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Domestic Relations -- Parent and Child -- Support of Incompetent Adult

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consideration of the decreased purchasing power of the dollar is thus greatly larger in proportion to other verdicts in similar cases than the increased cost of living would seem to justify.[29]

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Domestic Relations—Parent and Child—Support of Incompetent Adult

Plaintiff, wife of the defendant, brought suit against him to recover the value of necessaries and necessary services furnished by her to their adult son. Plaintiff alleged that the defendant husband had separated himself from his family, that the son continued to live with the plaintiff, his mother, before reaching majority and thereafter, and that before and after attaining majority he was insolvent, unmarried, and so mentally and physically handicapped as to be incapable of supporting himself. On demurrer, *held:* a good cause of action was stated.[1]

Under the English and earlier American view, the parent's obligation to support his minor child was a moral one only.[2] The prevailing view in this country now, however, is that there is a *legal* as well as moral duty of support resting on the parent.[3] While the common law duty is widely recognized, the basis and reasoning upon which it has been founded have varied greatly. Some courts have imposed the duty of support as a reciprocal of the parent's right to the custody, control and earnings of the minor child;[4] others have found a basis in the in-

[29] The fact that on a previous trial of this same case, reversed on appeal, the jury awarded only $100,000 would also point to the conclusion that an award of $160,000 was excessive.

[1] Wells v. Wells, 227 N. C. 614, 44 S. E. 2d 31 (1947).

[2] Mortimer v. Wright, 6 M. & W. 481 (Exch. 1841); Shelton v. Springett, 11 C. B. 452 (1851); Kelley v. Davis, 49 N. H. 187 (1870); Freeman v. Robinson, 38 N. J. L. 383, 20 Am. Rep. 399 (1876).

[3] 1 SCHOULER, DOMESTIC RELATIONS §787 (6th ed. 1921); MADDEN, PERSONS AND DOMESTIC RELATIONS §110 (1931).

The North Carolina court early recognized a legal duty on the father to maintain his children, even when they had separate estates of their own. Walker v. Crowder, 37 N. C. 478 (1843); Hagler v. McCombs, 66 N. C. 345 (1872). The duty is not an absolute one, however. It is qualified by the parent's ability. Casualty Co. v. Lawing, 225 N. C. 103, 33 S. E. 2d 609 (1945).

The duty of support is limited to necessaries, what constitutes necessaries varying with the circumstances of the particular case. The liability is enforced under several principles: an agency implied in law, an agency implied in fact, or quasi-contract, the North Carolina court adopting the latter. *See* Howell v. Solomon, 167 N. C. 588, 592, 83 S. E. 619, 621 (1914).

The duty of support is now generally covered by criminal statutes also. *See* N. C. GEN. STAT. (1943) §§14-322 through 14-325.

[4] Central Asylum v. Knighton, 113 Ky. 156, 67 S. W. 366 (1902); Dedham v. Natick, 16 Mass. 140 (1819); Fulton v. Fulton, 52 Ohio St. 229, 39 N. E. 729 (1895); Butler v. Commonwealth, 132 Va. 609, 110 S. E. 868 (1922). Right to custody and earnings does not form a satisfactory basis for the duty, however, since the duty of support must still remain on the father even though custody of the child has been awarded the mother or third persons. Alvey v. Hartwig, 106 Md. 254, 67 Atl. 132 (1907); *see* Sanders v. Sanders, 167 N. C. 319, 83 S. E. 490, 491 (1914).

ability of the child to care for himself[5] and the state's interest as *parens patriae*.[6] The state's concern in preventing the child from becoming a pauper and a charge upon the taxpayer is said by some to warrant the imposition of the duty;[7] and still others, including the North Carolina court, have taken the view that the obligation springs from the natural relationship of parent to child, a responsibility arising from the fact of parenthood alone.[8]

