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David A. Bratt
University of Kentucky

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CHILD SUPPORT, LIFE INSURANCE, AND THE UNIFORM MARRIAGE AND DIVORCE ACT

Death discharges us of all our obligations.
Montaigne¹

INTRODUCTION

In any divorce action when a child is involved, a major concern is, or should be, the financial security of that child. One method of achieving this security is for one or both parents to name the child as the beneficiary of a life insurance policy.

The parties to a divorce may agree to maintain the child as a beneficiary of a life insurance policy, and the property settlement agreement may provide for such insurance and be incorporated into the divorce decree. Such an agreement is contractually binding and may be enforced by the court.² But divorcing spouses do not always agree, especially in a bitterly contested divorce. The parent deprived of custody, so often the father,³ may well resist settlement terms requiring the maintenance of life insurance even though it is the child who might suffer. In this latter context the court may be called upon to order one or both parents to purchase or maintain life insurance for the benefit of the child.⁴ The ability of the Kentucky courts to so provide for the security of the child is the focus of this comment.

I. COMMON LAW FOUNDATIONS

Throughout the country the rule has been that the court may *not* order a divorcing parent to maintain life insurance

¹ I ESSAYS OF MICHEL DE MONTAIGNE, ch. VII at 27 (Charles Cotton, Translator, W.C. Hazlitt ed. 1892).

² KY. REV. STAT. § 403.180(5) (Supp. 1978) [hereinafter cited as KRS].

³ See Comment, *Paternal Custody of the Young Child Under the Kentucky No-Fault Divorce Act*, 66 KY. L.J. 165 (1977). The Kentucky General Assembly has recently eliminated the maternal presumption. 1978 Ky. Acts ch. 86 § 1 (amending KRS § 403.270). Presumably, paternal custody will be more common in the future, but it remains to be seen whether the courts will discard the long-held prejudice against paternal custody.

⁴ The court might also, on its own initiative, seek to secure the child's future support by ordering life insurance.

unless the legislature has provided otherwise by statute.⁵ This general rule rests upon two common law premises. First, a father⁶ is obligated to support his child only during its minority.⁷ Second, the parent is not obligated to settle an estate upon his child because the obligation of support terminates at the death of the parent regardless of the age of the child.⁸

The Kentucky courts have adhered to these general common-law principles. They have uniformly held that a father has a responsibility to support his child only during its minority.⁹ However, this common-law premise is not the pri-

⁵ 24 AM. JUR.2d *Divorce & Separation* §§ 834, 837 (1966). See Annot., 59 A.L.R.3d 9, 15 (1974). A few jurisdictions, generally under statutory authority, find a life insurance requirement permissible as security for the payment of child support. 24 AM. JUR.2d, *supra*, at § 834. Kentucky has no such statute. The Kentucky provision for security was directed against the husband who was "about to remove himself, or his property" and was for the benefit of the wife. KRS § 403.080 (repealed 1972 Ky. Act. ch. 182 § 29). While security may be an immediate, pre-death benefit, the real, substantial benefit is not received until the father dies. It is evident in *Riley v. Riley*, 131 So.2d 491 (Fla. Dist. Ct. App. 1961) that the security rationale is really a guise to avoid the rule that the support obligation ends at death. See especially the lengthy dissent in *Riley* by Judge Sturgis. *Id.* at 494-99. But guise or not, it is now the law in Florida that a court may order the non-custodial parent to maintain life insurance with the child as beneficiary so as to secure support payments. See, e.g., *Bosem v. Bosem*, 279 So.2d 863 (Fla. 1973) *rev'g* 269 So.2d 758 (Fla. Dist. Ct. App. 1972); *Simon v. Simon*, 319 So.2d 46 (Fla. Dist. Ct. App. 1975) (custodial parent may not be required to maintain life insurance); *Perkins v. Perkins*, 310 So.2d 438 (Fla. Dist. Ct. App. 1975); *Becker v. King*, 307 So.2d 855 (Fla. Dist. Ct. App. 1975).

⁶ The general rule has been that the father bears the primary obligation of support. See, e.g., *Bowman v. Bowman*, 233 S.W.2d 1020 (Ky. 1950); *Beutel v. Beutel*, 189 S.W.2d 933 (Ky. 1945). *But see*, *Brooks v. Burkeen*, 549 S.W.2d 91 (Ky. 1977), and text accompanying notes 63-70 *infra* for discussion of the movement towards a mutual obligation of support.

