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# OUT OF REACH: PROTECTING PARENTAL CONTRIBUTIONS TO HIGHER EDUCATION FROM CLAWBACK IN BANKRUPTCY


## ABSTRACT

*Parental contributions to higher education have become commonplace. However, courts are divided on how contributions by parents towards the college education of their children should be treated when those parents file for bankruptcy. The Bankruptcy Code grants trustees avoidance powers under § 548 to recover transfers made by a debtor up to two years before the petition date if those transfers are actually or constructively fraudulent. Trustees are attempting to use these avoidance powers to "clawback" payments made to colleges and universities by debtors for the education of their children. Factors including societal expectations, financial aid calculations, emotional benefits, and economics have created varying opinions on whether these contributions constitute constructive fraud under § 548.*

*This disagreement has not gone unnoticed. In 2015, a bill was introduced in the House of Representatives that seeks to create an exception to trustee avoidance power for all parental tuition payments: the Protecting All College Tuition (PACT) Act. However, the PACT will not effectively protect educational expenditures from trustee avoidance powers because it fails to explicitly preempt state bankruptcy laws.*

*Parental contributions to higher education are similar to charitable donations, a category of transfers that has been protected from trustee avoidance powers since the passage of the Religious Liberty and Charitable Donation Protection Act (RLCDPA) of 1998. Using the RLCDPA as a guide, this Comment will propose amendments to the Code to protect payments to institutions of higher education by parent debtors on behalf of their children. With simple additions to § 544 and § 548, federal lawmakers can advance the public's interest in higher education, protect creditors, and limit the need for litigation around the subject.*

## INTRODUCTION

As the cost of college continues to rise, parents are contributing more financially to the higher education of their children.[1] When a parent files for bankruptcy, these contributions become subject to review.[2] In recent years, some bankruptcy trustees have tried to recover ("clawback") payments made to colleges and universities by parent debtors on behalf of their adult children.[3] The trustees argue that, where a child is eighteen or older, these funds should be used to satisfy the parent debtor's own growing debts.[4] As of 2015, at least twenty-five colleges had been asked to return money as fraudulent transfers and over a dozen had complied.[5] According to consumer bankruptcy experts, this trend is expected to rise.[6]

Trustees are responsible for examining the financial history of a debtor in bankruptcy and, where possible, recovering funds the debtor transferred prior to filing for redistribution to creditors.[7] Where a trustee finds that a debtor did not receive "reasonably equivalent value" in exchange for a transfer of the debtor's assets, the trustee can sue to recover that property as a constructively fraudulent transfer.[8] Most commonly, trustees look for property or cash the debtor gave to family members or friends.[9] But when a parent pays tuition to a college or university for his or her child, some trustees have argued that it is not the parent who receives value in return, but the child.[10] It is under this argument that trustees look to recover those funds.[11]

The Bankruptcy Code (the Code) does not define reasonably equivalent value, but courts and commentators agree that debtors must receive some sort of economic benefit in exchange for a transfer of their assets before reasonably

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1 *See* SALLIE MAE, HOW AMERICA PAYS FOR COLLEGE 7–9 (2015), http://news.salliemae.com/files/doc_library/file/HowAmericaPaysforCollege2014FNL.pdf.; *see also* Katy Stech, *Bill Proposes Ban on Tuition Clawbacks in Bankruptcy*, WALL STREET J.: BANKRUPTCY BEAT (May 12, 2015), http://blogs.wsj.com/bankruptcy/2015/05/12/bill-proposes-ban-on-tuition-clawbacks-in-bankruptcy.

2 *See* 11 U.S.C. § 548 (2012).

3 Stech, *supra* note 1.

4 *Id*.

5 *Id*.

6 *Id*.

7 *See* UNITED STATES COURTS, BANKRUPTCY BASICS 17–18 (3d ed. 2011), http://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics.

8 11 U.S.C. § 548(a)(1)(B)(i) (2012).

9 Stech, *supra* note 1.

10 *Id*.

11 *Id*.

equivalent value can be found.[12] Even still, some courts have effectively ignored the requirement of reasonably equivalent value in their analysis and instead based their decisions to protect tuition payments from clawback on public policy grounds.[13]

The courts are not the only ones that think trustees should not be able to clawback tuition from universities.[14] In 2015, federal lawmakers introduced the Protecting All College Tuition (PACT) Act to protect tuition payments from trustees.[15] The PACT Act addresses the treatment of tuition payments by parent debtors in bankruptcy and seeks to protect such payments from clawback under § 548 of the Code.[16] However, the bill stalled after it was introduced in the House of Representatives.[17] This lack of activity coupled with several drafting issues suggest that the PACT Act, as it is written, is not the solution to the disagreement on how educational expenditures should be treated in bankruptcy.[18] That does not mean the goal of that legislation is unfounded, though. Protecting tuition payments from clawback is important for three policy reasons: (1) parental income impacts student financial aid, (2) schools receive payments from parents in good faith, and (3) society expects parents to help their children pay for college.

This Comment will argue that § 544 and § 548 of the Code should be amended to protect parental payments to colleges and universities. It will suggest protection for such payments that equate to fifteen percent or less of the parent debtor's income and those that exceed fifteen percent where a consistent practice can be shown. This fifteen percent threshold is similar to the protection the Religious Liberty and Charitable Donation Protection Act (RLCDPA) created for charitable donations.[19] RLCDPA, enacted in 1998, will serve as a helpful starting point.[20] But this Comment will show that effective legislation must go a few steps further and address some of the questions left

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[12] *See* 11 U.S.C. § 548(a)(1)(B)(i) (2012); *see, e.g.*, Gold v. Marquette Univ. (*In re* Leonard), 454 B.R. 444, 444 (Bankr. E.D. Mich. 2011); Lisle v. John Wiley & Sons, Inc. (*In re* Wilkinson), 196 F. App'x 337, 341 (6th Cir. 2006).

[13] *See, e.g.*, Banner v. Lindsay (*In re* Lindsay), 2010 Bankr. LEXIS 1554 (Bankr. S.D. N.Y. 2010); *In re* Leonard, 454 B.R. at 457–58.

[14] *See* Protecting All College Tuition Act of 2015, H.R. 2267, 114th Cong. (2015).

[15] *Id*.

[16] *Id*.

[17] *See id*.

[18] *See id*.; Elizabeth Stephens, *PACT Will Not Prevent Trustees from Attempting to Claw Back College Tuition Payments*, 35-2 AM. BANKR. INST. J., 16, 17 (2016).

[19] *See generally* Religious Liberty and Charitable Donation Protection Act of 1998, Pub. L. No. 105-183, § 3, 112 Stat. 517 (1998).

[20] *Id*.

unanswered by RLCDPA.[21] By amending § 544 and 548 to protect payments to colleges and universities where specific criteria are met, Congress can protect both the ability of parents to contribute to their children's higher education and the interest of creditors in preventing debtor fraud.

## I. BACKGROUND

When an individual files for chapter 7 bankruptcy, the individual seeks to liquidate his nonexempt[22] property in exchange for a discharge of his debts.[23] After a debtor files a petition with the bankruptcy court, a chapter 7 trustee is appointed to administer the debtor's estate and facilitate the liquidation of the debtor's nonexempt assets.[24] The trustee seeks to maximize the amount received by the debtor's unsecured creditors, utilizing the powers granted by the Code.[25]

One of these powers is avoidance power, or the power to clawback transfers of property made by a debtor in the two years preceding the bankruptcy filing if the transfers are fraudulent.[26] Fraudulent transfers include both those that are actually fraudulent and those that are constructively fraudulent.[27] Deciding if a debtor received reasonably equivalent value for a transfer is an important step in identifying constructively fraudulent transfers.[28] Unfortunately, the Code does not define reasonably equivalent value, so the job of interpreting the concept has fallen to the courts.[29] This task has proven to be particularly challenging where the value, if any, a debtor receives in exchange for a transfer of his property is indirect or intangible.[30] A scenario in which this challenge commonly arises is when a debtor has contributed financially to his children's higher education in the two years preceding the

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[21] *See generally id.*

[22] Chapter 7 debtors may keep some of their property that is exempt under federal or state bankruptcy law. 11 U.S.C. § 522 (2012).

[23] BANKRUPTCY BASICS, *supra* note 7, at 18–20.

[24] *Id.* at 17–18.

[25] *See id.*

[26] *Id.*; *see* 11 U.S.C. § 548 (2012).

[27] *See id.*

[28] *See id.* § 548(a)(1)(B).

[29] *See id.*; *see, e.g.*, *In re* Lindsay, 2010 Bankr. LEXIS 1554; *In re* Leonard, 454 B.R. at 455–57; Shearer v. Oberdick (*In re* Oberdick), 490 B.R. 687, 701–02 (Bankr. W.D. Pa. 2013); DeGiacomo v. Sacred Heart Univ. (*In re* Palladino), 556 B.R. 10, 16 (Bankr. D. Mass. 2016).

[30] *See, e.g.*, Senior Transeastern Lenders v. Official Comm. of Unsecured Creditors (*In re* TOUSA, Inc.), 680 F.3d 1298, 1303 (11th Cir. 2012).

bankruptcy filing.[31] So far, courts disagree about whether such payments constitute constructive fraud.[32] This Section will further explain § 548 and trustee avoidance powers. Then it will seek to better understand the meaning of reasonably equivalent value. Finally, it will introduce four key cases that demonstrate the variety of approaches courts have taken in analyzing parental contributions to higher education under § 548.

