a father may have the obligation to help with the education. *Commonwealth ex rel. Williams v. Williams*, 242 Pa. Super 550, 364 A.2d 410 (1976); *Commonwealth ex rel. Ulmer v. Sommerville*, 200 Pa. Super 640, 190 A.2d 182 (1962), but this is only true if the amount of support required of him would not work a hardship upon him.

The father has argued with some force that the policy in Pennsylvania today is to limit parents' responsibilities for support when a child reaches 18. He cites the Act of 1974, P.L. 249, 50 P.S. Sect. 4502, which terminated the liability of parents for a child receiving services or benefits under the Mental Health and Mental Retardation Act when the mentally disabled person becomes 18. Again, however, this is a legislative statement dealing with one specific situation. If the legislature had intended to dissolve a parent of all responsibility for an 18 year old child, it could have said so. So we must decide this case on the unchanged law of our appellate courts, and it is noted that one of the cases cited was decided after the 18 year old legislative surge in 1972.

(3) *Undue hardship.* In this case the father has a net weekly income of approximately $240.00 and from this he must support himself and his wife. He reports that he expects to retire at the beginning of 1979 and upon his retirement, his income will be reduced to $160.00 per week. Since support orders are effective as of the time they are made and may be changed from time to time according to the circumstances, *Welsh*, supra, we must make this order based on the $240.00 income and if he does in fact retire and his income is reduced, the father may petition the court to modify the order.

We conclude that it would not work an undue hardship upon the father to require him to contribute $40.00 per week for the support of his daughter so she may obtain an education.

Records in this court show that prior to August 10, 1978, the father had been paying Kimberly's mother $45.00 per week for the child's support. That order was terminated and

Kimberly has brought this action on her own complaint, Act of 1953 P.L. 431, 62 P.S. Sect. 2043.35. At the time the order was made on October 6, 1976, requiring the father to pay $45.00 per week, he was earning approximately $190.00 per week. Since that time his income has increased by $50.00.

An order in the usual form will be filed.

COMMONWEALTH EX REL. McCOY V. McCOY, C.P. Franklin County Branch, No. F. R. 1978-106-5

Non-Support - Parent's Responsibility for College Education - Sufficient Estate of Parent

1. In the absence of an agreement to provide a child with a post high school education, a parent may be ordered to provide support for a child while securing such education or ordered to provide such an education in part or whole only, if: the child is willing and able to successfully pursue her course of studies; and the parent has a sufficient estate, earning capacity or income to enable payment of the order without undue hardship.

William C. Cramer, Assistant District Attorney, Attorney for the Petitioner

William F. Kaminski, Attorney for the Respondent

OPINION AND ORDER

KELLER, J., October 18, 1978:

The petition of JoAnn McCoy to modify an existing support order was presented to the Court on September 14, 1978, and a hearing on the matter was scheduled for October 4, 1978. The petitioner alleged changed circumstances:

1. The petitioner is unable to get a job, because she is partially disabled, and also states that she has an earning capacity of $50.00 per week.

2. There are added expenses for the one child, Brenda Kay McCoy, because she is attending college.

The hearing was held as scheduled and counsel for the respective parties have submitted memoranda of law.

FINDINGS OF FACT

1. JoAnn McCoy, petitioner, and C. Kenneth McCoy, Jr., respondent were divorced on October 9, 1969.

2. Two children were born of the marriage:

(a) Brenda Kay McCoy born January 28, 1961;

(b) Bryan Keith McCoy born March 6, 1963.

3. On September 20, 1976, this Court entered the following Order:

> "NOW, September 29, 1976 the within Stipulation and Agreement in the above captioned proceedings is hereby approved, and the Order of Court entered on July 12, 1972 is amended, and it appearing to the Court that the respondent is earning approximately $217.00 net per week, and the petitioner has earning capacity of $70.00 per week,
>
> "It is ordered that C. Kenneth McCoy, Jr., pay the costs of these proceedings, and that the bond entered by the respondent to guarantee faithful compliance with the Order shall remain in effect, and that commencing Monday, October 4, 1976 he pay, via the Collection Officer of this Court, to JoAnn McCoy the sum of $70.00 plus $.20 service charge and a like sum of money each Monday thereafter until further order of the Court for the support of Brenda Kay McCoy, born January 28, 1961, and Bryan Keith McCoy, born March 6, 1963. It is further ordered that this Order is predicated upon Respondent's continuing existing medical and life insurance coverage on said minor children at his place of employment."

