Dealing with Student Loans in a Divorce

by Michael Brewer

At an estimated $1.71 trillion,[1] student loan debt in the United States is staggeringly high, and among Nebraskans, there are approximately 236,000 student loan borrowers with an average student loan debt of $32,000.[2] With these statistics in mind, and considering the recent increase in Nebraska appellate opinions involving the different aspects of student loans in divorce and the great likelihood of handling a divorce case that includes student loans, this article aims to provide a practical guide for Nebraska practitioners to better understand how to deal with student loans in a divorce.

There are three common scenarios where practitioners must navigate student loans during divorce proceedings: (1) student loans incurred during the marriage; (2) premarital student loans paid off or down during the marriage; and (3) student loan child support deductions.

Student Loans Incurred During the Marriage

The first scenario involving student loans in divorce is when student loans are incurred during the marriage.

Walker v. Walker is the first published case where the Nebraska Appellate Court examined whether student loans incurred during the marriage are part of the marital estate. In *Walker*, the Nebraska Court of Appeals found that student loans incurred during the marriage are not marital debt, and therefore not part of the marital estate.[3] Accordingly, the party incurring the student loan debt remained responsible for the debt, and the loans were not included in the equitable division of the marital estate.

In *Walker*, the parties were married for seven years, and the wife incurred student loan debt for law school over the last three years of the marriage, graduating from law school four months after the divorce was filed. Although there was a dispute over the portion of the student loans that exceeded the cost of her educational expenses,[4] the Court found that the wife's student loans were nonmarital because the wife takes all the benefits of her education with her, and therefore, equity requires she be responsible for the debt that goes along with the education.[5]

After *Walker*, the Nebraska Court of Appeals examined the issue of student loan debt incurred during the marriage in four unpublished opinions,[6] and in these cases, which are discussed next, the Court reached the opposite conclusion of *Walker*, finding that these debts can be marital and therefore included in the division of the marital estate.[7] These four unpublished opinions are discussed next.

In *Schmid v. Schmid*, the parties were married for twenty-five years, and the wife incurred student loan debt to obtain a bachelor's degree three years before the parties filed for divorce.[8] The Nebraska Court of Appeals held that the student

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loans that the wife incurred during the marriage were for the joint benefit of the parties because the education she received through incurring the debt financially benefitted the entire family.[9]

In *Lewis v. Lewis*, the parties were married for nineteen years, and the wife incurred student loan debt over a period of a few years at the beginning of the marriage, and again in the middle of the marriage.[10] Echoing its ruling in *Schmid*, the Nebraska Court of Appeals held that the student loans the wife incurred during the marriage were for the joint benefit of the parties because the loans allowed the wife to improve her career opportunities and therefore contribute more money to the family.[11]

In *Meelhuysen v. Meelhuysen*, the parties were married for four years, and both parties incurred student loans and obtained degrees during the marriage.[12] The Nebraska Court of Appeals found no abuse of discretion in the trial court's ruling that both parties' student loan debts were marital, and, without much discussion or analysis of the issue, found no abuse of discretion in ordering each party to pay their own student loan debt.[13]

In *Riegel v. Lemond*, the final unpublished opinion on this issue, the parties were married for approximately 20 years,[14] and the husband incurred $6,700 in student loan debt during the marriage.[15] The husband testified that some of the student loan debt was for his education and that some of it was for family expenses.[16] The Nebraska Court of Appeals found no abuse of discretion in the trial court's ruling that the loans should not be included in the marital estate, because the husband did not "present an adequate record establishing how a student loan incurred during the marriage was utilized."[17] The Court, in language it had not previously used when examining this issue, further stated that "[i]f the loan was utilized solely for educational expenses, then, arguably, the debt could be found to be nonmarital property. However, if part of the loan was utilized for the support of the obligor's family, then such loan could arguably be found to be marital."[18] However, since the husband "failed to provide an itemization to establish how any student loan acquired during the marriage was utilized", he did not meet his burden of proving his student loan debts were marital.[19]