### *A. Section 548 – Fraudulent Transfers*

Section 548 of the Code grants the bankruptcy trustees avoidance powers.[33] In other words, § 548 grants trustees the ability to clawback transfers made prior to bankruptcy if such transfers are found to be fraudulent.[34] The section serves to ensure a debtor's assets are distributed in a way that is in the best interest of all creditors.[35]

Provisions like this have a deep history in bankruptcy law. The history of this section dates back to the Statute of 13 Elizabeth which was passed by the English parliament in 1571.[36] The Statute sought to address a practice by debtors of transferring their assets to friends or family to obstruct attempts by creditors to collect on their claims.[37] Debtors waited until their creditors gave up on recovering their claims and then retook ownership of the property they had transferred.[38] These actions by the debtor were fraudulent because they depleted the debtor's estate without receiving anything of similar value in exchange that could be used to satisfy the claims of his creditors.[39]

Today, trustees can avoid transfers made by the debtor up to two years before the filing date of the bankruptcy petition.[40] Section 548(a)(1) provides:

> The trustee may avoid any transfer . . . of an interest of the debtor in property, or any obligation . . . incurred by the debtor, that was made

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[31] *See, e.g.*, *In re* Lindsay, 2010 Bankr. LEXIS 1554; *In re* Leonard, 454 B.R. at 455–57; *In re* Oberdick, 490 B.R. at 711; *In re* Palladino, 556 B.R. at 14–15.

[32] *Compare In re* Lindsay, 2010 Bankr. LEXIS 1554, *and In re* Leonard, 454 B.R. at 458, *with In re* Oberdick, 490 B.R. at 711, *and In re* Palladino, 556 B.R. at 14–15.

[33] S*ee* 11 U.S.C. § 548 (2012).

[34] S*ee id*.

[35] *See* H.R. REP. NO. 595, at 177–78 (1978), as *reprinted in* 1978 U.S.C.C.A.N. 5963, 6138–39.

[36] Mellon Bank N.A. v. Metro Commc'ns, Inc., 945 F.2d 635, 643–44 (3d Cir. 1991). *See generally* 11 U.S.C. § 548 (2012).

[37] Mellon Bank N.A., 945 F.2d at 643.

[38] *Id*.

[39] *Id*.

[40] 11 U.S.C. § 548(a)(1) (2012).

> or incurred on or within 2 years before the date of the filing of the petition, if the debtor voluntarily or involuntarily—
> (A) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or
> (B)
> (i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and
> (ii)(I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation; . . . .[41]

This section allows trustees to avoid transfers if they are either actually fraudulent or constructively fraudulent.[42] Actually fraudulent transfers, reachable by trustees under § 548(a)(1)(A), are those that are made "with actual intent to hinder, delay or defraud" a creditor.[43] Under § 548(a)(1)(B), trustees can also avoid transfers that were not intended to be fraudulent if the debtor was insolvent or became insolvent when the transfer was made and "received less than a reasonably equivalent value in exchange."[44] These transfers are referred to as constructively fraudulent.[45]

It is easy to identify constructive fraud when a transfer is made for no consideration.[46] However, it becomes less clear if a transfer constitutes constructive fraud when a debtor receives something of value in exchange for his property, but there is a question of whether the value received was "reasonably equivalent."[47] Even more challenging are situations in which a debtor received some indirect or intangible benefit in exchange for the transfer of his property.[48]

### *B. What is Reasonably Equivalent Value?*

A key consideration in analyzing potentially fraudulent transfers under § 548(a)(1)(B) is whether the debtor received reasonably equivalent value in

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41 *Id*.

42 *See id*.

43 *Id*. § 548(a)(1)(A).

44 *Id*. § 548(a)(1)(B); *see* Trey Monsour, *Understanding Fraudulent Transfers and Ensuing Litigation,* LAW 360 (July 2, 2014), http://law360.com/articles/553894/understanding-fraudulent-transfers-and-ensuing-litigation.

45 *See id*.; *see also* 11 U.S.C. § 548(a)(1)(B) (2012).

46 Monsour, *supra* note 44.

47 *Id*.

48 *See, e.g.*, *In re* TOUSA, Inc., 680 F.3d at 1301.

the exchange.[49] That the debtor receives "less than a reasonably equivalent value in exchange" is a fundamental feature of a constructively fraudulent transfer, but deciding whether reasonably equivalent value has been received is probably the most difficult task in a fraudulent transfer analysis.[50]

In § 548(d)(2)(A), the Code says value is: "property or satisfaction or securing of a present or antecedent debt of the debtor, but [value] does not include an unperformed promise to furnish support to the debtor or to a relative of the debtor."[51] The Code does not define reasonably equivalent value, however, and courts do not agree on how the term should be interpreted.[52] In fact, bankruptcy courts have acknowledged that no bright line rule exists to determine if reasonably equivalent value is received.[53]

Bankruptcy courts have said that the first step in deciding if a transferor receives reasonably equivalent value is to decide if any value was received at all.[54] They have also long acknowledged that fair consideration may be received in the form of an indirect benefit.[55] The court in *Rubin v. Manufacturers Trust Co.*, first explained what has come to be known as the indirect benefit rule:

> [A] debtor may sometimes receive "fair" consideration even though the consideration given for his property or obligation goes initially to a third person . . . . [T]he transaction's benefit to the debtor need not be direct; it may come indirectly through benefit to a third person . . . If the consideration given to the third person has ultimately landed in the debtor's hands, or if the giving of the consideration to the third person otherwise confers an economic benefit upon the debtor, then the debtor's net worth has been preserved, and [the statute] has been satisfied—provided, of course, that the value of the benefit received by the debtor approximates the value of the property or obligation he has given up.[56]

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[49] *See* 11 U.S.C. § 548(a)(1)(B) (2012).

[50] Jeffrey Baliban, *Measuring Reasonably Equivalent Value*, A.B.A. (Feb. 15, 2012), http://americanbar.org/litigation/committees/bankruptcy/articles/winter2012-measuring-reasonble-value.html.; *see* 11 U.S.C. § 548(a)(1)(B) (2012).

[51] 11 U.S.C § 548(d)(2)(A) (2012).

[52] *See id*.; *see also* Baliban, *supra* note 50.

[53] *In re* Lindell, 334 B.R. 249, 256 (Bankr. D. Minn. 2005); *see also* Creditors' Comm. Of Jumer's Castle Lodge, Inc. v. Jumer (*In re* Jumer's Castle Lodge, Inc.), 338 B.R. 244, 354 (C.D. Ill. 2006).

[54] *In re* Wilkinson, 196 F. App'x at 341; *see also* Baliban, *supra* note 50.

[55] *See* Rubin v. Manufacturers Hanover Trust Co., 661 F.2d 979, 991–92 (2nd Cir. 1981).

[56] *Id*.

In other words, an indirect benefit may be recognized, but the courts must still decide if the value of that benefit is reasonably equivalent to the value of the property exchanged.[57]

The court in In re TOUSA, further clarified what is required to recognize an indirect benefit.[58] In that case, the parent company, TOUSA, Inc., was a Florida home builder indebted to a collection of lenders, the Transeastern Lenders, as a result of its involvement in a joint venture, the Transeastern JV.[59] The joint venture went into default on its debt and litigation ensued among TOUSA, the Transeastern JV and the Transeastern Lenders.[60] TOUSA eventually settled with the joint venture for $420 million and its subsidiaries were made to pledge assets to secure new loans for payment of the settlement.[61] But most of these "Conveying Subsidiaries," as they were called, had no liability in the joint venture debt.[62]

TOUSA and many of its subsidiaries filed for bankruptcy within six months of obtaining the new loans and a suit was brought to recover the settlement funds for the conveying subsidiaries.[63] The Official Committee of Unsecured Creditors, which brought the suit on behalf of the subsidiaries, argued that they did not receive reasonably equivalent value in exchange for the funds used to pay a settlement that was an obligation to the joint venture of TOUSA and not the subsidiaries.[64] The bankruptcy court agreed, holding that the funds paid in the settlement were a fraudulent transfer because "the Conveying Subsidiaries did not receive reasonably equivalent value in exchange for the transfer [and] . . . did not receive either 'property' or the 'satisfaction or securing of a present or antecedent debt of the debtor,'" among other reasons.[65] Additionally, the bankruptcy court found that the defendants did not produce evidence of tangible and concrete indirect benefits or any value of such benefits that could be quantified with reasonable precision.[66]

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[57] *See id*. *See generally* 11 U.S.C. § 548(a)(1)(B) (2012).

[58] *See In re* TOUSA, Inc., 680 F.3d at 1301; *see also* Baliban, *supra* note 50.

[59] *See In re* TOUSA, Inc., 680 F.3d at 1301; *see also* Baliban, *supra* note 50.

[60] *In re* TOUSA, Inc., 680 F.3d at 1302; *see also* Baliban, *supra* note 50.

[61] *In re* TOUSA, Inc., 680 F.3d at 1302; *see also* Baliban, *supra* note 50.

[62] *In re* TOUSA, Inc., 680 F.3d at 1302; *see also* Baliban, *supra* note 50.

[63] *In re* TOUSA, Inc., 680 F.3d at 1301; *see also* Baliban, *supra* note 50.

[64] *In re* TOUSA, Inc., 680 F.3d at 1302; *see also* Baliban, *supra* note 50.

[65] 3V Cap. Master Fund Ltd. v. Official Comm. of Unsecured Creditors (*In re* TOUSA, Inc.), 444 B.R. 613, 650 (S.D. Fla. 2011); *see also* Baliban, *supra* note 50.

[66] *In re* TOUSA, Inc., 444 B.R. at 650; *see also* Baliban, *supra* note 50.

The court listed three requirements that must be met for an indirect benefit to be recognized: (1) the debtor must receive the benefit, even if indirectly; (2) the value received must be in some kind of enforceable entitlement to tangible or intangible property; (3) the property must be received in exchange for the transfer or obligation.[67]

The courts have suggested that the Code's reference to property in the definition of value should be construed "in its broadest sense, including cash, all interests in property, such as liens, and every kind of consideration including promises to act or forbear to act."[68] The Supreme Court has advised that "the term property . . . does not exclude interests that are novel or contingent or where enjoyment must be postponed."[69] Value, for bankruptcy purposes, seems to be synonymous with economic value and "economic value connotes monetary value, even if it is not immediately recognized."[70] But the Code does not instruct on the valuation of such economic benefits.[71]

As economist Jeffrey Baliban explained, "[w]hile it is certainly appropriate that valuation experts should leave matters of law to the court, they can help with matters of fact where quantifying value is concerned."[72] Section 548 serves to preserve value for unsecured creditors.[73] With this in mind, it seems equitable that the "valuation of property [or] benefits received in a transfer should be analyzed from the creditors' point of view."[74] Some courts conducting these valuations have chosen to apply a strict mathematical formula based on fair market value to decide if reasonably equivalent value has been received.[75] Fair market value is "the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts."[76] To qualify as reasonably equivalent value under the formula,

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67 In re TOUSA, Inc., 444 B.R. at 641; *see also* Baliban, *supra* note 50.