4. The petitioner was last employed in 1976 for a two-month period as a barmaid earning $2.00 per hour and working a fifty (50) hour week.

5. The petitioner testified without contradiction or corroboration that she suffered a severe vision disability in that she has no center vision in her left eye (i.e., only peripheral vision), and a 10% impairment of her right eye. In addition, she testified that she is receiving medication and treatment from the Cumberland Valley Mental Health Center for depression and anxiety.

6. Other that making a weekly contact with the Greencastle American Legion, and regularly reporting to the

Pennsylvania Employment Service, the petitioner has not actively sought employment.

7. The petitioner concedes that she has an earning capacity of $50.00 per week for part-time employment.

8. The petitioner introduced no evidence of living expenses except to testify that her rent had increased by $25.00 per month, her heat by $50.00 per month, her electricity by $25.00 per month, and her food expenses by $5.00 to $10.00 per week. She also testified that due to her fifteen-year old son's activities, his expenses had increased by $5.00 to $10.00 per week.

9. The petitioner testified that respondent's medical insurance coverage provided for the parties' children was not as comprehensive as it had been, but she was unable to testify with any certainty as to any increase in medical expenses arising out of the reduced coverage.

10. The petitioner's father is temporarily residing with her and contributing nothing to the family living expenses.

11. The parties' daughter, Brenda, graduated from high school in April 1978, worked in a pizza parlor until the end of September 1978, when she entered Eastern Mennonite College as a full-time student in a four year nursing course.

12. Tuition, room, board and other expenses for Brenda's freshman year at Eastern Mennonite College is $5,000.00. Various scholarships and governmental grants will pay $4,000.00. Brenda has a part-time job at the college, and all of her earnings, which are unknown to the petitioner, will be applied to the unpaid balance.

13. The petitioner testified that she had been trying to send approximately $30.00 each week to Brenda to use in part as spending money and in part to apply to the sum due the college.

14. The petitioner never discussed Brenda's plan to attend college with the respondent; and he never agreed to assist with her post high school education or provide support for her while she attended college.

15. The respondent is employed by Ryder Trucking Company and has a net weekly take-home pay of $250.00.

16. The respondent recently was promoted to a

management position as a terminal manager with an increase in annual pay of $900.00. As a result of the promotion, respondent and his wife were transferred to New England and presently are residing temporarily in a motor lodge in Stanford, Connecticut while looking for an apartment.

17. On the basis of his living experience in New England, the respondent's uncontradicted and unshaken weekly living expenses, or anticipated living expenses are:

Rent	$	100.00
Food		60.00
Auto gas, oil and maintenance		20.00
Auto insurance		6.50
Utilities		10.00
Clothing and cleaning		15.00
Medical insurance		2.24
Support order		70.20
Household supplies, etc.		10.00
Medical expense - wife		5.00
	$	298.94

18. The respondent's income is presently being provided housing at the motor lodge, but this will terminate on October 11, 1978.

19. The petitioner is presently receiving Public Assistance for herself.

20. The petitioner seeks an increase in support to $90.00 per week.

21. Due to the petitioner's failure to introduce evidence of either the total family cost of rent, food, fuel, utilities, clothing, medical and dental expenses, and other necessities on some regular basis, or the cost of the same allocated to the children on such a basis; the actual cost of maintenance of the children or either of them is entirely speculative.

22. The petitioner testified that any increase in the existing support order would impose a financial hardship upon him and his present wife.

23. The respondent was not consulted concerning Brenda's plans for attending college by the petitioner or Brenda, and he only became aware of the fact that she was going to go to college a short time before she left. He has received no communication from his daughter since she commenced college.

24. No evidence was introduced as to Brenda's ability to successfully pursue her chosen course of college studies.

25. No evidence was introduced concerning Brenda's income from her summer employment or her part-time college employment.

26. No evidence was introduced that Brenda had or is making any effort to secure a loan under any of the educational loan programs established by the Commonwealth of Pennsylvania or federal government.

27. There is no probative evidence before the Court of the actual financial needs of Brenda other than the $1,000.00 cash difference between total annual college charges and the total annual scholarships and grants.

