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# Divorce and Separation—Child Support—Enforcement and Modification of Obligation Upon Death of Father

Patrick W. Hurley

# Divorce and Separation—Child Support—Enforcement and Modification of Obligation Upon Death of Father*

In enforcing a claim for child support against the estate of the father, American jurisdictions adhere to three views. Under the common law, the rule is that a claim for future child support payments is invalid after the father's death.[1] A second group of courts allows the claim to survive if the court indicated at the time the decree was entered that the support obligation was intended to survive the death of the father.[2] A third group of courts holds that the obligation is always enforceable.[3] The distinctions between a claim involving child support and one for alimony and detailed studies of the tripartite division of the jurisdictions on the child support issue have been made by numerous authors.[4]

The question whether a child support obligation continues after the death of the father was recently decided by the New Mexico Supreme Court in a case of first impression.[5] In *Hill v. Matthews*,[6]

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* Hill v. Matthews, 416 P.2d 144 (N.M. 1966).

1. *E.g.*, Robinson v. Robinson, 131 W. Va. 160, 50 S.E.2d 455 (1948); Sandlin's Adm'x v. Allen, 262 Ky. 355, 90 S.W.2d 350 (1936); Blades v. Szatai, 151 Md. 644, 135 Atl. 841 (1927).

2. *E.g.*, Garber v. Robitshek, 226 Minn. 398, 33 N.W.2d 30 (1948); Murphy v. Moyle, 17 Utah 113, 53 Pac. 1010 (1898).

3. *E.g.*, Newman v. Burwell, 216 Cal. 608, 15 P.2d 511 (1932). In that case the court said of its decision:

> [I]t is the solemn duty of every father to support his children during their minority, and if he fails to do so, every principle of justice demands that they be thus supported out of his estate.
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> [T]he conclusion we have reached herein may in certain instances destroy the power of testamentary disposition. It is conceivable that in some cases the installments of support money accruing after the father's demise may aggregate sufficient to consume his entire estate, thus leaving nothing on which a testamentary disposition might act . . . . [A] conclusion contrary to the one herein announced might well result in certain cases in the minor child becoming a public charge. It would seem that the well-being of the child is at least as important as the father's power of testamentary disposition.

4. In general the arguments in favor of allowing a claim for child support are stronger than those for alimony. Alimony was unknown at common law although the obligation to support one's offspring has a recognized common law basis. Even on grounds of social policy, a divorced wife is not thought to be in such need of maintenance as are the minor children of the marriage. See generally 24 Am. Jur. 2d *Divorce and Separation* §§ 827-36 (1966); Comment, 62 W. Va. L. Rev. 91 (1959); Comment, 62 Harv. L. Rev. 1079 (1949); Comment, 11 Wash. L. Rev. 45 (1936); Comment, 35 B.U.L. Rev. 596 (1955); Note, 32 Tul. L. Rev. 123 (1957); Annot., 18 A.L.R.2d 1126 (1950), and 39 A.L.R.2d 1406 (1953).

5. Hill v. Matthews, 416 P.2d 144, 145 (N.M. 1966).

6. *Id.* at 144.

the parents entered into a child support agreement by stipulation prior to their divorce and the stipulation was subsequently ratified by the divorce decree. In the stipulation the father agreed to contribute specified amounts[7] to support the couple's daughter until her majority or emancipation. Upon the father's death, the majority of his estate passed by devise to an older daughter by a former marriage; the younger daughter who had been receiving child support payments was bequeathed nothing.[8] Because of the father's death, however, the younger daughter became entitled to receive certain Civil Service and Social Security death benefits.[9] This action was brought in the name of the younger daughter for an award from the father's estate equal to the present worth of the child support payments that would accrue until she attained her majority. Plaintiff prevailed in the district court and on appeal the New Mexico Supreme Court, *held*, Affirmed; the assumption of an obligation of child support in a stipulation pursuant to a pending divorce creates an enforceable claim against the estate of the father if the stipulation is ratified by the subsequent decree.[10] The Social Security and Civil Service benefits to be paid to the child were not regarded as support from the estate of the father,[11] although the present worth of these benefits exceeded the present worth of the stipulated child support payments that were to accrue in the future.[12]

After considering the legislative grant of power to the courts enabling them to effectuate the child support provisions of a divorce decree,[13] the court in *Hill* decided that it was not bound to follow the common law rule. The relevant statute provides that the decree

7. The payments were to be fifty dollars per month to age six and seventy-five dollars per month thereafter.

8. The older daughter was beneficiary of a $5,000 life insurance policy and residuary legatee of her father's estate which was approximately $10,000. His relatives, divorced wife, and younger daughter were left one dollar each.