68 In re TOUSA, Inc., 444 B.R. at 656; *see also* Baliban, *supra* note 50.

69 Segal v. Rochelle, 382 U.S. 375, 379 (1966); *see also* Baliban, *supra* note 50.

70 Baliban, *supra* note 50.

71 *Id*.

72 *Id*.

73 *Id*.

74 *Id*.

75 Cooper v. Ashley Commc'ns, Inc. (*In re* Morris Commc'ns, Inc.), 914 F.2d 458, 466 (4th Cir. 1990); *see also* Durrett v. Wash. Nat'l Ins. Co., 621 F.2d 201, 203–04 (5th Cir. 1980); Madrid v. Lawyers Title Ins. Co., 21 B.R. 424 (B.A.P. 9th Cir. 1982) (acknowledging, but refusing to follow Durrett's mathematical formula); *see also* Baliban, *supra* note 50 (quoting *In re* Morris Commc'ns, Inc., 914 F.2d at 466).

76 United States v. Cartwright, 411 U.S. 546, 559 (1973); *see also* Baliban, *supra* note 50.

consideration must be worth at least seventy percent of the fair market value.[77] Other courts have rejected "any fixed mathematical formula . . . and opt[ed] for the standard that '[r]easonable equivalence should depend on all the facts of each case,' an important element of which is market value."[78] Under this standard, fair market value remains an important consideration, but case-by-case adjudication is required.[79]

The effect of an indirect benefit on a transferor's cost of capital may also be relevant.[80] Cost of capital is the "expected rate of return that the market participants require in order to attract funds to a particular investment."[81] Any transfers a debtor makes that improve "its ability to generate cash flow, make its cash flows more consistent, or avoid the loss of cash flow could be viewed to have favorable impact on its cost of capital."[82]

The court in *Lisle v. John Wiley & Sons, Inc. (In re Wilkinson)*, shared Baliban's view that a benefit, whether directly or indirectly received by a debtor, must be an "economic" one to be considered "value."[83] According to the *Wilkinson* court, "[t]he district court rightly stated that 'the focus should be on the overall effect on the debtor's net worth after the transfer.'"[84] Other courts have expressed a similar idea in holding that "ethereal" or "emotional benefits" do not constitute value for purposes of § 548.[85] The *Wilkinson* court held that, where an indirect benefit is alleged to be received, a debtor must demonstrate that the benefit is "concrete and quantifiable."[86]

The debtor also has the burden of actually quantifying the benefit.[87] The court acknowledged that this burden "can be challenging in a case where the alleged benefit is goodwill, corporate synergy, a business opportunity, the continuation of a business relationship, or some other intangible benefit."[88] In

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77 *In re* Morris Commc'ns, Inc., 914 F.2d at 466; *see* Durrett, 621 F.2d at 203; Madrid, 21 B.R. at 426–27; *see also* Baliban, *supra* note 50.

78 *In re* Morris Commc'ns, Inc., 914 F.2d at 466–67 (quoting Bundles v. Baker, 856 F.2d 815, 824 (7th Cir. 1988)).

79 Baliban, *supra* note 50.

80 *Id*.

81 *Id*. (citing SHANNON PRATT & ROGER GRABOWSKI, COST OF CAPITAL: APPLICATIONS AND EXAMPLES (4th ed. 2010)).

82 Baliban, *supra* note 50.

83 *In re* Wilkinson, 196 F. App'x at 342.

84 *Id*.

85 *E.g.*, Pereira v. Wells Fargo Bank, N.A. (*In re* Gonzalez), 342 B.R. 165, 169 (Bankr. S.D.N.Y. 2006).

86 *In re* Wilkinson, 196 F. App'x at 342.

87 *Id*.

88 *Id*.

*Wilkinson*, the indirect benefit to the debtor resulted in a reduction to his debt.[89] The court found this to be a "concrete and quantifiable" indirect benefit.[90] Thus, in order to be considered value, and potentially reasonably equivalent value, an indirect benefit must be: "(1) an 'economic' benefit; (2) concrete; and (3) quantifiable."[91]

### *C. Court Application of Reasonably Equivalent Value Standard to Educational Expenditures*

When analyzing educational expenditures under § 548, the decision whether such payments constitute constructive fraud should turn on if the parent making the payment received reasonably equivalent value in exchange. Courts have been split on whether such payments should be protected from clawback by the trustee in bankruptcy.[92] Many courts, especially those holding that these payments should be protected, have not focused their analyses strictly on determining if reasonably equivalent value was received.[93] Rather, these courts have engaged in judicial activism and based their holdings on policy considerations, effectively creating an exception not provided for in the Code.[94]

Four cases since 2010 illustrate the disagreement among bankruptcy judges on whether educational expenditures made on behalf of a debtor's child in the two years preceding bankruptcy should be protected from the bankruptcy trustee.[95] On one hand, the bankruptcy courts in *Banner v. Lindsay (In re Lindsay*) and *Gold v. Marquette (In re Leonard*) concluded that such payments are constructively fraudulent and reachable by the trustee.[96] On the other hand, the courts in *Shearer v. Oberdick (In re Oberdick*) and *DeGiacomo v. Sacred Heart Univ., Inc. (In re Palladino*) found that the benefits parents receive are enough to warrant protection for these payments.[97] As these cases will show,

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[89] *Id*.

[90] *Id*.

[91] *Id*.

[92] *See, e.g.*, *In re* Lindsay, 2010 Bankr. LEXIS 1554; *In re* Leonard, 454 B.R. 444; *In re* Oberdick, 490 B.R. 687; *In re* Palladino, 556 B.R. 10.

[93] *See, e.g.*, *In re* Lindsay, 2010 Bankr. LEXIS 1554; *In re* Leonard, 454 B.R. 444; *In re* Oberdick, 490 B.R. 687; *In re* Palladino, 556 B.R. 10; *see also* 11 U.S.C. § 548 (2012).

[94] *See, e.g.*, *In re* Oberdick, 490 B.R. at 712; *In re* Palladino, 556 B.R. at 15–16. *See generally* 11 U.S.C. § 548 (2012).

[95] *See In re* Lindsay, 2010 Bankr. LEXIS 1554; *In re* Leonard, 454 B.R. 444; *In re* Oberdick, 490 B.R. 687; *In re* Palladino, 556 B.R. 10.

[96] *In re* Lindsay, 2010 Bankr. LEXIS 1554; *In re* Leonard, 454 B.R. 444.

[97] *In re* Oberdick, 490 B.R. 687; *In re* Palladino, 556 B.R. 10.

the courts are starkly divided on the proper treatment of these payments in bankruptcy.[98]

### *1.* Banner v. Lindsay (In re Lindsay)*: Transfers Are Fraudulent When Fair Consideration Is Not Received*

In *Banner v. Lindsay (In re Lindsay)*, the court held that transfers by the debtor were constructively fraudulent because fair consideration was not received.[99] In this case, the chapter 7 trustee sought to avoid transfers made by the debtor to his wife, his son, and a college where his son was enrolled.[100] The debtor had previously been sued by a co-owner of his business and two years later, after violating an injunction resulting from that lawsuit, was ordered to pay over a million dollars in damages to the co-owner.[101] The debtor transferred personal assets, including stock, cash, and the title to a house to his wife.[102] The debtor also sold personal property, including a car and a motorcycle, and used the proceeds to pay his son's college tuition.[103] Just a few months later, the debtor filed for bankruptcy.[104]

The court emphasized that an important factor in determining a constructively fraudulent transfer is whether the conveyance was made with fair consideration.[105] The court asserted that fair consideration requires three things: "1. the recipient either conveyed property in exchange or discharged an antecedent debt in exchange; 2. such exchange is the 'fair equivalent of the property received;' and 3. such exchange was made in good faith."[106] When deciding this issue, the court stated that "[t]he burden of proof shifts from the plaintiff to the defendant where the facts regarding the nature of the consideration are in the defendant's control."[107]

According to the court, the debtor failed to satisfy his burden of proof and demonstrate fair consideration.[108] The court concluded that the debtor had no

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[98] *See In re* Lindsay, 2010 Bankr. LEXIS 1554; *In re* Leonard, 454 B.R. 444; *In re* Oberdick, 490 B.R. 687; *In re* Palladino, 556 B.R. 10.

[99] *In re* Lindsay, 2010 Bankr. LEXIS 1554, at *1–2.

[100] *Id*. at *1–8.

[101] *Id*. at *11.

[102] *Id*. at *12.

[103] *Id*. at *13.

[104] *Id*.

[105] *Id*. at *14–15; *see* Ackerman v. Ventimiglia (*In re* Ventimiglia), 362 B.R. 71, 81–82 (Bankr. E.D.N.Y. 2007).

[106] *In re* Lindsay, 2010 Bankr. LEXIS 1554, at *16–17; *see In re* Ventimiglia, 362 B.R. at 81–84.

[107] *In re* Lindsay, 2010 Bankr. LEXIS 1554, at *19.