⁷ Annot., *supra* note 5, § 2 at 15.

⁸ 24 AM. JUR.2d, *supra* note 5, § 837; Annot., *supra* note 5, § 2 at 15.

⁹ See, e.g., *Young v. Young*, 413 S.W.2d 887 (Ky. 1967); *Davis v. Davis*, 347 S.W.2d 534 (Ky. 1961); *Whitaker v. Whitaker*, 183 S.W.2d 623 (Ky. 1944); *Central Ky. Asylum for the Insane v. Knighton*, 67 S.W. 366 (Ky. 1902); and *Commonwealth v. Wills' Ex'r*, 13 Ky. Op. 963 (1886) (abstracted at 7 Ky. L. Rev. 677). *But see* *Breuer v. Dowden*, 268 S.W. 541 (Ky. 1925) (obligation of support continues beyond minority if child incapable of self-support (*dictum*)) and *Crain v. Malone*, 113 S.W. 67 (Ky. 1908) (parent has obligation to care for dependent adult child).

While no Kentucky decision discusses the rationale underlying the rule, one might draw the inference that they who bring a helpless child into the world owe to that child a duty of support until the child is self-supporting. The implication is evident in such assertions by the court that "a parent is not liable for support of an adult child unless the child is incapable of self-support at the time of reaching his majority." *Clark v. Graves*, 282 S.W.2d 146, 148 (Ky. 1955). However, the obligation of support does not reattach if a child capable of self-support at majority subsequently becomes incapable

mary obstacle to ordering the maintenance of life insurance. It only prevents court-imposed insurance if a child is no longer a minor. Insurance could be required, consistent with this common-law principle, for the period of the child's minority or until the child is otherwise emancipated.¹⁰

The primary obstacle arises from the common-law principle that the death of the father terminates his legal obligation of support.¹¹ In *Sandlin's Adm'x v. Allen*,¹² the decedent's former spouse sought to hold his estate liable for periodic support payments which would have become due had he lived. Their daughter was still in high school. The Court held that Sandlin's estate was not liable for three reasons. First, because the estate of a non-divorced father has no obligation to support the decedent's child, "it would be illogical to hold 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."¹³ Second, the Court relied on a New York decision¹⁴ for the proposition that the obligation to support a child is a per-

of support. *Crain v. Mallone*, 113 S.W. 67 (Ky. 1908). Also, in *Sandlin's Adm'x v. Allen*, 90 S.W.2d 350, 353 (Ky. 1936), the Court, noted: "The liability of the decedent for the support of his son is not founded on any contract, express or implied. It is simply a natural and legal duty which is imposed on any father who brings a child into the world." (quoting *Rice v. Andrews*, 217 N.Y.S. 528, 531 (Sup. Ct. 1926)).

The responsibility for support is not abrogated because the child does not reside in the father's household. See, e.g., *Clark v. Graves*, 282 S.W.2d 146 (Ky. 1955); *Foreman v. Cook*, 127 S.W.2d 856 (Ky. 1939). Neither is a father's obligation ended if the child's custodian has deprived the father of visitation rights. *Dalton v. Dalton*, 367 S.W.2d 840 (Ky. 1963); *Spencer v. Spencer*, 312 S.W.2d 360 (Ky. 1958).

It should be noted that the requirement of paternal support does not always last until the age of majority is reached. The Court, in *Clark v. Graves*, 282 S.W.2d 146, 148 (Ky. 1955), notes that "conditions may justify a court in relieving the father of such responsibility before the child reaches majority." Petrilli notes that the obligation of support ends: (1) when the child dies; (2) when the child, if a daughter, marries; (3) when the child is emancipated; (4) when the child is inducted into the military; or (5) when the child is adopted by another. R. PETRILLI, KENTUCKY FAMILY LAW § 27.5 (1969).

¹⁰ Decreasing term insurance could be limited to coincide with a child's minority and thus would not violate this common-law principle. Alternatively, the court could simply allow the insured parent to change the beneficiary of a whole life policy once the child reaches majority.

¹¹ Petrilli notes that KRS § 403.250(3) (Supp. 1978) provides that death no longer terminates the father's obligation of support. R. PETRILLI, *supra* note 9 (Supp. 1977). This provision will be discussed *infra*.

¹² 90 S.W.2d 350 (Ky. 1936).

¹³ *Id.* at 353.