9. The sum of these payments exceeded seventy-five dollars per month. They began at the time of the father's death, when the child was eighteen months old, and would continue until the child was eighteen years old.

10. The original action was brought in the probate court which recognized the right to enforce the continuation of payments; but a lump sum equivalent to the present worth was not awarded. Both parties appealed to the district court from the ruling of the probate court, and the district court confirmed the obligation and awarded its present worth. The supreme court affirmed the district court but remanded for a recalculation of the present worth of the series of payments.

11. 416 P.2d at 146.

12. The court found that the present worth of the child support payments was $9,691; an equivalent calculation shows that the present value of the Social Security and Civil Service benefits is $9,800. Chemical Rubber Company Standard Mathematical Tables (10th ed. 1955).

13. 416 P.2d at 145.

may be enforced as a lien on any real property owned by the obligor;[14] the court reasoned that this statute indicates that public policy in New Mexico favors enforcement of this type of obligation as one in rem, not as one in personam which would terminate upon the death of the obligor.

The court in *Hill* considered the defendant's argument "that by reason of a divorce decree a child is in a better position in respect to his father's estate than he would be without the decree for divorce."[15] The result, however, was justified upon the ground that the preferential position of a child of a divorce is not created by the divorce decree but by the stipulation between the parents.[16] The stipulation was equated to a contract between the parents[17] of which the child would be a third party beneficiary, and his rights under the contract were compared to those of a general creditor who may proceed against the estate of his debtor.[18]

The purpose of this Comment is to suggest that, considering the broad terms of the New Mexico statutes governing divorce,[19] child support payments should not necessarily terminate upon the death of the father except to the extent that such claims interfere with the rights of general creditors against the father's estate and to the

14. N.M. Stat. Ann. § 22-7-16 (1953) provides:

> In case a sum of money is allowed to the child or children by the decree for the support, education, or maintenance of such child or children, such decree shall become a lien on the real estate of the party which must furnish the child support from the date of filing for record a certified copy of such decree in the office of the county clerk of each county where any of such property may be situated.

It should also be noted that N.M. Stat. Ann. § 22-7-21 (1953) allows enforcement of the decree by attachment, garnishment, execution, or contempt proceedings.

15. 416 P.2d at 145.

16. *Ibid.*

17. *Ibid.*

18. *Ibid.*

19. N.M. Stat. Ann. §§ 22-7-1 to -22 (1953). In particular N.M. Stat. Ann. § 22-7-6 (1953) provides:

> In any suit for the dissolution of the bonds of matrimony, division of property, disposition of the children, or for alimony, the court . . . may make and enforce . . . such order to restrain the use or disposition of the property of either party, or for the control of the children . . . during the pendency of the suit, as in its . . . discretion may seem just and proper . . . and, on final hearing . . . may set apart out of the property of the respective parties, such portion thereof, for the maintenance and education of their minor children, as may seem just and proper, and may make such an order for the . . . maintenance and education of said minor children . . . as may seem just and proper; and may modify and change any order in respect to the . . . maintenance or education of said children, whenever circumstances render such change proper. Said district court shall have exclusive jurisdiction of all matters pertaining to said . . . maintenance and education of said children.

extent that such claims are modified by the district court as proposed by this Comment.

By its holding in *Hill* the court rejected the common law view that regards as invalid a claim for future child support payments after the father's death; it is not clear whether the court could properly be categorized as adopting the second or third view mentioned above.[20] The second and the third views agree that the claim for continuation of the obligation may be allowed. The second view seems to be only a more restricted application of the third view. This is because it seeks to find a manifestation of the trial court's intention that the obligation survive. Although this provides a theoretical difference between the second and third views, in practical application this is often a search for intention on an issue that was not considered. Such a search may easily devolve into a rationalization of what the court thinks that public policy should require. This essentially amounts to an acceptance of the third group of jurisdictions which holds that the child support obligation is always enforceable against the obligor's estate.