[108] *Id*. at *1–2.

legal obligation to pay for his child's college education.[109] It also rejected the argument that the debtor has a "moral obligation" to fund his son's college education.[110] The court also relied on a recent ruling in which another bankruptcy court dismissed a chapter 7 case for substantial abuse when the debtor admitted he filed the case with the goal of better positioning himself to fund a college education for his children.[111] The *Lindsay* court held that the $35,055 in proceeds transferred to the university as tuition for the debtor's son constituted fraudulent transfers and ordered the debtor to turn this amount over to the trustee.[112]

### 2. Gold v. Marquette (In re Leonard)*: Indirect Benefits Can Constitute Reasonably Equivalent Value Only Where Economic, Concrete, and Quantifiable*

The court in *Gold v. Marquette (In re Leonard)* acknowledged that indirect benefits can constitute reasonably equivalent value, but they must be economic, concrete, and quantifiable.[113] Under this standard, the court concluded that tuition payments for a debtor's child are avoidable in bankruptcy.[114] The debtors in this case co-signed a $35,000 student loan with their eighteen year old son and deposited the funds into their bank account.[115] In the year preceding their bankruptcy filing, the debtors wrote a check to Marquette University totaling over $20,000 for their son's undergraduate education.[116] When the debtors filed for bankruptcy, the trustee sought to clawback these payments as both actually and constructively fraudulent under the Code and Michigan's fraudulent transfer statutes.[117]

The university argued that the proceeds of the student loan were held in trust by the debtors for their son.[118] Pre-petition transfers of property held in trust for another are generally not avoidable as fraudulent transfers.[119] The court rejected this contention, however, saying that the debtors "owned a one-

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109 *Id*. at *27.

110 *Id*.

111 *Id*. (citing *In re* Godios, 333 B.R. 644 (Bankr. W.D.N.Y. 2005)).

112 *Id*. at *28.

113 *In re* Leonard, 454 B.R. at 457 (citing *In re* Wilkinson, 196 F. App'x at 342).

114 *Id*. at 460.

115 *Id*. at 447.

116 *Id*. at 460.

117 *Id*. at 447–48.

118 *Id*. at 447.

119 *Id*. at 450–51; *see* Stevenson v. J.C. Bradford & Co. (*In re* Cannon), 277 F.3d 838, 849–52 (6th Cir. 2002).

half interest in the funds" and that the funds had been "commingled with the debtor's other funds."[120] The court supported this conclusion with "evidence that the debtors used the funds for their own purposes, including payment of property taxes on their home."[121]

The university also argued that the debtors received reasonably equivalent value for the payments "because the transfers enabled their son to attend and receive a college education at [the university]."[122] The trustee, however, countered that any value received in exchange for the tuition payments made by the debtors was received by the debtors' son, a third party.[123] The university did not dispute a direct benefit to the debtors' son, but claimed the debtors also received reasonably equivalent value:

> in the form of intangible benefits: (1) "their son received an education" which "bestowed peace of mind" on the Debtors that [their son] "will be afforded opportunities" in life that would not have come but for the education; and (2) Debtors "anticipated that they will not remain financially responsible" for [their son].[124]

Looking to previous Sixth Circuit cases, the court cited the indirect benefit rule from *Rubin* and acknowledged that "[v]alue can be in the form of either a direct economic benefit or an indirect economic benefit."[125] The court applied the *Wilkinson* test that requires an indirect benefit be (1) an economic benefit, (2) concrete, and (3) quantifiable, before it can constitute reasonably equivalent value.[126]

Though it conceded that a feeling of moral obligation is "understandable," the court said that satisfying a moral obligation and receiving "peace of mind" that their son "will be afforded opportunities" is not an economic benefit to the debtors.[127] The court found that speculative future relief from a need to financially support their son was unconvincing.[128] Further, the court highlighted that the debtors had no legal obligation under Michigan law to support their adult son.[129] The court also pointed out that it was solely

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120 *In re* Leonard, 454 B.R. at 452–53.
121 *Id*. at 453.
122 *Id*. at 454.
123 *Id*.
124 *Id*. at 455.
125 *Id*. (citing Rubin, 661 F.2d at 991–92).
126 *Id*. at 457 (citing *In re* Wilkinson, 196 F. App'x at 342).
127 *Id*.
128 *Id*.
129 *Id*.

speculation that providing for an education would make a difference regarding whether the debtors would need to provide financial support to their son in the future.[130] Under the *Wilkinson* framework, the court held that the debtors did not receive reasonably equivalent value in exchange for the payments made to the university.[131]

### *3.* Shearer v. Oberdick (In re Oberdick)*: Reasonably Equivalent Value and a Familial Obligation to Provide for Education*

Some courts, on the other hand, have opted to protect tuition payments from clawback. In *Shearer v. Oberdick (In re Oberdick)*, the court recognized a familial obligation to pay for higher education and based its decision on this obligation rather than an analysis of reasonably equivalent value.[132] In this case, the chapter 7 trustee brought an action against the husband and wife debtors for both actual and constructive fraudulent transfers.[133] The husband debtor was a former partner at a law firm.[134] The law firm was sued by the landlord from which it rented office space for breaching the lease agreement.[135] Approximately twenty partners, including the debtor, were also named as defendants.[136] Six years later, a judgment was entered in favor of the landlord against the debtor, and certain other defendants, in the amount of $2.7 million.[137] The Pennsylvania Superior Court affirmed the judgment.[138] The landlord then filed a fraudulent transfer action against the couple in an attempt to collect on the judgment.[139] Less than a year later, the couple filed for bankruptcy.[140]

When the couple filed for bankruptcy, the trustee filed an adversary proceeding against them to avoid a variety of transfers made by the couple after the lease violation suit began, including $82,536.22 worth of payments made to the University of Chicago and Robert Morris University for the college education of two of their children.[141] The trustee argued that the debtors have no legal obligation under Pennsylvania law to pay for the education of their children once they have reached eighteen years of age or graduated from high school, whichever comes later.[142] The trustee asserted "that 'enhanced' education is not a necessity" and that expenditures for non-necessities were recoverable.[143]

In response, the debtors argued that the tuition payments were necessary for two reasons.[144] First, the debtors argued that "college tuition and related

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130 *Id*.

131 *Id*. at 460.

educational expenses for the children [is] a family obligation."[145] Second, the debtors explained that their children were denied student aid by both state and federal governments because of their 'expected family contribution.'[146]

The court held that the college tuition expenses were "reasonable and necessary for the maintenance of the Debtor's family," but restricted this finding to § 548 by indicating the decision was "for purposes of the fraudulent transfer statute only."[147] The court said:

> Even though there may not strictly speaking be a legal obligation for parents to assist in financing their children's undergraduate college education . . . this Court has little hesitation in recognizing that there is something of a societal expectation that parents will assist with such expense if they are able to do so.[148]

The court also explained that there was no evidence the debtors had made the educational expenditures "as part of a strategy or with an ulterior motive to shield the funds from the reach of [the landlord]."[149]

### *4.* DeGiacomo v. Sacred Heart Univ., Inc. (In re Palladino)*: Financially Independent Children as Reasonably Equivalent Value*

Finally, in *DeGiacomo v. Sacred Heart Univ., Inc. (In re Palladino)*, the court held that the debtors did receive reasonably equivalent value, in the form of a financially independent child, for the college tuition they paid.[150] The debtors were convicted on felony charges for operating a Ponzi scheme and

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132 *In re* Oberdick, 490 B.R. at 712.
133 *Id*. at 694.
134 *Id*. at 693.
135 *Id*.
136 *Id*.
137 *Id*. at 694.
138 *Id*.
139 *Id*. at 699.
140 *Id*.
141 *Id*. at 711.
142 *Id*.; *see In re* Lindsay, 2010 Bankr. LEXIS 1554, at *27.
143 *In re* Oberdick, 490 B.R. at 711.
144 *Id*.
145 *Id*.
146 *Id*. at 711–12.
147 *Id*. at 712.
148 *Id*.
149 *Id*.
150 *In re* Palladino, 556 B.R. at 16.

filed joint petitions for relief under chapter 7.[151] In the two years preceding their conviction and subsequent bankruptcy filing, the debtors paid a total of $64,696.22 to Sacred Heart University to cover tuition and other educational expenses for their daughter.[152]

The chapter 7 trustee acknowledged that the university had no knowledge of the debtors' fraudulent activity and received their payments in good faith. However, he argued that these transfers were constructively fraudulent because the debtors did not "receive reasonably equivalent value from [the university] in exchange for the payments and [they] were insolvent at the time the payments were made."[153]

The court highlighted that this case turned on a question of value. It acknowledged "[t]here is no dispute that but for the question of value, the debtors' payments would qualify as constructively fraudulent."[154] The transfers met the other requirements under § 548: "[t]he funds transferred belonged to the [debtors], the transfers were made within the two and four year statutory lookback periods under the Bankruptcy Code and the UFTA, and the [debtors] were insolvent when the transfers were made."[155] The court also accepted a previous bankruptcy court's finding that "[e]thereal or emotional rewards, such as love and affection, do not qualify as value for purposes of defeating a constructive fraudulent conveyance claim"[156] and that under Massachusetts law, there is no legal obligation for a parent to support an adult child.[157]

Still, the court determined the trustee's valuation of the debtors' payments to the university was "overly rigid."[158] It found "that the [debtors] paid [the university] because they believed that a financially self-sufficient daughter offered them an economic benefit and that a college degree would directly contribute to financial self-sufficiency."[159] Based on this, the court held that the debtors had received reasonably equivalent value from the university and therefore, the payments did not constitute constructive fraud.[160]

Despite being the more recent of these four decisions, the *Oberdick* and *Palladino* courts did not settle the issue. Courts since *Palladino* have reached the same conclusion as the *Lindsay* and *Leonard* courts: that parental

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151 *Id*. at 12–13.
152 *Id*. at 12.
153 *Id*. at 13.
154 *Id*. at 15.
155 *Id*.
156 *Id*. (citing *In re* Gonzalez, 342 B.R. at 169).
157 *Id*.

contributions to higher education are not protected from clawback in bankruptcy.[161] Legislative action could put an end to the unpredictable results from the courts.