Having recognized the existence of the legal duty owed by parent to child, the North Carolina court has not confined enforcement of the duty to actions by third parties who have furnished necessaries, or to divorce decrees or criminal actions. Instead, a progressive attitude has been taken; the obligation has been directly sanctioned by allowing the child himself to proceed directly against the parent.[9] Such direct enforcement would seem to be equally available to illegitimate children against the putative father.[10]

The common law duty of support owed to the child ordinarily terminates (1) upon the attainment of majority,[11] (2) when there has otherwise been an emancipation,[12] or (3) upon the death of either parent or

[5] Porter v. Powell, 79 Iowa 151, 44 N. W. 295 (1890); Doughty v. Engler, 112 Kan. 583, 211 Pac. 619 (1923); Buchanan v. Buchanan, 170 Va. 458, 197 S. E. 426 (1938).

[6] Geary v. Geary, 102 Neb. 511, 167 N. W. 778 (1918).

[7] Willitts v. Willitts, 76 Neb. 228, 107 N. W. 379 (1916).

[8] Barritt v. Barritt, 44 Ariz. 509, 39 P. 2d 621 (1934); Doughty v. Engler, 112 Kan. 583, 211 Pac. 619 (1923); Buckminster v. Buckminster, 38 Vt. 248, 88 Am. Dec. 652 (1865). "The duty of parents to provide for the *maintenance* of their children is a principle of natural law; an obligation, says Puffendorf, (b) laid on them not only by nature herself, but by their own proper act, in bringing them into the world. . . ." 1 COOLEY'S BLACKSTONE 446 (3rd ed. 1884).

Thayer v. Thayer, 189 N. C. 502, 127 S. E. 553 (1925) (natural obligation to support illegitimate children is sufficient consideration to uphold express promise to furnish necessaries); Sanders v. Sanders, 167 N. C. 317, 83 S. E. 490 (1914) (legal, natural and moral duty to support minor children irrespective of loss of custody); Burton v. Belvin, 142 N. C. 153, 55 S. E. 71 (1906) (father under natural obligation to support illegitimate children); Kimbrough v. Davis, 16 N. C. 71 (1827) (natural duty of support extends to illegitimates).

[9] Green v. Green, 210 N. C. 147, 185 S. E. 651 (1936); Note, 15 N. C. L. REV. 67 (1936); Pickelsimer v. Critcher, 210 N. C. 779, 188 S. E. 313 (1936).

The weight of authority, however, is apparently contra. Rawlings v. Rawlings, 121 Miss. 140, 83 So. 146 (1919); Huke v. Huke, 44 Mo. App. 308 (1891); Glaze v. Hart, 225 Mo. App. 1205, 36 S. W. 2d 684 (1931); Allings v. Allings, 52 N. J. Eq. 92, 97 Atl. 655 (1893).

[10] Doughty v. Engler, 112 Kan. 583, 211 Pac. 619 (1923); *cf.* Hyatt v. McCoy, 195 N. C. 762, 143 S. E. 518 (1928); Thayer v. Thayer, 189 N. C. 502, 127 S. E. 553 (1925); *see* Burton v. Belvin, 142 N. C. 151, 153, 55 S. E. 71, 72 (1906); Kimbrough v. Davis, 16 N. C. 71, 75 (1827).

[11] Humboldt County v. Beigger, 232 Iowa 494, 4 N. E. 2d 422 (1942); Breuer v. Dowden, 207 Ky. 12, 268 S. W. 541 (1925); Blades v. Szatai, 151 Md. 644, 135 Atl. 841 (1927); Brown v. Ramsay, 29 N. J. L. 117 (1860); *re* Beilstein, 145 Ohio St. 397, 62 N. E. 2d 205 (1945); Lind v. Zeisel, 159 N. E. 849 (Ohio App. 1927).