Furthermore, in deciding to reject the common law rule, the court in *Hill* reviewed the statute that allows a child support decree to become a lien upon the real estate of the father.[21] The court concluded only that the public policy of the state would permit continuation of the obligation after the father's death. Courts accepting the second view, however, enforce the obligation only if they can find a manifestation of the trial court's intention to continue the obligation. These courts typically hold that sufficient intention is manifested if the divorce decree made the obligation a lien on the father's property.[22] Section 22-7-16 of the New Mexico statutes provides that the child support obligation may be made a lien upon the father's real property, regardless of the trial court's expressed intention, merely by proper recording of the decree. Therefore, it would seem that under such a statute a further search for intention is unnecessary and that the second view's "intention" requirement is satisfied in all cases. This also would justify acceptance of the third view by the New Mexico court.

The New Mexico court in *Hill* made one statement about the enforcement of child support obligations that seems to have an ambiguous implication. It said:

20. See text accompanying notes 2 and 3 *supra*.
21. N.M. Stat. Ann. § 22-7-16 (1953).
22. See note 2 *supra*.

> The law provides a general creditor with the remedy to proceed against the estate of his debtor and no good reason presents itself to our minds why a child should not be able to enforce a judgment for support.[23]

The court failed to elaborate whether the child could enforce its claim on an equal priority with the estate's creditors or only after the creditors claims had been satisfied. If equal priority were intended, it would create new problems in the administration of estates. First, unless the assets of the estate were sufficient to satisfy all debts, including the present worth of the child support payments, the personal representative would have to delay payment of all obligations until the enforceability of the child support payments had been ascertained.[24] Second, if the child's claim is allowed equal priority with other creditors, it permits an opportunity to defraud creditors. To illustrate, a father heavily encumbered with debt and anticipating death in the near future, could accept a divorce and child support obligation. His children would get a share of the estate's assets despite its overall insolvency. Thus, the obligation for future payment of child support should only be paid from the residue of the estate after its creditors have been satisfied.

Child support payments in New Mexico should therefore be an obligation on the residue of a father's estate, after creditors have been satisfied and despite a manifestation of the divorce court's intention. However, simply enforcing the obligation without considering modification of it would be generally unfair. A truly equitable result will be the exception rather than the rule if the New Mexico court rejects the common law view, only to allow strict enforcement of the obligation. The father's death creates significant changes in the status of the parties. An example will illustrate the potential inequity that may result from the present New Mexico rule. Suppose the father, a high-rate wage earner with relatively little savings, is required to make child support payments under a stipulation ratified by a divorce decree. If he subsequently remarries and has more children, upon his death, by the reasoning of *Hill*, his divorced wife might successfully claim the major portion of his personal estate for the benefit of the child of the first marriage, but to

23. 416 P.2d at 145.

24. In *Hill* the creditors had been paid and the residue of the estate was not as great as the present worth of the child support payments. Letter From Lalo Garza, Attorney for Appellee, to Patrick W. Hurley, July 25, 1966. Consider whether the court would sustain an action by the child's guardian against the executor for improper disbursement of the assets of the estate.

the detriment of the children of the second marriage. An equitable solution to this hypothetical requires enforcement of a modified child support obligation only after analyzing the needs and means of all those who were dependent upon the father. Due regard should be given to any benefits accruing to the dependents subsequent to the father's death, including Social Security or Civil Service benefits.

The initial question is whether the court would have authority to modify the terms of a child support obligation after the death of the father. The courts generally have broad authority to modify the terms of a divorce decree to either increase or decrease the amount of child support payments while the father is living. The New Mexico court's position concerning modification inter vivos was stated in *Quintana v. Quintana*.[25]

> In so far as the order reviewed relieves defendent of the payment of future installments for child support, the trial court had undoubted power thus to vacate the prior order, if new facts made such a change proper. . . . If a change in conditions should occur affecting the future welfare of the minor children, the trial court has express statutory jurisdiction to modify or change any previous order in relation thereto.[26]

This statutory authority to modify a decree derives from section 22-7-6 of the New Mexico statutes.[27] That statute is concerned with the circumstances of the situation and does not specifically require the father to be living. Thus, it appears that the executor or administrator of the deceased father should have the authority to request such a modification.