## II. ANALYSIS

This Section will first argue that parents paying for their children's college education do not receive reasonably equivalent value as defined above. It will then assess several policy arguments in favor of an exception for payments to institutions of higher education from a trustee's avoidance powers despite the lack of reasonably equivalent value received in return. Next, the Protecting All College Tuition Act of 2015, an act proposed to protect such payments from clawback by trustees, will be introduced. Discussion of the Act will focus on how it is incomplete and will not prevent trustees from attempting to clawback tuition payments because it fails to pre-empt state fraudulent transfer laws. Therefore, this Section will argue that the PACT Act is not a viable solution to the uncertainty surrounding this issue. Finally, this Section will argue in favor of protecting these tuition payments where certain criteria are met through amendments to the Code similar to those made by the Religious Liberty and Charitable Donation Act. Specifically, this Section will argue that trustees should not be permitted to avoid payments to institutions of higher education for the education of a debtor's child when either: (1) the payments constitute fifteen percent or less of the debtor's income, or (2) the debtor can demonstrate a pattern of making such payments or a history of saving for their children's education.

### *A. Parents Do Not Receive Reasonably Equivalent Value in Exchange for Tuition Payments*

Despite the conflicting holdings of bankruptcy courts, applying the concept of reasonably equivalent value to tuition payments made by a parent debtor yields a clear result. Parents do not receive reasonably equivalent value when funding higher education for their children. The economic value derived from a college education is received directly by the student and any indirect benefit to a parent debtor is neither concrete nor quantifiable.[162]

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158 *Id*.

159 *Id*. at 16.

160 *Id*.

161 *See, e.g.*, Roach v. Skidmore Coll. (*In re* Dunston), 566 B.R. 624 (Bankr. S.D. Ga. 2017).

162 *See In re* Leonard, 454 B.R. at 457 (citing *In re* Wilkinson, 196 F. App'x at 342).

Parents often hope to provide more opportunities for their children than they had. This is especially true in terms of education. As of 2010, fifty percent of America's current college students had parents who did not attend college.[163] First-generation college students comprise thirty percent of all entering college freshmen.[164] So it is not surprising that parents often feel, and courts have recognized, a moral obligation to help their children pay for higher education.[165] For example, in *In re Palladino*, the mother debtor expressed this feeling of responsibility in her affidavit:

> As Nicole's mother, I feel obligated to pay Nicole's tuition because I am her mother and she shouldn't have to come out of [Sacred Heart University] saddled with thousands of dollars in loans. Assisting Nicole with her loans gives her the best chance of graduating from [Sacred Heart University]. Upon graduating, Nicole will be in the best position to go to graduate school, secure a job and become financially self-sufficient by finding her own place to live, paying her own bills and paying for her own food.[166]

There is also often a societal expectation that parents who are financially able will assist with educational expenses.[167] In the United States, high-income parents are significantly more likely to contribute their income and savings to their children's college education compared to low- and middle-income parents.[168] Approximately eighty-two percent of high-income parents helped their children pay for school with out-of-pocket funds in 2014.[169] In the same year, only roughly fifty-nine percent of middle-income and forty-three percent of low-income parents contributed out-of-pocket funds to help pay for school.[170]

In past cases, debtors have argued that they receive personal benefits as a result of their contributions to their children's education.[171] Some of these personal benefits include peace of mind in the future opportunities that will be afforded to their children and love and appreciation from their children.[172] Parents may also feel they gain an outward appearance of being a "good" parent. However, while these rewards may be very important to the debtors, they are not economic benefits and do not hold any value in the eyes of creditors.[173] Bankruptcy courts have said that abstract, emotional benefits like love cannot constitute reasonably equivalent value when rebutting a

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[163] *Fast Facts: Back to School Statistics*, NATIONAL CENTER FOR EDUCATION STATISTICS, nces.ed.gov/fastfacts/display.asp?id=372 (last visited Nov. 7, 2016).

[164] *Id*.

[165] *See In re* Leonard, 454 B.R. at 457; *see also In re* Lindsay, 2010 Bankr. LEXIS 1554, at *27.

[166] *In re* Palladino, 556 B.R. at 15.

constructive fraud claim.[174] Further, such consideration is not "concrete" or "quantifiable" as is required under the *Wilkinson* test for a benefit to qualify as value in the context of § 548.[175]

In addition to these intangible benefits, some debtors have claimed they benefit economically from having financially independent children.[176] In her affidavit, the mother debtor in *In re Palladino*, claimed such value:

> If Nicole is unable to graduate from [Sacred Heart University], she will either move back home with me, or she will obtain her own place to live in which case I will have to pay for her housing, bills and food costs. Either of these options result [sic] in a financial burden on me. The value to my husband and I [sic] in exchange for paying the tuition to [Sacred Heart University] is a financially self-sufficient daughter resulting in an economic break to us.[177]

It is generally accepted, as the mother debtor argues, that a college degree can be helpful to young adults in achieving employment and, in turn, financial independence.[178] The court in *In re Palladino* held that, despite the uncertainty involved in paying a bill with the expectation of future benefits, "future outcome cannot be the standard for determining whether one receives reasonably equivalent value at the time of a payment."

The court offered medical procedures and music lessons as examples of investments that a parent might make not knowing at the time of payment if the expenditure will ultimately be "worth it."[179] The court found that it was reasonable to assume that a college education will "enhance the financial well-being of the child" which will result in an economic benefit to the parents.[180] The economic benefit, in this case, is a financially independent child.[181]

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167 *See In re* Oberdick, 490 B.R. at 712; *see also In re* Palladino, 556 B.R. at 15.

168 SALLIE MAE, *supra* note 1, at 6–7.

169 *Id*. at 11.

170 *Id.*

171 *See, e.g.*, *In re* Lindsay, 2010 Bankr. LEXIS 1554; *In re* Leonard, 454 B.R. 444; *In re* Oberdick, 490 B.R. 687; *In re* Palladino, 556 B.R. 10.

172 *See, e.g.*, *In re* Leonard, 454 B.R. at 458.

173 *See id*.

174 *In re* Palladino, 556 B.R. at 15 (citing *In re* Gonzalez, 342 B.R. at 169).

175 *See In re* Leonard, 454 B.R. at 457 (citing *In re* Wilkinson, 196 F. App'x at 342).

176 *See, e.g.*, *In re* Palladino, 556 B.R. at 16.

177 *Id*. at 15–16.

178 *See, e.g.*, *id*. at 16.

179 *Id*.

180 *Id*.

181 *See, e.g.*, *id*.

This would be a sound conclusion if the parents had a legal obligation from which they could be relieved. But parents neither have a legal obligation to fund a college education for their children, nor to provide financially for their adult children if they do not gain financial independence.[182] The lack of obligation is clear because when a bankruptcy case arises, the debtor's adult child will not have a valid claim for his living expenses alongside other creditors.[183] Additionally, if the child is a college student, the university will have no claim either.[184] As long as a student is eighteen or older, the college or university they attend has no legal claim for unpaid tuition against their parents, even if the parents have made payments on the student's behalf in the past.[185] Paying a child's college tuition does not satisfy any legal claim against or obligation of a parent.[186] Parents do not receive reasonably equivalent value in return when they contribute financially to the higher education of their children because they do not receive any direct benefits and any indirect benefits they receive are not economic, concrete, nor quantifiable.

### *B. Policy Arguments for Protecting Tuition Payments*

Although debtors do not receive adequate consideration for the expenditures they make for their children's education under the reasonably equivalent value standard, there are several compelling policy arguments for protecting tuition payments from a trustee's avoidance powers, at least in part. First, the government requires students to submit their parent's financial information for consideration when determining the student's financial need.[187] The financial circumstances of a student's parents, specifically the amount the government believes they can afford to contribute to their child's education, directly impact the amount of financial aid a student receives.[188] Second, when the colleges and universities accept payments from parents for the education of their children, the schools receive these payments in good faith. These institutions are not privy to any financial hardships parents may be facing and have limited options for recourse if these funds are revoked by a bankruptcy

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182 *See, e.g.*, *In re* Lindsay, 2010 Bankr. LEXIS 1554, at *27; *In re* Leonard, 454 B.R. at 457.

183 *See, e.g.*, *In re* Lindsay, 2010 Bankr. LEXIS 1554, at *27; *In re* Leonard, 454 B.R. at 457.

184 *See, e.g.*, *How Do I Pay? How Students Pay for Stanford,* STANFORD UNIVERSITY, https://parents.stanford.edu/how-do-i-pay/ (last visited Mar. 2, 2017) ("While the university acknowledges parents' and guardians' financial support, payment is the responsibility of the student.").

185 *See, e.g.*, *id.*

186 *See, e.g., In re* Lindsay, 2010 Bankr. LEXIS 1554, at *27; *In re* Leonard, 454 B.R. at 458.

187 *How is Aid Calculated?*, FEDERAL STUDENT AID, http://studentaid.ed.gov/sa/fafsa/next-steps/how-calculated#efc (last visited Oct. 22, 2016).

188 *Id.*

trustee. Finally, as higher education becomes more of a necessity, there is a societal expectation that parents will help their children pay for college.[189]

### *1. Expected Family Contribution: Parental Finances Impact Financial Aid*

It seems counterintuitive to limit a student's financial aid award because it is decided his parents can afford to contribute a certain amount to his education and then later call these transfers fraudulent if the parents file for bankruptcy. In the 2011–2012 academic year, seventy-one percent of undergraduate students received some form of financial aid.[190] Although financial aid is often awarded to college students based on academic merit as well as financial need, need-based aid is the primary source of financial aid for the majority of undergraduate students.[191] Need-based aid is awarded based on a student's financial need, a number calculated by subtracting the student's Expected Family Contribution (EFC) from a school's cost of attendance.[192] EFC is calculated based on information reported on a student's Free Application for Federal Student Aid (FAFSA), including the taxed and untaxed income, assets, and benefits of the student's family.[193] Other factors considered are the size of the student's family and the number of family members that will be enrolled in college that year.[194] For dependent students, their parents must supply this information, and for financial aid purposes, a student can remain dependent beyond the age of eighteen.[195] The effect of parental finances on a student's financial aid has been raised to bankruptcy courts in previous cases.[196]

In *In re Palladino,* the debtors' daughter, though considered an adult under Massachusetts law, was still a dependent for college financial aid purposes.[197] The debtors were required to provide personal financial information on financial aid forms for consideration in determining their daughter's eligibility for aid.[198] Ultimately, because she was considered a dependent, the amount of aid their daughter received from the university was directly affected by the

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189 *See In re* Oberdick, 490 B.R. at 712; *In re* Palladino, 556 B.R. at 15.