¹⁴ *Id.* The decision relied on was *Rice v. Andrews*, 217 N.Y.S. 528 (Sup. Ct. 1926).

sonal obligation and is not a debt for which an estate is liable. That personal obligation gives rise to a right to the services and companionship of the child, a right that cannot be exercised after death. The Court apparently agreed that because the right to services and companionship had been lost through death, the obligation of support should therefore be removed.¹⁵ Finally, the Court concluded that to hold the decedent's estate liable for support payments would "upset the entire fabric of statutory law regulating the distribution and devolution of estates."¹⁶

In *Bowling v. Robinson*,¹⁷ the divorcing parents drew up an agreement for the custody and support of the children. The agreement was made part of the judgment, "subject to further orders of the court."¹⁸ When the father died, the mother sought to enforce the agreement against the estate. Her theory, apparently, was that the agreement with the father was a contract and that the contractual obligations extended beyond the father's death. She relied on *Arnold v. Arnold's Ex'x*,¹⁹ in which the father had specifically agreed to leave his estate to his children. In *Arnold*, the Court had held the estate was bound contractually by the agreement.²⁰ However, the *Bowling* Court found the facts before them to be more similar to those in *Sandlin* and held that an order of support automatically terminated at the father's death, "[u]nless there is a provision of the judgment to the contrary."²¹ The Court found that the

¹⁵ The *Rice* opinion notes: "One of the considerations which made the father responsible for the support and maintenance of the child vanished at the death of the [father]." 217 N.Y.S. at 531. But the *Rice* opinion does not rest on the loss of this one right. The New York court was also reluctant to accord to the child of divorced parents a benefit not enjoyed by the child of non-divorced parents: "[S]uch child has no claim against his father's estate for his support and maintenance, but must shift for himself . . ." *Id.* at 530.

¹⁶ 90 S.W.2d at 353 (quoting *Carey v. Carey*, 43 S.W.2d 489, 499 (Tenn. 1931)).

¹⁷ 332 S.W.2d 285 (Ky. 1960).

¹⁸ *Id.* at 286.

¹⁹ *Id.* at 287. The *Arnold* case is reported at 237 S.W.2d 58 (Ky. 1951).

²⁰ 237 S.W.2d at 62.

²¹ 332 S.W.2d at 287. The Court noted that it still had power to modify (in this case abolish) a support decree after the father's death: "Unless there is a provision that would unalterably impose liability upon the father's estate, the power of the court to modify an allowance for support is not lost by the father's death." *Id.* This language in *Bowling* and similar language in *Sandlin* may seem confusing. The *Sandlin* court said: "Such power [to control the father's obligation] is not lost by the death of the

"until the further orders of the court" language of the original decree did not impose contractual liability on the father's estate and could not extend the father's obligation beyond death.²²

II. REQUIRING LIFE INSURANCE

Kentucky's highest court first encountered the question of court-imposed life insurance in *Stephanski v. Stephanski*²³ in 1971. After fourteen years of marriage and three children, the wife sought an absolute divorce and custody of the children; both were granted by the trial court. However, she was not content with the amount of the award for child support and she appealed. She also contended that the trial court erred in failing to order her ex-husband to name her and the children as co-beneficiaries of a \$15,000 life insurance policy. The court

father." 90 S.W.2d at 353. Does this mean that if a father dies while still under an obligation to support a minor child that the court may intervene, continue the obligation, and thrust the obligation on the father's estate? Or does it simply mean the court retains jurisdiction after the father's death so as to be able to decree the obligation at an end and so modify the judgment? Petrilli suggests that the latter interpretation is correct and that jurisdiction is retained only to declare the obligation at an end. R. PETRILLI, *supra* note 9, at n.67(a).

But another question remains. May the trial court, in its initial judgment, without the consent of the parties and before the father's death, provide that the father's estate will be liable for support of the child in the event the father dies during the child's minority? In *Bowling* the Court asserted:

Unless there is a provision of the judgment to the contrary, the death of a parent who has been ordered to make payments for the support of his child automatically terminates the obligation with respect to periodic payments which would accrue after his death, and his estate is not bound for them. Unless there is a provision that would unalterably impose liability upon the father's estate, the power of the court to modify an allowance for support is not lost by the father's death.