Very recently, the Nebraska Court of Appeals revisited the division of student loans obtained during the marriage and issued a published opinion in *Wright v. Wright*.[20] In *Wright*, the parties were married for approximately six years, and the husband incurred approximately $124,000 in student loans during the marriage.[21] The husband also claimed that $41,000 of the student loan amount was in excess of the cost of his education and was used to support the family.[22] The trial court excluded the entirety of the husband's student loans from the marital estate and the Court of Appeals found no abuse of discretion on this issue.[23] Although the Court of Appeals did not explicitly state that the husband's student loans were not for the joint benefit of the parties, its ruling made it clear that the Court believed it did not have enough evidence before it to include any of the husband's student loans in the marital estate.[24]

Despite its holding, the *Wright* Court did offer insight into what it would consider helpful in analyzing student loans incurred during the marriage in the context of property division. *Wright* stressed the necessity of "presenting a sufficient record that establishes the distribution and utilization" of these loans,[25] which would include an "itemization of the student loan proceeds" and "records of tuition payments."[26] The *Wright* Court also suggested accounting for how funds deposited into bank account were used to benefit the family when making a marital claim.[27]

From these cases, it is clear that student loans incurred during a marriage may well be considered marital debts, and this issue is fact-driven. Further, the opinions that have been issued provide the framework for the arguments that can be made to best represent your client, no matter which side you represent.

If you wish to have student loan debt included in the marital estate, argue that the loans were for the joint benefit of the parties as the loans allowed the incurring party to progress in their career, contribute more money to the household, financially benefit the family, or that excess funds were used for family or household expenses. As these cases have noted, be prepared to prove all these items with precision and specificity.

On the other hand, if you wish to have the student loan debt that was incurred during the marriage excluded from the marital estate, argue that the loans were not for the joint benefit of the parties because the party that incurred the loans did not receive the benefit of their education until after the parties separated, and therefore the family or other spouse never received any benefit from the debt, or rely on the unpublished opinion in *Riegel* and argue that the amount of loans used for educational expenses are not marital. Another argument that can be made is that the party that incurred the loans did not prove what the loans were used for. This argument applies to loans that went directly to the school as well as any excess loans.

The bottom line is that if you want student loans to be included in the marital estate, be prepared to specifically prove, with appropriate documentation, why they should be.[28]

Premarital Student Loans Paid During the Marriage

The second situation where student loans arise in divorce is when student loans obtained prior to marriage are paid off or down during the marriage. Since these loans were obtained before the parties married, the loans themselves are premarital and therefore not included in the division of the marital estate. However, the Nebraska's appellate courts have examined this exact issue and have found that like other premarital debts

paid off or down during the marriage, payments made toward premarital student loans using marital assets may be taken into account in the division of the marital estate.

The first case to examine this issue was *Gangwish v. Gangwish*.[29] In *Gangwish*, approximately $12,000 of the wife's premarital student loans were paid off during the marriage.[30] However, the trial court only gave her a $7,000 credit in the division of the marital estate even though the entire amount of student loans were paid off during the marriage.[31] The husband appealed, arguing that since the entire amount was paid off during the marriage, the wife should be credited with the entire amount in the division of the marital estate.[32] The Nebraska Supreme Court agreed, stating the wife's "award should have been reduced by the total student loan debt that she brought into the marriage because that debt was paid off with marital assets."[33] However, the Court did not revise the student loan payment credit because "the marital estate totaled well over $1 million and the alleged mistake constitutes less than one-half of 1 percent of this total[,]" which was not an abuse of discretion.[34]

This issue was revisited in *Anderson v. Anderson*.[35] In *Anderson*, the wife brought premarital student loan debt into the marriage, and the husband sought to have her credited for the amount of her premarital student loans that were paid off during the marriage.[36] In disallowing the credit for the amount of the wife's student loans paid off during the marriage, *Anderson* found that the husband had failed to meet his burden of proving the amount paid toward the wife's student loans during the marriage (versus the amount paid prior to the marriage), and therefore the amount paid toward the wife's premarital student loans could not be included in the division of the marital estate.[37]

