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"Enforcement" of a party's obligation to pay secondary education expenses is not subject to *Petersen*'s limitation on retroactive reimbursement

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In 2011, the Illinois Supreme Court issued its decision in *In re Marriage of Petersen*, 2011 IL 110984, wherein it held that reimbursement by one party to the other for prior payment of their children's college expenses was limited to only those expenses incurred after the date of the filing of the contribution petition.

The Illinois Appellate Court has recently issued an important decision which clarifies the rule established in *Petersen*. In *In re Former Marriage of Donnelly,* 2015 IL App (1st) 142619, the Appellate Court held that *Petersen*'s limiting rule applies only in instances which are factually analogous to that case, *i.e.*, where there is only a reference to the reservation of the issue of payment of college expenses in the dissolution decree, and the parties have not included terms regarding payment of college expenses in a marital settlement agreement ("MSA") incorporated into the judgment.

In *Petersen*, the parties' 1999 dissolution judgment included the not-uncommon provision that "the court expressly reserves the issue of each party's obligation to contribute to the college or other education expenses of the parties' children pursuant to §513 of the Illinois Marriage and Dissolution of Marriage Act [IMDMA.]" 2011 IL 110984, ¶ 4. The former wife waited, however, until 2007 to file a petition for contribution against her ex-husband to recover the expenses she had incurred since 2002, when the first of the parties' three children entered college.

In holding that the mother was barred from recovering any expenses incurred prior to the date of the filing of her petition, the Supreme Court looked to the trial court's judgment, which simply "reserved" the matter for a later date, and held that the judgment did "nothing more than maintain the status quo between the parties with respect to the issue of college expenses by not making an award at that time, even though the circuit court was authorized by statute to do so." *Id*. at ¶ 17. Therefore, because the father had "no concrete obligation" to provide for additional educational expenses under the decree, the Court viewed the mother's petition as an attempt "to change the status quo" and to alter the father's obligations under the decree. *Id.* at ¶ 18. Therefore, the Court concluded that the mother's petition was a modification of child support, which thereby brought her request within the ambit of §510 of the IMDMA (750 ILCS 5/510) and made it subject to that section's prohibition on retroactive support prior to the filing date of this petition. *Id*.

... where a MSA has similar provisions, *Donnelly* provides a basis to argue that the limitation on retroactive reimbursement in *Petersen* does not apply.

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

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

The Appellate Court answered this question in the negative.

In *Donnelly,* the parties executed a MSA which contained a specific agreement that they would pay for their children's secondary education, although no specific dollar amounts were stated. Instead, they agreed that "[t]he extent of the parties' obligation hereunder shall be based upon their then respective financial conditions." *Id*. at ¶ 4. The MSA was thereafter incorporated into the dissolution judgment. *Id*.

The parties' agreement to pay for these expenses as set forth in their MSA was the pivot-point in the Appellate Court's analysis. The Court held that this language "not only expressly imposed the obligation to pay on both parties, but also provided that any disagreement over the respective shares to

be paid would be submitted to a court of competent jurisdiction upon proper notice and petition." *Id*. at ¶ 23. Because the MSA established an express obligation by the parties that they would pay these educational expenses, the Court found this language distinguishable from the express judicial reservation of the issue of the parties' obligation in *Petersen*. *Id.* at ¶ 24. Therefore, unlike the mother in *Petersen* who was attempting to modify the parties' obligations, the Court held that when the mother in *Donnelley* petitioned for contribution, she was simply attempting to enforce the prior settlement agreement. *Id*. at ¶ 29. As a result, the Appellate Court concluded that the rule established in *Petersen* did not preclude the circuit court from ordering the father to reimburse the mother for college expenses she had already paid prior to the date that the petition was filed, even where the judgment did not order a specific dollar amount to be paid, but instead left it open for a ruling at a later date. *Id*.

The bottom line here is that where a MSA has similar provisions, *Donnelly* provides a basis to argue that the limitation on retroactive reimbursement in *Petersen* does not apply. ■