332 S.W.2d at 287. The "unless" clauses suggest that the trial court might include a provision or impose liability in the initial judgment (without the consent of the parties) which will bind the estate. Petrilli adds to the confusion: "The decree may clearly intend to impose liability upon the father's estate, 'unalterably' (*Bowling*, p. 287)." R. PETRILLI, *supra* note 9, at n.67(b). The case of *Budig v. Budig*, 481 S.W.2d 95 (Ky. 1972) resolves the confusion: "We have held [citing *Sandlin* and *Bowling*] that a parent is not liable for the support of a child after death *unless he had obligated himself* for such support [citing *Arnold*]." *Id.* at 97 (emphasis added). Clearly, the trial court could not impose a provision extending the obligation past death; such an obligation could only be assumed voluntarily by the father in an agreement incorporated in the judgment as in *Arnold v. Arnold's Ex'r*, 237 S.W.2d 58 (Ky. 1951).

²² 332 S.W.2d at 287.

²³ 473 S.W.2d 806 (1971).

found that the support award left the wife and children in difficult financial circumstances but that the husband could not afford to pay more. The modest financial resources of the husband and the fact that the trial court had declined to order a provision for life insurance allowed the Court of Appeals to avoid a decision of the life insurance question. After noting the lack of unanimity among various jurisdictions as to the power to impose a life insurance provision, the Court held: "It is not necessary for us to determine which line of cases should be followed. In our opinion, even if the chancellor had the power, he did not abuse his discretion in failing to impose that obligation on Mr. Stephanski."²⁴ Had the father been more affluent or had the trial court presumed to have the power to require the maintenance of life insurance the Court would have had to face the issue directly.

The latter instance arose in *Budig v. Budig*²⁵ the following year. The trial court ordered George Budig to "maintain in full force and effect, with the children as beneficiaries, life insurance in the sum of \$60,000.00."²⁶ The Court of Appeals reversed and explicitly held "that the chancellor erred in ordering George to maintain life insurance for the benefit of his children."²⁷ The Court did not offer a full exposition of the policy underlying the decision. However, the Court found that those jurisdictions which have ordered the maintenance of life insurance have done so under statutes which require "a father to provide for his children's support during their minority regardless of whether he [the father] remained alive."²⁸ Since at that time there was no such statute in Kentucky, the *Budig* Court reiterated the common-law rule that the obligation to support one's child terminates at the parent's death unless the parent contractually obligates his estate. This holding was explicitly based on *Sandlin*, *Bowling*, and *Arnold*. If any questions remained after those earlier opinions as to the inability of the court to order the father or his estate to furnish support after

²⁴ *Id.* at 808.

²⁵ 481 S.W.2d 95 (Ky. 1972).

²⁶ *Id.* at 97.

²⁷ *Id.*

²⁸ *Id.*

death, they were dispelled by the clear, concise, and direct holding of the *Budig* decision.²⁹

The *Budig* decision affords no details of the life insurance plan ordered by the trial court, nor does it indicate if the father was to maintain the policy with the children as beneficiaries past their minority. Presumably, the decree of the trial court might also have faltered on the common-law rule that the father need not support his child beyond minority.³⁰ But the decision does not mention this rule and perhaps the decree of the trial court did not violate it. In any event, given the fact that a life insurance plan can be fashioned to coincide with the minority of the child, the only clear obstacle to an order for the maintenance of life insurance is the common-law principle that the parent is not obligated for child support after the parent's death. Life insurance, *ipso facto*, would not benefit the child until after the parent died.³¹

III. THE UNIFORM ACT

The *Budig* decision was handed down prior to Kentucky's adoption of the Uniform Marriage and Divorce Act.³² The Uniform Act abolishes the common-law rule, relied on in *Budig*, that the death of the parent terminates the parent's obligation of support. The section entitled "Modification and Termination of Provisions for Maintenance, Support and Property Disposition,"³³ provides in subsection (c):

Unless otherwise agreed in writing or expressly provided in

²⁹ See note 21 *supra* for a discussion of the ambiguous language in the *Bowling* and *Sandlin* opinions. Specifically, the *Budig* Court held that "a parent is not liable for the support of a child after death unless he obligated himself for such support. . . ." *Id.*

³⁰ See notes 9-10 and accompanying text *supra* for discussion on this point.

³¹ However, see note 5 *supra* for a discussion of the use of insurance as security for child support payments.