Finally, the Nebraska Court of Appeals reexamined this issue very recently in *Ramsey v. Ramsey*.[38] In *Ramsey*, the wife had approximately $42,000 of premarital student loans, and this entire amount was paid off during the marriage.[39] Referring to *Gangwish*, the Court stated that "[w]hen one party's nonmarital debt is paid off with marital funds, the value of the debt repayment ought to reduce that party's property award upon dissolution."[40] In an effort to clear up any confusion as to whether one-half or the entire amount of the student loan debt paid off during the marriage should be taken into account in dividing the marital estate, *Ramsey* found that the entire amount of the wife's premarital student loan debt that was paid off during the marriage should be characterized as an asset attributable to her—the party that benefitted from having their debt paid off.[41] The Court reasoned that if this asset was the parties' only asset, the wife would have to pay the husband half of this amount to equalize the marital estate.[42]

It is worth noting in *Ramsey* that the husband met his burden of proving the amount of the wife's student loans paid off during the marriage by stipulation.[43] It is also worth mentioning that because neither party appealed the trial court's incorrect method of calculating the marital estate and resulting equalization payment,[44] the *Ramsey* Court recalculated the value of marital estate, and the resulting equalization payment, under a plain error standard.[45] Under this standard, the Court found that even though the wife would have received approximately $13,000 more if a correct calculation was used, the difference between the wife receiving 50% of the marital estate under a correct calculation, and the 48% she received under the improper calculation, did not rise to the level of plain error.[46]

Like student loan debt incurred during the marriage, it is clear that premarital student loan debt paid off or down during the marriage may be included in the division of the marital estate, and this issue is also fact-driven. The above-mentioned appellate opinions provide the framework for the arguments that can be made to best represent your client, no matter which side you represent.

If you wish to have the student loan payments that were made during the marriage included in the marital estate, you will need to be able to prove what this amount is, with the most effective way being stipulating with the opposing party as to the amount. If an agreement cannot be reached, obtain statements from the loan provider(s) showing the balance at the time of the marriage and evidence the payments made during the marriage.

If instead you wish to have these student loan payments excluded from the marital estate, argue that the opposing party has not met their burden of proving the amount paid off during the marriage.

Student Loan Child Support Deduction

The third situation where student loans impact a divorce occurs when the party paying child support desires a deduction from their income in the child support calculation due to their monthly student loan payment.

As family law practitioners are well aware, child support is governed by the Nebraska Child Support Guidelines, with the principle behind the Guidelines being to recognize both parents' duty to contribute financially to their children in proportion to their respective incomes.[47] The Guidelines are a rebuttable presumption, and should be applied as defined unless a court finds that one or both parties have produced sufficient evidence to rebut the presumption, including showing that applying the Guidelines would be inappropriate or unjust.[48] Further, the Guidelines specify several instances when a deduction from a party's income can be taken into account in the child support calculation; however, payments toward student loan obligations are not in the enumerated list.[49] Finally, any deviations from the Guidelines must also take into account the best interests of the child.[50]

The Nebraska Appellate Courts have analyzed the issue of whether payments toward a student loan can be used as a deduction to income in the child support calculation in a trio of opinions about twenty years ago.[51] Those three rulings establish that student loan payments can be used as a deduction to income in the child support calculation, and they define what needs to be proven in order to accomplish this.

In *State ex rel Elsasser v. Fox*, the Nebraska Court of Appeals established that student loan payments can be taken as a deduction to a child support payor's income.[52] The court compared student loan payments to the allowed deductions contained in the Guidelines, and in finding student loan payments to be comparable, stated that student loan payments "are fixed, legally unavoidable monthly payments" that cannot, for most former students, be discharged in bankruptcy."[53] The Court further added that the child support payor was current in his child support payments, and the student loan he incurred will undoubtedly benefit his child now and in the future.[54]

A few years after *Elsasser*, the Nebraska Supreme Court analyzed this issue in *Sears v. Larson*.[55] *Sears* agreed with *Elsasser* to the extent that in appropriate cases, student loan payments can be allowed as a deduction from income for the purposes of child support.[56] *Sears* provided further guidance as to what a party requesting this deduction would need to prove, namely—the amount of the loans, the terms of the loans, the amount attributable to principal and interest, and the amount of the loans that were used for education, child support, or other expenditures—in order to receive this deduction.[57] In addition, the party seeking this deduction needs to prove that applying the Guidelines without allowing a deduction to their income for student loan payments would produce an unjust result.[58] Based on these factors, and the fact that the record did not provide any specific details as to the nature and amount of the loans, the *Spears* Court held that the party seeking the deduction did not meet the burden of proof and did so without defining what "an unjust result" means in this context.[59]