[12] Emancipation may be either partial or complete; but it is only in complete emancipation that all rights and duties of the parent-child relationship are extinguished. Note, 28 MINN. L. REV. 275 (1944). Where there has not been a

child.[13] The principal case, however, constitutes an exception to the "majority" rule. Under the doctrine of this and supporting cases, if at the time of attaining majority the child is mentally or physically incapable of self-support, the obligation upon the parent does not terminate but continues as long as the necessity for support exists.[14] The court recognizes that majority is a status rather than an inflexible rule of substantive law conferring vested rights. Since the decision may not be rationalized under the rules of emancipation, the North Carolina court properly chose to place it upon public policy. In the final analysis, the question becomes—shall the parent be legally bound to support his incapacitated adult child or shall that duty devolve upon the taxpayers if the parent chooses to ignore his moral obligation? Consistent with the theory that parental duty springs from and is a responsibility of parenthood, the North Carolina court has placed the burden upon the parent.

North Carolina has no statute making parents liable to the state or county for the maintenance furnished to adult incompetents.[15] Under

complete emancipation, *i.e.* where there has not been an assent by both parties, the act or assent of one party alone cannot absolve that party of the duties upon him. Thus in Hunycutt v. Thompson, 159 N. C. 29, 74 S. E. 628 (1912) it was held that the act of the father in driving his minor son from home might result in emancipation as to the child but did not free the father of the duty of support. Assent need not be express; it may be implied from circumstances. James v. James, 226 N. C. 399, 38 S. E. 2d 168 (1946); Jolly v. Telegraph Co., 204 N. C. 136, 167 S. E. 575 (1933), *reh. denied*, 205 N. C. 108, 170 S. E. 145 (1933); Lowrie v. Oxendine, 153 N. C. 267, 69 S. E. 131 (1910); Ingram v. R. R., 152 N. C. 762, 67 S. E. 926 (1910). Exceptions to the rule requiring mutual assent for complete emancipation are marriage and enlistment in the armed services. Complete emancipation occurs here because of the inconsistency of the parent-child relationship with the new relationship entered into by the child.

[13] Blades v. Szatai, 151 Md. 644, 135 Atl. 841 (1927); Rice v. Andrews, 217 N. Y. Supp. 528 (1926); Comment, 25 MICH. L. REV. 555 (1926); *see* Stone v. Bayley, 75 Wash. 184, 189, 134 Pac. 820, 822 (1913) (the court questioned the termination of the common law duty by death as a matter of public policy and held a divorce decree providing for maintenance was binding upon the father's estate).

That a father may disinherit his child and leave him to become a charge upon the State has been severely criticized. MADDEN, PERSONS AND DOMESTIC RELATIONS §115 (1931).

[14] Freestate v. Freestate, 244 Ill. App. 166 (1927); Breuer v. Dowden, 207 Ky. 12, 268 S. W. 541 (1925); Crain v. Mallone, 130 Ky. 125, 113 S. W. 67 (1908); Comm. v. O'Malley, 105 Pa. Super. 232, 161 Atl. 883 (1932); Rowell v. Town of Vershire, 62 Vt. 405, 19 Atl. 990 (1890); Schultz v. Western Farm Tractor Co., 111 Wash. 351, 190 Pac. 1007 (1920); *see* Borchert v. Borchert, 45 A. 2d 463, 465 (Md. 1946); *re* Beilstein, 145 Ohio St. 397, 62 N. E. 2d 205, 207 (1945); Gaydos v. Domabyl, 301 Pa. 523, 152 Atl. 549, 553 (1930).

New York has apparently imposed a common law duty to support incapacitated adult children notwithstanding that they did not become incapable of self-support until after attaining majority. *In re* Van Denburgh, 178 App. Div. 237, 164 N. Y. Supp. 966 (1917); Alger v. Miller, 56 Barb. 227 (N. Y. 1868); Cromwell v. Benjamin, 41 Barb. 558 (N. Y. 1863).

[15] The duty to support adult incompetents apparently exists only as between husband and wife in North Carolina.