³² Act Relating to Marriage and Divorce, 1972 Ky. Acts ch. 182 (codified at KRS § 403 (Supp. 1976)). Compare NAT'L CONF. OF COMM'RS ON UNIFORM STATE LAWS, UNIFORM MARRIAGE AND DIVORCE ACT (amended 1971) [hereinafter cited and referred to as the UNIFORM ACT] with KRS § 403 (Supp. 1978). See Note, *Kentucky's New Dissolution of Marriage Law*, 61 Ky. L.J. 980 (1973) for such a comparison. For present purposes, the changes made in the Uniform Act by the Kentucky legislature are of no concern.

³³ UNIFORM ACT § 316.

the decree, provisions for the support of a child are terminated by emancipation of the child but not by the death of a parent obligated to support the child. When a parent obligated to pay support dies, the amount of support may be modified, revoked, or commuted to a lump sum payment to the extent just and appropriate in the circumstances.³⁴

By its terms, the subsection terminates the support obligation when the child is emancipated, but the death of the supporting parent does not automatically terminate the obligation.³⁵ The parties or the court may provide for the contingency of the premature death of the parent or parents in the original decree. If no such provision is incorporated in the original decree, the court may modify the support provisions at a later time, even after the death of one or both of the parents. In so doing, the court must consider the factors enumerated in KRS § 403.210, which states the criteria for a support order. The intent of the Act is to encourage the divorcing parents to provide for the support of a child during the full term of its minority, and, in the absence of voluntary provisions, give to the court the discretion to impose post-death support provisions.³⁶

IV. LIFE INSURANCE AND THE UNIFORM ACT

The Uniform Act has statutorily removed the common-law obstacle to the imposition of life insurance, the obstacle which dictated the holding in *Budig*. While no Kentucky court has yet so held, it is patently clear that the court may order a supporting parent to maintain life insurance for the benefit of the child.

The course of court-decisions in Colorado is instructive. In *Laws v. Laws*,³⁷ the Colorado Supreme Court held that the trial court could not require the father to maintain life insurance in the amount of \$10,000 for each child until the children reached majority. The Court found that the insurance required by the trial court was not intended to enforce the orders of the court,

³⁴ Kentucky adopted this subsection without alteration. Compare UNIFORM ACT § 316(c) with KRS § 403.250(3) (Supp. 1978).

³⁵ UNIFORM ACT, Commissioner's Note to § 316(c); R. PETRILLI, *supra* note 9, at § 27.5 (Supp. 1977).

³⁶ UNIFORM ACT, Commissioner's Note to § 316(c).

³⁷ 432 P.2d 632 (Colo. 1967).

rather it was "simply a very bald order"³⁸ to force the father to settle an estate upon the children should he die before the children reached majority. The Court also noted that no father has a legal duty to carry insurance on his own life for the benefit of his children and that "[i]t can hardly be contended that the law places upon the divorced parent any greater obligation toward his children than he has in the absence of divorce."³⁹ While it is not stated quite as directly as in Kentucky's *Budig* decision, it is clear that Colorado, like Kentucky, proscribed the power of the trial court because of the common-law rule that the father is relieved of child support obligations by his own death,⁴⁰ because a father has no obligation to settle an estate on his child, and because a contrary decision would give the child of divorced parents greater rights than the child whose parents were not divorced.

In 1971, Colorado adopted the Uniform Act.⁴¹ Section 316(c) was adopted without legislative modification.⁴² Subsequently, in *In re the Marriage of Icke*⁴³ the Colorado Supreme Court considered the sole question of whether the trial court had the authority to order a parent, obligated to pay child support, to maintain insurance on his life with his children as named beneficiaries. The Court overruled the *Laws* decision, holding that Colorado Revised Statute §14-10-122(3) abolishes the old common-law rule and continues the support obligation of a divorced parent beyond the parent's death. The Court explicitly held: "The maintenance of a life insurance policy provides a reasonable and practical means by which this obligation can be met."⁴⁴

V. OTHER QUESTIONS

Having concluded that the court may, in its discretion,

³⁸ *Id.* at 635.

³⁹ *Id.*

⁴⁰ That the *Laws* opinion is based on the common-law rule is more explicitly noted in *In re the Marriage of Icke*, 540 P.2d 1076, 1077 (Colo. 1975). See also *McLeod v. Provident Mut. Life Ins. Co.*, 526 P.2d 1318 (Colo. 1974); and *Menor v. Menor*, 391 P.2d 473, 477 (Colo. 1964).

⁴¹ 1971 Colo. Sess. Laws ch. 520.

⁴² Compare UNIFORM ACT § 316(c) with COLO. REV. STAT. § 14-10-122(3) (1973).