190 Mary Beth Marklein, *Students Get Financial Aid at Highest Rates Since WWII*, USA TODAY (Aug. 20, 2013), http://usatoday.com/story/news/nation/2013/08/20/student-aid—amounts-increasing/2677237.

191 *Need-Based Aid vs. Merit-Based Aid*, THE PRINCETON REVIEW, http://princetonreview.com/college-advice/need-based-merit-based (last visited Oct. 22, 2016).

192 *How is Aid Calculated?*, *supra* note 187.

193 *Id.*

194 *Id.*

195 *The EFC Formula*, FEDERAL STUDENT AID, http://studentaid.ed.gov/sa/sites/default/files/2016-17-efc-formula.pdf (last visited Oct. 22, 2016).

196 *See, e.g.*, *In re* Palladino, 556 B.R. at 12; *In re* Oberdick, 490 B.R. at 711–12.

197 *In re* Palladino, 556 B.R. at 12.

198 *Id.*

financial contributions her parents were deemed to be able to make.[199] This is true for all dependent students.[200]

In a similar fashion, other debtors have argued that the tuition payments they made for their children were necessary expenditures. The debtors in *In re Oberdick* explained that their children were granted minimal financial aid, only small unsubsidized loans, because of their EFC.[201] In short, colleges and universities assume parents will pay the EFC amount when awarding aid, so that government-decided number could leave dependent students unable to pay for college unless their parents actually contribute that amount.[202]

### *2. Schools Receive Payments in Good Faith*

The concept of an Expected Family Contribution tells us that schools can reasonably anticipate receiving payments from a student's parents.[203] Colleges and universities accept payments from parents in good faith. Even the trustee attempting to recover the tuition payments in *In re Palladino*, acknowledged that the university received payments from the debtors on behalf of their daughter in good faith and with no knowledge of potentially fraudulent activity.[204] Financial support from parents is so common that many colleges and universities allow students to grant their parents electronic access to their account to easily make payments online.[205] Schools do not hold on to excess funds; instead they receive payments to cover only the amount uncovered by other forms of financial aid and refund any overpayments annually.[206] Considering this, schools would have no reason to suspect that a student account was being used to place debtor funds out of the reach of a bankruptcy proceeding.

Further, payment of tuition and other fees owed to the school are ultimately the student's responsibility as long as the student is eighteen or older.[207] This means schools have no legal claim against the parents of a student if tuition is

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199 *See id.*; *see also The EFC Formula*, *supra* note 195.

200 *The EFC Formula*, *supra* note 195; *see In re* Palladino, 556 B.R. at 12.

201 *In re* Oberdick, 490 B.R. at 711–12.

202 *See generally How is Aid Calculated?*, *supra* note 187.

203 *But see The EFC Formula*, *supra* note 195.

204 *In re* Palladino, 556 B.R. at 13.

205 *E.g.*, *How Do I Pay?*, *supra* note 184.

206 *See, e.g.*, *Refunds*, STANFORD UNIVERSITY, https://sfs.stanford.edu/student-accounts/refunds (last visited Jan. 21, 2017).

207 *See, e.g.*, *How Do I Pay?*, *supra* note 184 ("While the university acknowledges parent's financial support, payment is the responsibility of the student.").

unpaid or clawed back in bankruptcy.[208] This is problematic if a student has graduated or otherwise left the school.[209] Recent college graduates are often judgement proof and a school's only course of action, short of litigation, is to withhold a student's transcripts in hopes the inconvenience encourages graduates to pay the outstanding balance, assuming they can even afford to.[210]

### *3. College has Become a Necessity and Parents are Expected to Pay*

Schools have come to expect financial contributions from parents and so has society. As higher education becomes more of a necessity, there is a societal expectation that parents will help their children pay for college. While satisfaction of such a societal obligation does not result in an economic value to a debtor, and therefore cannot constitute reasonably equivalent value, it is still an important consideration in deciding how tuition payments should be treated in bankruptcy.

Americans place great value on a college education.[211] Between 2009 and 2014, an average of ninety-seven percent of those surveyed by Sallie Mae agreed that college is an investment in the future.[212] More than eighty percent said they believe a college education is more important now than it used to be.[213] And on average from 2009–2014, over eighty percent still viewed going to college as part of the American dream.[214]

Not only do families think college is important, they think parents should help pay.[215] Eighty-six percent of those surveyed expressed a willingness to stretch themselves financially to facilitate their children's higher education.[216] As the court said in *In re Oberdick*, "there is something of a societal expectation that parents will assist with [educational] expense[s] if they are able to do so."[217]

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208 *See* SALLIE MAE, *supra* note 1, at 6; *see, e.g.*, *How Do I Pay?*, *supra* note 184.

209 *See, e.g., How Do I Pay?*, *supra* note 184.

210 *See Enrollment Holds,* STANFORD UNIVERSITY, https://gap.stanford.edu/handbooks/gap-handbook/chapter-5/subchapter-5/page-5-5-1 (last visited Sept. 10, 2017).

211 SALLIE MAE, *supra* note 1, at 14–15.

212 *Id*. at 14.

213 *Id*.

214 *Id*.

215 *Id*. at 15.

216 *Id*.

217 *In re* Oberdick, 490 B.R. at 712.

### *C. Protecting All College Tuition Act of 2015: Legislation Aimed at Protecting Tuition Payments*

In 2015, probably influenced by these policy considerations, federal law makers introduced the PACT Act in the House of Representatives.[218] The bill proposes an amendment to the Code "to provide an exception to the avoidance of transactions by bankruptcy trustees under § 548."[219] Specifically, it seeks to make good-faith payments by parents of postsecondary education tuition for their children an exception to the transfers that may be avoided under § 548.[220]

The bill is short and straightforward.[221] If passed, it would amend § 548 by adding a new subsection.[222] This addition would provide an exception to § 548(a)(1)(B), the subsection that lays out the requirement of reasonably equivalent value and other criteria for finding a transfer constructively fraudulent.[223] Specifically, the amendment would read: "(f) A payment by a parent to an institution of higher education (as defined in either § 101 or 102 of the Higher Education Act) for the education of that parent's child is not a transfer covered under paragraph (1)(b)."[224] In other words, under the PACT Act, parental payments to institutions of higher education cannot be found to be constructively fraudulent.[225]

The sponsor of the PACT Act, Representative Chris Collins of New York, believes that how parents prioritize their bills is a personal choice and this might mean paying for a child's tuition over other debts.[226] He argues that "[f]amilies all over America . . . are tightening their belts and paying the tuition because it is the future for their kids."[227] The bill is co-sponsored by Representative Blake Farenthold of Texas, Representative Doug Collins of Georgia, and Representative Luke Messer of Indiana.[228] It was introduced to the House of Representatives on May 12, 2015, and referred to the Subcommittee on Regulatory Reform, Commercial and Antitrust Law on June 1, 2015.[229] The bill has since stalled.[230]

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218 Protecting All College Tuition Act of 2015, H.R. 2267.
219 *Id*.
220 *Id*.
221 *See generally id*.
222 *Id*.
223 *Id*.; 11 U.S.C § 548(a)(1)(B) (2012).
224 Protecting All College Tuition Act of 2015, H.R. 2267.
225 *See id*.
226 Stech, *supra* note 1.
227 *Id*.
228 Protecting All College Tuition Act of 2015, H.R. 2267.
229 *Id*.

It is unclear why there has been a lack of movement on the bill. However, it is unlikely it would successfully prevent trustees from avoiding tuition payments.[231] The simple language of the bill does not address the avoidance powers available to trustees under state law.[232] Its deficiencies become apparent when compared to a similar act, the Religious Liberty and Charitable Donations Protection Act (RLCDPA) of 1998.

### *1. The Religious Liberty and Charitable Donation Protection Act*

In 1998, Congress passed the Religious Liberty and Charitable Donation Protection Act (RLCDPA).[233] Prior to the Act's passage, courts allowed bankruptcy trustees to clawback donations to religious institutions and other charitable organizations made before the donor filed for bankruptcy under § 548(a)(1)(B).[234] The RLCDPA added an exception to § 548 for charitable donations.[235] Specifically, the RLCDPA added subsection (a)(2) to the Code.[236] This subsection reads as follows:

> (2) A transfer of a charitable contribution to a qualified religious or charitable entity or organization shall not be considered to be a transfer covered under paragraph (1)(B) in any case which—
>
> (A) the amount of the contribution does not exceed 15 percent of the gross annual income of the debtor for the year in which the transfer of the contribution is made; or
>
> (B) the contribution made by a debtor exceeded the percentage amount of gross annual income specified in subparagraph (A), if the transfer was consistent with the practices of the debtor in making charitable contributions.[237]

The addition protects these transfers from a trustee's clawback power regardless of whether the debtor received reasonably equivalent value in

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230 *Id*.

231 *See* Stephens, *supra* note 18, at 62; Protecting All College Tuition Act of 2015, H.R. 2267.

232 Stephens, *supra* note 18, at 17; s*ee also* Religious Liberty and Charitable Donation Protection Act of 1997, Pub. L. No. 105-183, § 548; Protecting All College Tuition Act of 2015, H.R. 2267.

233 Religious Liberty and Charitable Donation Protection Act of 1998, Pub. L. No. 105-183, § 548.

234 *See, e.g.*, Morris v. Midway S. Baptist Church (*In re* Newman), 203 B.R. 468, 478 (D. Kan. 1996); Christians v. Crystal Evangelical Free Church (*In re* Young), 148 B.R. 886, 897 (Bankr. D. Minn. 1992), *aff'd*, 152 B.R. 939 (D. Minn. 1993), *rev'd*, 82 F. 3d 1407 (8th Cir. 1996), *rev'd*, 141 F. 3d 854 (8th Cir. 1998).