N. C. GEN. STAT. (1943) §122-46 provides that the clerk of superior court may commit a mentally disordered, epileptic, or person addicted to the use of drugs or alcohol to the State Hospital under a certificate of indigency where such person has no estate or property "nor has any one such property who is liable for his maintenance under §35-33 of the General Statutes." By §35-33 it is pro-

the holding of the principal case, however, the state or county would seem to have a recoverable claim, for necessaries furnished, against the parent of any inmate of a state or county hospital or asylum when such inmate was incapacitated upon reaching majority.[16] But where the adult child became incapacitated after having attained majority, the duty of support, having once terminated, is not revived; and accordingly no recovery could be had.[17]

In the principal case, the court, in creating the exception to the "majority" rule, reached a result commensurate with sound public policy and progressive social principles. Would an extension of that exception to include a parental duty of support embracing all incapacitated adult children who would become a charge upon the taxpayers be desirable? Only one state has apparently extended the common law duty of support to that extreme.[18] The better solution seems to lie in the enactment of so-called "poor laws." In substance these provide that the father, mother, grandfather, grandmother or children, in that order, of any old or incapacitated indigent person shall maintain them if of ability to do so.[19] Such a statute would seem to be consistent with North Carolina policy as enunciated in the cases and would properly place the burden of maintenance upon those more equitably able to bear it than the taxpayers.

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vided that the clerk shall inquire whether the inebriate is indigent and if he so finds he shall then inquire whether or not the petitioning wife or husband or if the inebriate is a minor whether the parent has sufficient estate to bear the cost of maintenance; if sufficient estate is found the clerk shall order payment therefrom; if not, payment shall be made by the county from which committed.

[16] *See* N. C. GEN. STAT. (1943) §§143-120 through 125.

[17] Breuer v. Dowden, 207 Ky. 12, 268 S. W. 541 (1925). *But cf.* Porter v. Powell, 79 Iowa 151, 44 N. W. 295 (1890) (distinguishable on the ground that only a partial and not a complete emancipation was achieved). *See* Wells v. Wells, 227 N. C. 614, 619, 44 S. E. 2d 31, 35 (1947).

[18] *In re* Van Denburgh, 179 App. Div. 237, 164 N. Y. Supp. 966 (1917); Alger v. Miller, 56 Barb. 227 (N. Y. 1868); Cromwell v. Benjamin, 41 Barb. 558 (N. Y. 1863). The matter is now covered by statute, N. Y. SOCIAL WELFARE LAW §101, providing: "The husband, wife, father, mother, grandparent, or child of a recipient of public assistance or care or of a person liable to become in need thereof shall, if of sufficient ability, be responsible for the support of such person. . . ."

[19] "Poor laws" in general are patterned after *43 Eliz. c. 2* (1601).

Substantially similar statutes are found in a majority of the states. *See* ALA. CODE (1940) tit. 44, §8; ARK. DIG. STAT. (Pope, 1937) §7603; CAL. CIV. CODE (Deering, 1941) §206; COLO. STAT. ANN. (Michie, 1935) c. 124, §1; CONN. GEN. STAT. (1930) §1717; GA. CODE ANN. (Park, 1936) §2301; IDAHO CODE (1932) §31-1002; ILL. ANN. STAT. (Smith-Hurd, 1935) c. 107, §1; IOWA CODE (1946) §252.2; ME. REV. STAT. (1944) c. 82, §20; MASS. ANN. LAWS (1942) c. 117, §6; MICH. STAT. ANN. (Henderson, 1937) §16.122; MINN. STAT. (Henderson, 1941) §261.01; MISS. CODE ANN. (1942) §7357; MONT. REV. CODE (Darlington, Supp. 1939) §4522; NEB. REV. STAT. (1943) §68-101; N. H. REV. LAWS (1942) c. 124, §18; N. J. STAT. ANN. (1940) §44:1-140; N. Y. SOCIAL WELFARE LAW §101; N. D. REV. STAT. (1943) §50-0119; OKLA. STAT. ANN. (1936) tit. 10, §12; PA. STAT. ANN. (Purdon, 1941) tit. 62, §195; UTAH CODE ANN. (1943) §91-0-1; VT. PUB. LAWS (1933) §3937; WASH. REV. STAT. ANN. (Remington, 1933) §9982; W. VA. CODE (Michie, 1943) §626(150).