Assuming that the court has the authority to modify the decree after the father's death, is the situation a proper one for exercising such authority? An answer to this question requires an understand-

25. 45 N.M. 429, 115 P.2d 1011 (1941). In *Quintana* the father was to support his daughter who was in the mother's custody. Because of illness, the father was in default on the payments, and the trial court dismissed a citation for contempt after finding that his illness was a good cause for the failure to pay. The mother subsequently levied execution on the father's truck, and it was sold with the net sum applied to the payments in default. When the mother tried again to institute contempt proceedings after the defaults had continued, the trial court held that the first levy was a full settlement of her demands. The father was relieved of obligation for the defaulted payments which had already accrued, but the court specified that the settlement ordered was limited to the duration of the circumstances then found to exist.

26. *Id.* at 432, 115 P.2d at 1012-13.

27. N.M. Stat. Ann. § 22-7-6 (1953). Portions of this statute are set forth in note 19 *supra*.

ing of the criteria used by a divorce court for setting the amount of child support payments. The criteria for the initial determination or for allowing modification thereof have not been enunciated in New Mexico. The New Mexico Supreme Court has limited itself to statements that the particular awards being questioned were not such an abuse of discretion as to require reversing the lower court.[28]

The generally recognized factors considered by a divorce court in setting an award for support of minor children are the needs of the children, considering their station in life, and the ability of their father to pay.[29] However, in evaluating the father's ability to pay the court may consider not only expenses for himself but also expenses incurred for others to whom there is a legal or moral obligation.[30]

Since a father's ability to pay child support along with his other legal and moral obligations is an accepted consideration for modifying a support award, upon his death in an action to enforce the obligation against his estate there should definitely be a reevaluation of the obligation. The practical reasons for this were recognized over sixty years ago by the New York Court of Appeals. In *Wilson v. Hinman*,[31] the New York court considered the claim of a wife to continuation of alimony payments which had been secured by a mortgage on real property of the husband. The payments were to continue "so long as she shall live." The court said:

> In this country . . . the class of persons whose income is derived solely from accumulated wealth is comparatively small. The income of most men is derived from their professional or business exertions, and the award of alimony is usually based on such an income, not on one accruing from accumulated property. An allowance of an amount which it would be entirely just that a man should pay during his life . . . might be grossly extravagant if imposed as a charge upon his estate after his death, and very unjust to other claimants on his property.[32]

A drastic change in ability to pay occurs when the obligation is

28. *E.g.*, Jones v. Jones, 67 N.M. 415, 356 P.2d 231 (1960). In this case the mother was contesting numerous aspects of the divorce decree including the adequacy of the child support award.

29. Annot., 1 A.L.R.3d 324 (1965) and cases cited therein.

30. Hardy v. Hardy, 117 Cal. App. 2d 86, 255 P.2d 85 (Dist. Ct. App. 1953) (trial court was entitled to consider the fact that the father had obligations to support a child by a former marriage, when the trial court set the amount of child support in their current divorce action).

31. 182 N.Y. 408, 75 N.E. 236 (1905).

32. 75 N.E. at 238.

shifted from a working man to his estate. This change is a proper situation for review and possible modification of the amount of child support payments. In addition to the change in status of the obligor, significant changes may have occured in the other major factor controlling child support payments—the needs of the child. The child may likely be the recipient of a legacy from the father which will tend to satisfy his needs. A few of the jurisdictions that allow claims for continuation of child support against the father's estate have considered whether a legacy from the father to the child satisfies the father's obligation.

In *Taylor v. George*,[33] the California Supreme Court was called upon to answer such a question. The father in that case had named his son, for whom child support was required, as the beneficiary of his life insurance. The insurance proceeds exceeded the future support payments that the divorce decree specified, and the naming of the beneficiary of the insurance policy had been left to the father's discretion by the decree. In his will the father expressly noted that no other provision had been made for the son because the proceeds of the insurance should more than meet his needs. The California court said:

> [T]he decedent's will when reasonably construed shows that the testator intended to and did fulfill his obligation of support by means of the life insurance policies. No reason appears why the testator could not, by his will, designate the fund out of which his obligations were to be met.[34]

This holding is compatible with the proposal of this Comment because it recognizes that the obligation survives; yet the holding allows the obligation to be satisfied by the testator in his own manner, respecting his testamentary disposition if possible.[35]

The needs of the child also may be affected materially by receipt of the father's death benefits. Those death benefits accruing to a child from Social Security and Civil Service as in *Hill* cannot actually be considered a legacy from the deceased father's estate since

33. 34 Cal. 2d 552, 212 P.2d 505 (1949).