⁴³ 540 P.2d 1076 (Colo. 1975) *aff'g* 530 P.2d 1001 (Colo. App. 1974).

⁴⁴ *Id.* at 1077.

require a divorcing parent to maintain life insurance for the benefit of a child of the marriage, at least two questions follow: Should the burden be imposed? And, who should bear the burden if it is imposed?

As a rationale for the common-law rule which prohibited the imposition of a post-death obligation of support, the courts noted that (1) it interfered with the testamentary disposition of the parent's estate,⁴⁵ (2) it seemed to require a parent to settle an estate upon the child,⁴⁶ (3) it benefited the child at a point in time when the parent could no longer enjoy the reciprocal benefits of companionship and service,⁴⁷ and (4) it gave to the child of divorcing parents a benefit not enjoyed by a child whose parents were not divorced.⁴⁸ Might these objections continue to deter the court from exercising its discretionary power to order the maintenance of life insurance?

Continuing the support obligation beyond death may indeed interfere with the testamentary disposition of the parent's estate. Conceivably, the executor may be required to make monthly support payments for several years.⁴⁹ But such would not be the case if life insurance were maintained to assure the continued support. The life insurance proceeds would be paid directly to the child or its custodian or would constitute a separate fund apart from the testamentary estate. The executor could quickly wind up matters without continuing concern about the support obligation.⁵⁰ Nor would a life insurance requirement settle an estate upon the child in the sense that the decedent parent would be forced to recognize the child in a will. The requirement would no more determine the disposition of

⁴⁵ Sandlin's Adm'x v. Allen, 90 S.W.2d 350, 353 (Ky. 1936) (quoting Carey v. Carey, 43 S.W.2d 498, 499 (Tenn. 1931)).

⁴⁶ Rice v. Andrews, 217 N.Y.S. 528, 530 (Sup. Ct. 1926).

⁴⁷ Sandlin's Adm'x v. Allen, 90 S.W.2d 350, 353 (Ky. 1936) (quoting Rice v. Andrews 217 N.Y.S. 528, 531 (Sup. Ct. 1926)).

⁴⁸ Bowling v. Robinson, 332 S.W.2d 285, 287 (Ky. 1960); Sandlin's Adm'x v. Allen, 90 S.W.2d 350, 353 (Ky. 1936).

⁴⁹ The comments to the Uniform Act suggest that "[t]o avoid indefinite delay in the settlement of estates, there may be modification or commutation to a lump sum payment 'to the extent just and appropriate in the circumstances.'" UNIFORM ACT, Commissioners Note to § 316(c).

⁵⁰ The executor would, however, be well advised to inform the court of the insurance provision for the support obligation and move that the court discharge the estate. UNIFORM ACT, Commissioners Note to § 316(c).

the decedent parent's property than would the traditional support order requiring monthly allotments prior to death. The life insurance premium would increase those monthly allotments paid during life but nothing more would be required of the parent after death.

The third point, that a parent would confer a benefit without reciprocity, seems a rather specious objection. The child can hardly be blamed for the untimely demise of the parent. With the obligations of support statutorily extended beyond death, whatever logic this point may have had is now totally lost.

There does seem, at first glance, to be an inconsistency in conferring a benefit on the child of divorcing parents that cannot be conferred on the child whose parents stay together. On closer examination, however, it is not so inconsistent and whatever inconsistency that does exist seems justified. While non-divorcing parents have no legal obligation to maintain life insurance, most families do have life insurance.⁵¹ If the child is not the direct beneficiary, the chances are the child will benefit indirectly because the surviving spouse is generally the direct beneficiary. Also, even without life insurance, the children of non-divorcing parents are probably protected upon their parents' death by a will. If there is a will which inadequately provides for the surviving spouse and children, the children are protected indirectly to the extent the law allows a surviving spouse to elect against the deceased spouse's will.⁵² The surviving spouse bears the legal obligation of child support⁵³ and, to some extent, the election statute ensures an adequate standard of living. Although divorcing parents may provide for their children in wills, the election statute is a benefit not afforded a child of divorced parents. Furthermore, divorcing parents, by the act of divorce, have subjected their arrangements for their child to the scrutiny of the court. In assuming that responsibility, the court would be remiss in its duty if it did not provide adequately for the present and future well-being of the child.