Shortly after *Sears*, this issue was analyzed in *Noonan v. Noonan*.[60] In *Noonan*, the trial court allowed for a deduction from the child support payor's monthly income for their student loan payment.[61] After confirming that its conclusion in *Sears* remains intact,[62] the Nebraska Supreme Court found that the trial court abused its discretion in allowing the deduction because the payor did not meet their burden of proving that disallowing the deduction would produce an unjust result.[63] *Noonan* added another aspect to consider when determining whether this deduction is available, stating that the record contained no evidence that "reveals whether the loan terms allow the [payor] to reduce the size of the monthly payment."[64]

From these cases, it is clear that payments toward student loans can be used as a deduction to income in the child support calculation, but whether a court chooses to allow such a deduction is discretionary. If you represent a party that wishes to get this deduction, prove your case through providing proof of the amount of the loans, the terms of the loans, the amount attributable to principal and interest, and the amount of the loans that were used for education, child support, or other expenditures. Additionally, show that the amount being paid toward the loan is under a repayment plan for the longest possible loan term. Further, if applicable, demonstrate the payor is current in their child support obligation. Finally, get it right the first time around as trying to relitigate this issue through a modification with the same set of facts will be unsuccessful.[65]

If you represent the party that does not want this deduction to be allowed, the best arguments are that the opposing party has not met their burden of proving a deviation from the Guidelines should be applied, either because they did not provide the appropriate proof or they did not prove that applying the Guidelines would produce an unjust result or would be in the child's best interests.

Conclusion

As this article shows, student loans in divorce are ripe for litigation in three common scenarios, and through examining Nebraska's caselaw on point, practitioners have a roadmap for successfully navigating clients through student loan issues in a divorce.

Endnotes

[1] Jaleesa Bustamonte, *Student Loan Debt Statistics*, Educationdata.Org (Mar. 12, 2020) https://educationdata.org/student-loan-debt-statistics(last visited Apr. 25, 2021).

[2] Mel Hanson, *Student Loan Debt By State*, Educationdata.Org (Sept. 29, 2020) https://educationdata.org/student-loan-debt-by-state#nebraska(last visited Apr. 25, 2021).

[3] *Walker v. Walker*, 9 Neb. App. 694, 700, 618 N.W.2d 465, 471 (2000).

[4] According to the Court of Appeals, the record from trial showed approximately $20,000 of the wife's student loans were in excess of her direct educational expenses. *Id.* at 696, 619 N.W.2d at 468.

[5] One unpublished opinion that predates *Walker* reached the same conclusion—that student loan debt incurred during the marriage is not marital debt because the party that incurs the student loan debt takes the benefit of the education along with them after the divorce, and therefore they should be responsible for the debt. *Wick v. Wick*, No. A-94-477, 1995 WL 711536 (Neb. Ct. App. Dec. 5, 1995).

[6] Unpublished opinions of the Court do not carry precedential weight, but that does not mean the Court will not rely on them. *See State v. James*, 6 Neb. App. 444, 450, 573 N.W.2d 816, 820–21 (1998). Further, unpublished opinions can only come before the Court when the case cited is related by identify or cause of action to the current case before the court. Neb. Ct. R. § 2-102(E)(4).

[7] It is this author's opinion that the Court reached a different conclusion in these three cases for two reasons: (1) each case presented a different set of facts than *Walker*; and (2) when reviewing trial court property division rulings, the Court follows the abuse of discretion standard, *Weidel v. Weidel*, 300 Neb. 13, 20, 911 N.W.2d 582, 588 (2018), which is a difficult standard to prove.

[8] *Schmid v. Schmid*, No. A-01-1396, 2003 WL 21397862, at *1 (Neb. Ct. App. June 17, 2003).

[9] *Id.* at *5.

[10] *Lewis v. Lewis*, No. A-16-248, 2017 WL 1456955, at *3 (Neb. Ct. App. Apr. 25, 2017).

[11] *Id.* at *6–7.