28. The respondent has at all times paid support for his children.

DISCUSSION

The petitioner contends that the expense of maintaining the parties' children has increased substantially as a direct result of their daughter, Brenda, commencing her college education, and it is therefore necessary for this Court to increase the order of support to be paid by the respondent. The respondent takes the position that he has no legal duty to provide her with a college education because he never agreed to assume such an obligation, and she is emancipated by reason of her graduation from high school and full-time summer employment.

Whether a parent may, as a matter of law, and in the absence of an express or implied agreement, be required to provide or aid in providing a college education for a child has been the subject of litigation in the trial courts and the Superior Court of Pennsylvania for many years. The Honorable Robert E. Woodside speaking for a unanimous Superior Court expressed the then evolving legal philosophy on this issue in *Commonwealth ex rel. Ulner v. Summerville*, 200 Pa. Super. 640, 643, 644 (1963) held:

> "We believe that the law of this Commonwealth requires a father, under certain circumstances, to support a child while attending college and that this appeal brings squarely before us the question of what circumstances will justify the entry of a support order in favor of such child. In the first place, before the father should be required by court order to support a child in college, the child should be able and willing to successfully

pursue his course of studies. *Commonwealth ex rel. Grossman v. Grossman*, supra, 188 Pa. Superior Ct. 236, 241, 146 A. 2d 315 (1958). In the second place, the father should have sufficient estate, earning capacity or income to enable him to pay the order without undue hardship.

"The duty of a parent to provide a college education for a child is not as exacting a requirement as the duty to provide food, clothing and shelter for a child of tender years unable to support himself. It is a natural law that a parent should spare no personal sacrifice to feed and protect his offspring. Therefore, beyond the barest necessities, a father should be required to sacrifice personal comfort in order to provide the necessities of a child too young to support himself. The same exacting requirement should not be demanded of a father to provide a college education for a child able to support himself.

"We are not suggesting that a father should be required to support a child in college only when the father's income or estate is such that he could do so without making any personal sacrifices. Most parents who send a child to college sacrifice to do so. No mathematical rule can be formulated to determine how extensive the hardship upon a father must be before it will excuse him from supporting a child in college. It must be a matter of judgment in a field where the judgments of sincere and advised men differ materially."

In a similar vein, a majority of the Superior Court in *Commonwealth ex rel. Schmidt v. Schmidt*, 223 Pa. 20, 23 (1972), concluded after noting that the trial court had found no undue hardship:

"There is no logical reason why a father who is able to do so should not be obligated to supply the student child with her reasonable expenses of maintenance in addition to her tuition costs. Surely, if the child is in need of such support, the cost of education must include such expenses. It is irrelevant that the child can employ self-help to obtain her needs where there is no 'serious' question of undue hardship on the supporting father."

The Supreme Court of Pennsylvania in recent years appears to have addressed itself to the issue only once in *Emrich v. Emrich*, 445 Pa. 428 (1971), and it held:

"With varying results due to the different circumstances of each case, the Superior Court has consistently enunciated the principle, which we approve, that a father has no duty to aid in providing a college education for his child, no matter how

deserving, willing or able a child may be, unless the father has sufficient estate, earning capacity or income to enable him to do so without undue hardship to himself."

The most recent appellate illumination of the problem appears in *Commonwealth ex rel. Williams v. Williams*, 242 Pa. Super. 550, 553, 364 A. 2d 410 (1976), wherein a majority held:

"Appellant testified that his net weekly income after support payments were deducted was $125.44, and that his weekly expenses were $141.46, leaving him with a weekly deficit of $16.02. Neither the accuracy or the reasonableness of these figures is questioned. On two occasions during the hearing the judge noted that appellant's expenses were due to his second marriage, which was 'an additional obligation that you took on after you had already incurred one.' The issue, however, is not which obligation was incurred first but whether the father can without 'undue hardship' contribute to his child's college education. *Commonwealth ex rel. Brown v. Weidner*, 208 Pa. Super. 114, 220 A. 2d 382 (1966); *Commonwealth ex rel. Rice v. Rice*, 206 Pa. Super. 393, 213 A. 2d 179 (1965). This inquiry is limited to a review of the father's economic status. *Commonwealth ex rel. Schearer v. Schearer*, 208 Pa. Super. 196, 222 A. 2d 620 (1966). Once it is established that a support order is causing 'undue hardship,' the hearing judge does not have the discretion to decide that the child's desire and ability to attend college outweigh the personal sacrifice that the order if continued would impose. *Commonwealth ex rel. Yannacone v. Yannacone*, supra."