235 Religious Liberty and Charitable Donation Protection Act of 1998, Pub. L. No. 105-183, § 548.

236 *Id*.

237 11 U.S.C. § 548(a)(2) (2012); s*ee also* Religious Liberty and Charitable Donation Protection Act of 1998, Pub. L. No. 105-183, § 548.

exchange, but it does not work alone.[238] The RLCDPA also amended § 544, the state strong-arm provision.[239]

### *2. State Strong Arm Powers: What the PACT Act Missed*

Section 544(b) of the Code allows trustees to look to state fraudulent transfer laws for authority to avoid pre-bankruptcy transfers.[240] Most states have their own fraudulent transfer statutes. For example, in *In re Leonard* the trustee sought to avoid tuition payments under both Code § 548 and Michigan's fraudulent transfer statute, which is virtually identical.[241] Because "section 548 merely provides an alternative to a state law cause of action," amending § 544 is essential to effectively limiting a trustee's clawback power.[242]

The RLCDPA adds an exception to § 544(b) to exclude transfers to charitable organizations from any avoidance power available to trustees under state law.[243] The section now reads:

> (1) Except as provided in paragraph (2), the trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502(e) of this title.
> (2) Paragraph (1) shall not apply to a transfer of a charitable contribution (as that term is defined in section 548(d)(3)) that is not covered under section 548(a)(1)(B), by reason of section 548(a)(2). Any claim by any person to recover a transferred contribution described in the preceding sentence under Federal or State law in a Federal or State court shall be preempted by the commencement of the case.[244]

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238 *See* 11 U.S.C. § 548(a)(2) (2012); s*ee also* Religious Liberty and Charitable Donation Protection Act of 1998, Pub. L. No. 105-183, § 548.

239 Stephens, *supra* note 18, at 17; s*ee also* Religious Liberty and Charitable Donation Protection Act of 1998, Pub. L. No. 105-183, § 548.

240 Monsour, *supra* note 44.

241 *In re* Leonard, 454 B.R. at 459; 11 U.S.C. § 548(a)(1) (2012); Mich. Comp. Laws § 566.34(a)(1) (2016).

242 Stephens, *supra* note 18.

243 *Id*. at 16; *see also* Religious Liberty and Charitable Donation Protection Act of 1998, Pub. L. No. 105-183, § 3.

244 11 U.S.C. § 544(b) (2012).

The proposed PACT legislation, as described above, would only amend § 548.[245] The PACT Act does not include any amendment to § 544.[246] Thus, trustees could still attempt to clawback tuition payments under individual state law.[247] Because of this, the PACT Act would not be an effective solution to settling the disagreement on treatment of tuition payments in bankruptcy.

### *D. An Exception to Section 548 for Tuition Payments*

The drafters of the PACT Act recognized that judicial interpretation has yet to yield a consensus on whether payments by parents to colleges and universities on behalf of their children should be reachable by trustees under § 548 of the Code.[248] Under accepted interpretations of reasonably equivalent value, payments made by a debtor to fund higher education for the debtor's child could be found to be constructively fraudulent.[249] But policy arguments offer significant support for protecting such payments from clawback by trustees. Legislative action is necessary to settle the uncertainty.

This is not the first time § 548 and policy considerations have been in conflict. RLCDPA addressed a similar situation involving charitable donations for which debtors likely do not receive reasonably equivalent value, but that public policy supports protecting.[250] Congress should act again to resolve the legal divide over educational expenditures in bankruptcy. An exception for educational expenditures similar to the one created by RLCDPA for charitable donations would embrace the policy considerations discussed above while still adequately protecting creditors from attempts by debtors to defraud them.

#### *1. Comparing Educational Expenditures to Charitable Contributions*

Contributions to a child's secondary education have similarities to charitable donations. Millions of Americans make financial contributions to religious and charitable organizations each year.[251] Americans gave over $350 billion to charitable organizations in 2014.[252] Similarly, millions of Americans

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245 Protecting All College Tuition Act of 2015, H.R. 2267.

246 Stephens, *supra* note 18, at 16; *see also* Religious Liberty and Charitable Donation Protection Act of 1998, Pub. L. No. 105-183, § 548; Protecting All College Tuition Act of 2015, H.R. 2267.

247 Stephens, *supra* note 18, at 16; *see also* Religious Liberty and Charitable Donation Protection Act of 1998, Pub. L. No. 105-183, § 548; Protecting All College Tuition Act of 2015, H.R. 2267.

248 *Compare In re* Lindsay, 2010 Bankr. LEXIS 1554, *and In re* Leonard, 454 B.R. 444, *with* Shearer v. In re Oberdick, 490 B.R. 687, *and In re* Palladino, 556 B.R. 10.

249 *See* Baliban, *supra* note 50. *See generally* 11 U.S.C. § 548(a)(1)(A) (2012).

250 *See* Religious Liberty and Charitable Donation Protection Act of 1998, Pub. L. No. 105-183, § 3. *See generally* 11 U.S.C. § 548(a)(1)(B)(i) (2012).

contribute to the higher education of their children each year.[253] In 2014, over 20 million students attended American colleges and universities.[254] In the same year, fifty-nine percent of American students funding higher education used some amount of parent income and savings to pay for college.[255] In other words, in 2014, over 10 million students relied on parental contributions, at least in part, to help pay for college.[256] In fact, thirty percent of all college costs were covered by parent income and savings.[257] These financial contributions to charitable organizations and higher education both receive favorable social and legal treatment.[258]

Within many religions, giving financially to one's religious institution is an important part of long-standing tradition. For example, speaking to Congress on behalf of RLCDPA, Representative Ron Packard explained that for many Christians tithing is "a sacred commandment, and they cannot practice their religions unless they can obey this commandment that says they need to bring their tithes to [God]."[259] Similarly, and probably a reflection of the increasing value placed on higher education, courts in more recent cases addressing the treatment of tuition payments in bankruptcy have acknowledged a societal expectation that parents contribute financially to the higher education of their children.[260] The courts recognizing this expectation are the same courts that have ruled in favor of protecting such tuition payments from a trustee's clawback power.[261] Many Christians believe donating to their church coincides with being a good Christian and many parents believe contributing to their children's education coincides with being a good parent.

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[251] *Charitable Giving Statistics*, NAT'L PHILANTHROPIC TR., https://www.nptrust.org/philanthropic-resources/charitable-giving-statistics (last visited Nov. 7, 2016).

[252] *Id*.

[253] SALLIE MAE, *supra* note 1, at 6; *Fast Facts: Back to School Statistics*, *supra* note 163.

[254] *Fast Facts: Back to School Statistics*, *supra* note 163.

[255] SALLIE MAE, *supra* note 1, at 20.

[256] *Id*.

[257] *Id*. at 6.

[258] *See, e.g.*, *Charitable Contribution Deductions,* INTERNAL REVENUE SERV., https://www.irs.gov/charities-non-profits/charitable-organizations/charitable-contribution-deductions (last visited Nov. 7, 2016); *Tax Benefits for Education: Information Center*, INTERNAL REVENUE SERV., https://www.irs.gov/uac/tax-benefits-for-education-information-center (last visited Nov. 7, 2016); *529 Plans: Questions and Answers*, INTERNAL REVENUE SERV., https://www.irs.gov/uac/529-plans-questions-and-answers (last visited Nov. 7, 2016).

[259] 144 CONG. REC. 3999, 4001 (1998) (statement of Rep. Packard).

[260] *See, e.g.*, I*n re* Oberdick, 490 B.R. at 712; *In re* Palladino, 556 B.R. at 15; *see also* SALLIE MAE, *supra* note 1.

[261] *See In re* Oberdick, 490 B.R. at 712; *In re* Palladino, 556 B.R. at 16.

The government has also demonstrated support for both charitable donations and contributions to education through preferential tax treatment. Charitable donations have been receiving advantageous tax treatment since long before RLCDPA was enacted. The charitable income tax deduction has been available to taxpayers since the War Revenue Act of 1917.[262] Today, taxpayers can deduct charitable contributions of money or property to qualified organizations.[263] Deductions of up to fifty percent of a taxpayer's adjusted gross income are available in most circumstances.[264]

Parents helping their children pay for college can also claim tax benefits for their contributions.[265] Taxpayers can deduct qualified education expenses paid during the year for a dependent student under the Tuition and Fees Deduction.[266] Qualified education expenses include tuition and fees, room and board, books, supplies and equipment, and other necessary expenses such as transportation.[267] The Tuition and Fees Deduction can reduce a parent's taxable income by up to $4,000.[268]

While in most scenarios this maximum deduction is far less than the twenty to fifty percent of income deductible under the Charitable Contribution Deduction, it is not the only tax benefit available to parents helping their children pay for college. Parents saving for their children's education can contribute to 529 plans.[269] Operated by state or educational institutions, 529 plans are designed to offer tax and other incentives to make saving for the higher education of a child or other designated beneficiary easier.[270] Contributions to a 529 plan are not tax deductible, but the earnings and distributions are exempt from federal, and usually state, taxation when used to cover qualified education expenses.[271] These tax benefits make clear the government's support of both charitable giving and investing in higher education.

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262 *See* War Revenue Act of 1998, Pub. L. No. 65-50, § 700, 40 Stat. 300 (1917).

263 *Charitable Contribution Deductions*, *supra* note 258.

264 *Id*.

265 *Tax Benefits for Education: Information Center*, *supra* note 258; *529 Plans: Questions and Answers*, INTERNAL REVENUE SERV., https://www.irs.gov/uac/529-plans-questions-and-answers (last visited Nov. 7, 2016).

266 *Tax Benefits for Education: Information Center*, *supra* note 258.

267 *Id*.

268 *Id*.