[12] *Meelhuysen v. Meelhuysen*, No. A-17-866, 2018 WL 4340118, at *2 (Neb. Ct. App. Sept. 11, 2018).

[13] *Id.* at *13. The Court of Appeals found an abuse of discretion in the trial court's overall division of the marital estate as its division gave the wife approximately 22% of the estate; therefore, the Court amended the overall division of the estate to give the wife approximately 34% of the marital estate. *Id.* at *15.

[14] *Riegel v. Lemond*, No. A-18-607, 2019 WL 2932786, at *1 (Neb. Ct. App. July 9, 2019).

[15] *Id.* at *13.

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Wright v. Wright*, 29 Neb. App. 787 (Neb. Ct. App. 2021).

[21] *Id.* at 805–06.

[22] *Id.*

[23] *Id.* at 808.

[24] *Id.*

[25] *Id.* at 807.

[26] *Id.*

[27] *Id.*

[28] These suggestions are not meant to be an exhaustive list.

[29] *Gangwish v. Gangwish*, 267 Neb. 901, 678 N.W.2d 503 (2004).

[30] *Id.* at 905, 678 N.W.2d at 509.

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.* at 905–06, 678 N.W.2d at 510. The holding in *Gangwish* was relied on in *Wiech v. Wiech*, which did not deal with the payment of premarital student loans during the marriage. 23 Neb. App 370, 678 N.W.2d 503 (2015). In *Wiech*, since the amount of premarital debt paid off during the marriage was substantial in comparison to the overall marital estate, the Court found that each parties' premarital debt should be included in the division of the marital estate, with each party receiving a 100% credit for the amount of their premarital debt that was paid off during the marriage. *Id.* at 381, 678 N.W.2d at 579.

[35] *Anderson v. Anderson*, 27 Neb. App. 547, 934 N.W.2d 497 (2019).

[36] *Id.* at 564, 934 N.W.2d at 511–12.

[37] *Id.*

[38] *Ramsey v. Ramsey*, 29 Neb. App. 688 (Neb. Ct. App. 2021).

[39] *Id.* at 699.

[40] *Id.*

[41] *Id.* at 702.

[42] *Id.* at 700.

[43] *Id.* at 698–99.

[44] *Id.* at 701.

[45] *Id.* at 702.

[46] *Id.* at 702–03. The $13,000 was only approximately 2.5% of the total net marital estate.

[47] Neb. Ct. R. § 4-201.

[48] *Id.* § 4-203.

[49] *Id.* § 4-205.

[50] *Brooks v. Brooks*, 261 Neb. 289, 622 N.W.2d 670 (2001).

[51] A fourth unpublished opinion found that the trial court did not abuse its discretion in allowing a deduction to a child support payor's income due to his student loan payments. *Johnson v. Johnson*, No. A-99-1434, 2001 WL 436200 (Neb. Ct. App. May 1, 2001).

[52] *State ex rel Elsasser v. Fox*, 7 Neb. App. 667, 674, 584 N.W.2d 832, 836 (1998).

[53] *Id.*

[54] *Id.*

[55] *Sears v. Larson*, 259 Neb. 760, 612 N.W.2d 474 (2000).

[56] *Id.* at 763, 612 N.W.2d at 477.

[57] *Id.* at 764, 612 N.W.2d at 477.

[58] *Id.*

[59] *Id.*

[60] *Noonan v. Noonan*, 261 Neb. 552, 624 N.W.2d 314 (2001).

[61] *Id.* at 563, 624 N.W.2d at 324.

[62] *Id.* at 564, 624 N.W.2d at 324.

[63] "[W]e note that there is nothing in the record to indicate the total amount of the father's loans, the terms of the loans, the amounts attributable to principal and interest, or what amounts were used for education, child support, or other expenses." *Id.* at 564–65, 624 N.W.2d at 324–25.

[64] *Id.* at 564, 624 N.W.2d at 325.

[65] *See Wilkins v. Wilkins*, 269 Neb. 937, 697 N.W.2d 280 (2005) (holding that attempting to relitigate a deduction to income for child support due to student loan payments in a modification action that is based upon the exact same set of facts is improper, as such is not a material change in circumstances).