In the absence of an agreement to provide a child with a post high school education, we conclude a parent may be ordered to provide support for a child while securing such education or ordered to provide such an education in part or in toto only if:

1. The child is willing and able to successfully pursue his couse of studies; and

2. The parent has a sufficient estate, earning capacity or income to enable payment of the order without undue hardship.

E.g., *Emrich v. Emrich*, supra, *Commonwealth ex rel. Ulmer v. Summerville*, supra, *Commonwealth ex rel. Schmidt v. Schmidt*, supra, *Commonwealth ex rel. Colligan v. Kass*, 225 Pa. Super. 299, 304 (1973), *Commonwealth ex rel. Williams v. Williams*, supra. This conclusion is consistent with the decisions of this

Court in *Commonwealth ex rel. Lewis v. Lewis*, No. 57-1969NS and *Commonwealth ex rel. Cline v. Cline*, No. 274-1978NS.

In the case at bar, we have no difficulty in concluding that Brenda has certainly passed the test of willingness and ability to pursue her course of studies at this time by virtue of her admission to Eastern Mennonite College, and her significant and commendable success in securing $4,000.00 worth of scholarships and grants.

In this case, the uncontradicted and unshaken evidence of the respondent is that his weekly income is $250.00, and his weekly expenses are $298.94, leaving him with a weekly deficit of $48.94. In our lexicon a continuing weekly deficit can be nothing but an undue hardship. Thus, on the facts the second test has not been met.

Here, however, we are dealing with a child who will not be 18 years old until January 28, 1979. In a footnote appearing at page 553 of *Commonwealth ex rel. Williams v. Williams*, supra, the Superior Court noted:

> "It must be remembered that this is not a petition to terminate a support order for a child under the age of 18. In that situation the order will be upheld if it is 'fair and not confiscatory in the light of the father's earning ability.' *Commonwealth ex rel. Gershman v. Gershman*, 181 Pa. Super. 76, 122 A. 2d 813 (1956); *Commonwealth ex rel. Bush v. Bush*, 170 Pa. Super. 382, 86 A. 2d 62 (1952). The order may require the father to make a personal sacrifice to insure the welfare of his child."

We are persuaded that until Brenda attains the age of 18 years, she will be entitled to full and reasonable support from her father notwithstanding the fact that she has completed high school, been employed for a summer and is now attending college.

The support action was initiated by the petitioner on behalf of her children under the Pennsylvania Civil Procedural Support Law, Act of July 13, 1953, P. L. 431; Section 5; 1963, August 14 P. L. 872, Section 1; 62 P.S. 2043.35(b) which provides inter alia: "A complaint may be filed by any person . . .to whom a duty of support is owing. It *shall* be filed on behalf of a minor child by a person having custody of the minor, without appointment as guardian ad litem.

On January 28, 1979, the right of Brenda to continued support while attending college will be determined according to

then existing facts as applied to the law as enunciated in *Commonwealth ex rel. Williams v. Williams*, supra, and its predecessor cases as above discussed, whereas the right of Bryan to support will continue under the law governing support applicable to minors. In addition, as of January 28, 1979, Brenda will be entitled in her own right to initiate an action for support while pursuing an education above the high school level. *Commonwealth ex re. Schulberg v. Hirsch*, 236 Pa. Super. 179, 183 (1975).

As a result of these conclusions, and in the interests of avoiding circuity, escalating expenses for the parties, and to conserve the time of bench and bar, we conclude:

1. Insofar as the Order of Court entered in the above captioned matter applies to Brenda Kay McCoy, it shall terminate on the Monday immediately following January 28, 1979, unless in the interim evidence is introduced to establish that she remains entitled to continued parental support as a matter of law for reasons other than willingness and ability to attend college.

2. If the order of September 29, 1976 is terminated as to Brenda Kay McCoy as above provided, then said order shall also be modified on the basis of respondent's weekly income and petitioner's weekly earning capacity to require respondent to pay on February 5, 1979; via the Collection Officer of this Court, to JoAnn McCoy, the sum of $50.00 plus $.50 service charge, and a like sum of $50.50 each Monday thereafter for the support of Bryan Keith McCoy born March 6, 1963. The respondent shall also continue to maintain existing medical and life insurance coverage for said minor son.