269 *529 Plans: Questions and Answers*, *supra* note 265. A 529 plan is a specialized college-savings plan for children.

270 *Id*.

271 *Id*.

Many of the policy arguments made as sponsors encouraged Congress to adopt RLCDPA are notably similar to ones that can be made in support of a similar exception for tuition payments.[272] For example, Representative George Gekas urged Congress that the Code should treat voluntary donations differently than other types of transfers because "[t]he inherent nature of charitable contributions is that they are made specifically without the intent of receiving anything in return."[273] The same can be said about tuition payments made by parents to secure the benefit of an education for their child. While the contribution might make them feel good and might earn them appreciation from the beneficiary, just as a charitable donation would, the benefits of their expenditure fall to someone else and are intended to from the outset.

Representative Gekas also highlighted the nature of the organizations that receive charitable donations.[274] "Religious and charitable organizations," he said, "provide valuable services to society and serve the common good."[275] Universities, both public and private, also make important contributions to society. In addition to providing higher education, universities contribute greatly to research in science, engineering, and other fields.[276] They also sponsor programs designed to assist military veterans in their transition back to civilian life and engage students in community partnerships to better their communities in the areas of arts, education, health, housing, and more.[277] Universities are often an important cornerstone in the communities they call home. The similarities between contributions to charitable organizations and payments to institutions of higher education support extending similar protections to these two types of transfers.

### *2. Proposed Amendments to Protect Tuition Payments*

Legislation similar to RLCDPA should be introduced to protect tuition payments from a trustee's clawback power. The RLCDPA protects payments to charitable organizations in two ways: (1) by protecting transfers up to fifteen percent of a debtor's income, and (2) by protecting transfers over the fifteen

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272 *See, e.g.*, 144 CONG. REC. 3999, 4000 (1998) (statement of Rep. Gekas).

273 *Id*.

274 *Id*.

275 *Id*.

276 *Highest Research & Development Funding*, BEST COLLEGES, http://www.bestcolleges.com/features/colleges-with-highest-research-and-development-expenditures/ (last visited Mar. 3, 2017).

277 *See, e.g.*, *Community Partnerships,* BROWN U., https://www.brown.edu/academics/college/special-programs/public-service/community-partnerships (last visited Mar. 3, 2017); *Our Programs & Services*, SYRACUSE U. INST. FOR VETERANS AND MIL. FAM., https://ivmf.syracuse.edu/our-programs/ (last visited Mar. 3, 2017).

percent limit where they are "consistent with the practices of the debtor in making charitable contributions."[278]

First, RLCDPA protects transfers up to fifteen percent of the debtor's gross income with the intention of "shift[ing] the burden of proof and limit[ing] litigation to where there is evidence of change in pattern large enough to establish fraudulent intent."[279] A similar "safe harbor" should apply to contributions to education and would effectively reduce the amount of litigation around the subject.

Fifteen percent of income is a reasonable limitation on educational expenditures by parents. On average, education spending by low-, middle-, and high-income parents in 2014 was below this threshold.[280] In 2014, middle-income parents with an income between $35,000 and $100,000, contributed $4,877 on average towards college for their children.[281] This equates to less than fourteen percent of income for any amount of income in that range.[282] In the same year, high-income parents with an income of $100,000 or more contributed $13,540 on average to their children's education.[283] This number equates to thirteen and a half percent or less of their income.[284] Low-income parents, with incomes of $35,000 or less, spent an average of $3,826 on their children's higher education in 2014.[285] This amount falls under eleven percent of income at an income of $35,000 and only crosses the fifteen percent threshold where a parent's income falls below $25,507.[286] It is unlikely that parents with an income of $25,507 or less are spending the $3,826 average on education because their Expected Family Contribution (EFC), if any, is minimal.[287] In fact, dependent students automatically qualify for an EFC of zero if their parents' income is $25,000 or less.[288]

Creating an exception for educational expenditures that equal fifteen percent or less of debtor income would mean that spending in line with average parental contributions to education would not be subject to scrutiny under

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278 Religious Liberty and Charitable Donation Protection Act of 1998, Pub. L. No. 105-183, § 3.

279 144 CONG. REC. 3999, 4000 (1998) (statement of Rep. Gekas). *See generally* Religious Liberty and Charitable Donation Protection Act of 1998, Pub. L. No. 105-183, § 3.

280 SALLIE MAE, *supra* note 1, at 20.

281 *Id*. at 12.

282 *Id*. at 20.

283 *Id*.

284 *Id*.

285 *Id*.

286 *Id*.

287 *See The EFC Formula*, *supra* note 195.

288 *See id*.

§ 548.[289] In turn, this would greatly decrease the number of disputes arising over the issue and stop the growing trend of litigation on the matter.[290]

Second, RLCDPA protects transfers over the fifteen percent limit when they are "consistent with the practices of the debtor in making charitable contributions."[291] Similar language should be drafted for educational expenditures. If parents spend more than fifteen percent of their income on tuition and related fees, but can demonstrate a consistent practice of doing so, such payments should also be protected. Establishing a consistent practice should involve looking to college expenditures made for those of the debtor's children currently and previously in college and could also consider the balance of college savings accounts when a debtor's first or only child has not been in school long enough to establish a pattern. Of course, whether a debtor can establish such a consistent practice might still be a matter to be litigated, but the guideline will further advance the policy considerations that favor protecting educational spending.

Looking to RLCDPA is a helpful starting point in drafting legislation to create a tuition exception. However, even though it can be used to demonstrate deficiencies in the proposed PACT Act, RLCDPA is not without its own issues.[292] RLCDPA was enacted only 262 days after its proposal.[293]

Probably as a result of being passed so hastily, several "drafting glitches" have been identified in the Act.[294] First, it is unclear from the language of RLCDPA whether the value of an individual contribution or the cumulative value of all of a debtor's annual contributions in a year cannot exceed fifteen percent of the debtor's gross annual income.[295] Second, RLCDPA does not specify what portion of a transfer is recoverable by the trustee should contributions exceed fifteen percent of the debtor's gross annual income.[296] Some courts have said the entire transfer becomes recoverable if it surpasses the fifteen percent threshold, while others have held that only the amount

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[289] *See generally* 11 U.S.C. § 548 (2012).

[290] *See generally* Stech, *supra* note 1.

[291] Religious Liberty and Charitable Donation Protection Act of 1998, Pub. L. No. 105-183, § 3.

[292] Stephens, *supra* note 18, at 16. *See generally* Religious Liberty and Charitable Donation Protection Act of 1997, Pub. L. No. 105-183, § 3.

[293] Lawrence A. Reicher, Comment, *Drafting Glitches in the Religious Liberty and Charitable Donation Protection Act of 1998: Amend § 548(A)(2) of the Bankruptcy Code*, 24 EMORY BANKR. DEV. J. 159, 162 (2008).

[294] *Id*.

[295] *Id*; *see* Religious Liberty and Charitable Donation Protection Act of 1998, Pub. L. No. 105-183, § 3.

[296] S*ee, e.g.*, Murray v. La. State Univ. Found. (*In re* Zodhi), 234 B.R. 371, 374 (M.D. La. 1999); *see also* Religious Liberty and Charitable Donation Protection Act of 1998, Pub. L. No. 105-183, § 3.

above fifteen percent can be clawedback.[297] These ambiguities make application of RLCDPA difficult.

In legislation protecting payments to colleges and universities, the fifteen percent threshold should apply to the total of a debtor's educational expenditures in a given year. Otherwise, as argued in interpreting RLCDPA, a debtor could give all of his assets away in increments of less than fifteen percent.[298] Further, if a transfer exceeds fifteen percent of a debtor's income and is determined to be constructively fraudulent, then the entire transfer should be recoverable. The additional exception, where there is evidence of a consistent practice of educational spending, would provide added protection for debtors that spend more than fifteen percent. Despite this, if it is still decided fraud exists, the entire transfer should be considered fraudulent.

An effective amendment should ensure the term "tuition" or other term used to describe the type of expenditures protected is defined to encompass all payments to universities to cover tuition and fees, as well as room and board, books, supplies and equipment, and other necessary expenses.[299] Finally, successful legislation will include the amendment to § 544, like the one included in RLCDPA, that the PACT Act is missing.[300] An express exception to the state strong arm provision is necessary to ensure educational expenditures are also protected from avoidance powers under state law.

## CONCLUSION

Given the rising costs of higher education, financial support from parents has become increasingly important to students. It is important to protect these contributions from attempts by court appointed bankruptcy trustees to claw them back. Trustees may argue that these funds should be used to satisfy the debtor's own growing debts, but policy arguments support that parents should be able to help their children pay for college. The impact of parental income on student financial aid awards, good faith receipt of payments by schools and their limited options for recourse, as well as a societal expectation that parents help pay for college, support protection of educational expenditures in bankruptcy.

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297 *See, e.g.*, Murray, 234 B.R. at 373; *see also* Reicher, *supra* note 293, at 172.

298 Reicher, *supra* note 293, at 164.

299 *See generally Tax Benefits for Education*, *supra* note 258.

300 *See* Religious Liberty and Charitable Donation Protection Act of 1998, Pub. L. No. 105-183, § 3.

Though the PACT Act seeks to create an all-encompassing exception for tuition payments from trustee avoidance powers, it falls short of a comprehensive solution. Looking to RLCDPA for guidance, the Code should be amended to protect payments by parents to colleges and universities where such payments total less than fifteen percent of a debtor's gross income in a given year, or, if exceeding fifteen percent, the debtor can demonstrate a consistent pattern of such educational spending.

Effective amendments should address the short-comings of the PACT Act by ensuring that payments are protected from trustee avoidance powers under both federal and state law by amending § 548 as well as § 544. They should also make clear that the fifteen percent limitation applies to a debtor's total educational expenditures in a year and indicate that the total amount of a transfer is recoverable where a transfer is found to be fraudulent. Amending § 544 and § 548 of the Code in this way to protect payments by parents for the higher education of their children would serve the public interest while still protecting creditors from fraud.

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