34. 212 P.2d at 508.

35. *Contra*, Gainsburg v. Garbarsky, 157 Wash. 537, 289 Pac. 1000 (1930), where the father died owing $2,250 in delinquent payments, and $1,400 of future payments had not accrued. The child was designated the beneficiary of a $10,000 life insurance policy on the father and a clause in his will said: "I give . . . to my daughter . . . all my life insurance that I now have that is payable to her." The insurance proceeds were not allowed to satisfy the support obligation because the testator's will did not expressly request the substitute. The court pointed out that the insurance proceeds were distributed according to the policy, not according to the terms of the will.

it is generally held that the decedent had no vested property right in them.[36] However, it should be observed that in cases like *Hill* the death benefits alone would have provided what the divorce decree had required for the child's maintenance.[37] In addition, it cannot be disregarded that the child will receive the death benefits as a sole result of the father's endeavors. In this light they are not greatly dissimilar from a legacy.

On the issue of considering these benefits, the court in *Hill* said that neither party had presented any pertinent authority on the issue; the parties had only argued "whether or not child support payments terminate upon the death of the father."[38] The court remarked:

> It is well that the contention end at that point since the social security payments and civil service benefits now received by the minor child . . . will end as soon as she attains the age of 18 years, whereas the stipulation and decree of divorce required the payments by the father to continue until the child reached her majority, or her emancipation, whichever occurs first.[39]

It is not apparent that the termination date of the payments should make them unworthy of consideration. The judgment of the court required the executor to make a payment equal to the present worth of the future child support payments which was comparable to the present worth of the death benefit payments.[40] It is not improbable that these death benefits appeared to the father to provide with certainty for his younger daughter's maintenance up to the age of eighteen years if he died before his obligation to make support payments ceased.

The course of action advocated by this Comment was applied by the Supreme Court of Michigan over sixty years ago. In *Creyts v. Creyts*[41] a support requirement was entered against the father to continue "until further order of the court." He had five sons and daughters, children of a former wife, who were all adults; after the divorce the father had married again. Upon his death the divorced

36. *E.g.*, Kaplan v. Flemming, 190 F. Supp. 526 (D.C.N.Y. 1961) (held that the beneficiary had no vested property right and that his benefits could be divested by Congress). Roston v. Folsom, 158 F. Supp. 112 (D.C.N.Y. 1957) (held that Social Security benefits were not property rights to which one could succeed).

37. See note 12 *supra*.

38. 416 P.2d at 145, 146.

39. *Id.* at 146.

40. See note 12 *supra*.

41. 143 Mich. 375, 106 N.W. 1111 (1906).

wife applied to the courts to continue the support obligation. It held:

> [I]n the interests of justice . . . where the rights of bona fide holders have not intervened, the court may alter, amend, enlarge, or diminish the decree, as the necessities of the one and the ability of the other party may require, and that it may protect the child by making the decree a charge upon property to prevent its dissipation, and that the power is not determined by the death of the husband.[42]

In order to preclude the defrauding of general creditors and to facilitate the administration of estates, all general creditors' claims should be satisfied first. The needs of *all* the deceased father's dependents should then be considered, not merely the needs of those children whose interests were specified by a divorce decree. The father's earning capacity while he was alive, which was a primary factor in setting the level of payments, is eliminated; and there is a likelihood that a legacy, life insurance, or other means of satisfaction such as Social Security or Civil Service death benefits may have arisen for some of the children. It is conceivable that in some cases the court's study may justify an order that the support payments be increased rather than decreased or terminated. If the needs of the child have increased and the estate under the burden of all its obligations is able to pay more, then the rule should allow this as if the father were still living.

It is only by recognizing the continuation of an obligation for child support as found in *Hill* and by recognizing the power of the courts to modify and adjust support payments on the basis of needs of the parties that there can be assurance of a result equitable to all those involved. A desirable solution, however, should interfere no more than necessary with the deceased father's testamentary plans.

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42. 106 N.W. at 1112.