The second ground for additional support asserted by the petitioner is predicted on her unsubstantiated, but unchallenged, testimony that she suffers a partial disability and her earning capacity had decreased from $70.00 per week, as stipulated to in the September 29, 1976 order, to $50.00. Her testimony was to the effect that she has been unemployed since 1976, and has limited her search for either partial or full employment of any variety to regularly reporting to the Pennsylvania Employment Service Office, and contacting the Greencastle American Legion. We are not persuaded that petitioner's evidence justifies her conclusion that her earning capacity had decreased by $20.00. We, therefore, find petitioner's earning capacity is $70.00 per week as she previously stipulated.

While the petitioner did not allege an increase in respondent's income or an increase in her expenses as grounds for an increase in the support order, evidence to that effect was introduced at the hearing. We, therefore, feel it appropriate to consider these additional matters.

The respondent has conceded that his income increased from $217.00 per week to $250.00 per week since the entry of the last order. However, he also testified that as a result of his promotion, which generated the income increase, he had been transferred to the Stanford, Connecticut area, where living expenses are substantially higher than in Franklin County. His uncontradicted testimony established that his current living expenses coupled with his weekly payment of $70.00 pursuant to the 1976 order left him with a regular and recurring weekly deficit. Under these circumstances, we conclude that the respondent's increased weekly employment income does not justify an increase in the current order.

The petitioner testified that certain of her living expenses had increased by certain specified dollar amounts. However, no evidence was introduced either as to total living expenses of the family unit or total living expenses allocated to the children (with, in either case, appropriate credit being given for the period of time when Brenda would be receiving necessaries such as food, shelter, etc. at college). It further appears that petitioner's father is living with petitioner and is not contributing to the family living expense. The living expenses properly allocated to the petitioner and her father may not be considered in determining the proper support to be required of the respondent. We, therefore, conclude the petitioner has failed to sustain her burden of proving a need for an increase in the current order predicated upon an increase in living expenses.

ORDER OF COURT

NOW, this 18th day of October, 1978, IT IS ORDERED AND DECREED THAT:

1. Insofar as the Order of Court entered in the above captioned matter applies to Brenda Kay McCoy, it shall terminate on the Monday immediately following January 28, 1979, unless in the interim evidence is introduced to establish that she remains entitled to continued parental support as a matter of law for reasons other than willingness and ability to attend college.

2. If the order of September 29, 1976 is terminated as to Brenda Kay McCoy as herein above set forth, then said order shall also be modified to provide:

October , 1978, it appearing to the Court that C. Kenneth McCoy, Jr., respondent, owes a duty of support to his child, and has a net weekly take-home pay of approximately $250.00 and that affiant has a net weekly earning capacity of approximately $70.00;

It is ordered that respondent pay the costs of these proceedings and continue his bond in the amount of $3,000.00 to guarantee faithful compliance with this order and commencing Monday, February 5, 1979, pay to JoAnn McCoy via the Collection Office of this Court the sum of $50.00 plus $.50 service charge and a like sum of $50.50 each Monday thereafter until further Order of the Court for the support of Bryan Keith McCoy, born March 6, 1963.

The petition to modify the Order of September 29, 1976 is denied and the Order shall remain in effect until modified as hereinabove set forth.

Costs of these proceedings to be paid by the respondent.

M REALTY & LEASING COMPANY V. ZONING HEARING BOARD OF WAYNESBORO, ET AL., C.P. Franklin County Branch, Misc. Doc. Vol. X, page 158

Zoning - Nonconforming Use - Abandonment of Nonconforming Use

1. The subjective intent of an owner is important in determining the legal character of contiguous parcels, but it is not the sole criteria.

2. If the objective manifestations of the owner's intent are opposed to his expressed intent at the zoning hearing, the board itself must evaluate the evidence and determine the owner's actual intent.

3. Evidence that lots are conveyed in one deed but seperately surveyed and referred to in the deed and treated seperately by the taxing authorities is sufficient to support a zoning board's conclusion that the lots are seperate tracts of land.

David C. Cleaver, Esq., Attorney for Appellant, M. Realty & Leasing Company

Stephen E. Patterson, Esq., Attorney for Appellee, Zoning Hearing Board of Waynesboro

D. L. Reichard, II, Esq. and Thomas D. Singer, Esq., Attonreys for Intervenor, the Borough of Waynesboro