⁵¹ In 92% of all American families with children under age 18, at least one member of the family owns life insurance. AMERICAN COUNCIL OF LIFE INSURANCE, LIFE INSURANCE FACT BOOK '77, at 34 (1977).

⁵² See KRS § 392.080 (Supp. 1978) for Kentucky's election statute.

⁵³ KRS § 403.210 (Supp. 1978).

Perhaps financial security is an elusive goal,⁵⁴ but if the court does not make reasonable and thorough plans for financial security it would not be acting in the child's best interest.⁵⁵

There are other considerations⁵⁶ which favor the imposition of a life insurance requirement. The legislative extension of the support obligation beyond death would be meaningless to the child of a deceased parent with an insolvent estate. The child is no less dependent after the parent's death and the burden of support may fall in total or in part on society if the surviving parent cannot fully carry the burden. Insurance, by design, can secure that obligation of support and assure that the obligation of the deceased parent will be met. Indeed, at least one court has reasoned that the child of divorcing parents may need even greater financial security than the child of a stable family and that insurance can be a reasonable means to that security.⁵⁷

The primary objective of the support provisions of the Uniform Act is to accord the child the benefits it would have had but for the divorce.⁵⁸ Insurance on a parent's life is now a quite common benefit enjoyed by the typical child.⁵⁹ It is a common means of securing not only the barest necessities,⁶⁰ but also of obtaining an advanced education or even of maintaining an accustomed standard of living. Requiring life insurance of divorcing parents would be a step toward this objective of the Uniform Act.

None of the cases cited herein has considered whether, under the Uniform Act, anyone other than a non-custodial father may be required to maintain life insurance. May the requirement be imposed on the custodial parent or on the mother? Given the broad purpose of the new Kentucky law

⁵⁴ *Riley v. Riley*, 131 So.2d 491, 497 (Fla. Dist. Ct. App. 1961) (Sturgis, J., dissenting).

⁵⁵ The best interest of the child is clearly the guiding principle in determining both custody and support provisions. KRS §§ 403.210, .270 (Supp. 1978); UNIFORM ACT, Commissioners' Prefatory Note.

⁵⁶ For a discussion of the tax advantages that may be obtained in conjunction with a life insurance provision, see Annot., *supra* note 5, and the sources cited therein.

⁵⁷ *Franklin Life Ins. Co. v. Kitchens*, 57 Cal. Rptr. 652 (Ct. App. 1967).

⁵⁸ See, e.g., KRS § 403.210(3) (Supp. 1978).

⁵⁹ See note 51 *supra*, for discussion on this point.

⁶⁰ *Allison v. Allison*, 363 P.2d 795 (Kan. 1961).

which extends the support obligation beyond death—to afford the child financial security upon the death of a parent—it would seem that either or both parents could be required to maintain life insurance.

In Kentucky, the father still shoulders the primary responsibility for the financial support of the child.⁶¹ Under the common law, “primary” meant the mother bore no burden unless the father died, disappeared, or was financially incapable and the child was apt to need public assistance.⁶² But Kentucky law is undergoing a subtle change. The support obligation is now more likely to be seen as a mutual obligation. The adoption of the Uniform Act was a step in that direction. Section 309 of the Uniform Act provides that “the court may order either or both parents owing a duty of support to a child . . . to pay an amount reasonable . . . for his support.”⁶³ The comment to section 309 disclaims any effort to prescribe a duty of support,⁶⁴ but the criteria set forth to be used by the court in assessing the dollar amount of support payments suggest a mutual obligation. The section requires that the court look at the financial resources of *both* parents,⁶⁵ whereas in the past the father’s obligation was assessed without considering the mother’s resources.⁶⁶ Although Kentucky continues to impose by statute

⁶¹ KRS § 405.020(1) (1970): “The father shall be primarily liable for the nurture and education of his children who are under the age of eighteen (18).”

⁶² Foster & Freed, *Divorce Reform: Brakes on Breakdown?*, 13 J. FAM. L. 443, 484 n.200 (1973-74).

⁶³ UNIFORM ACT § 309; KRS § 403.210 (Supp. 1976).

⁶⁴ UNIFORM ACT, Commissioners’ Note to § 309.

⁶⁵ KRS § 403.210 (Supp. 1978) provides:

Child support.—in a proceeding for dissolution of marriage, legal separation, maintenance, or child support, the court may order either or both parents owing a duty of support to a child *of the marriage* to pay an amount reasonable or necessary for his support, without regard to marital misconduct, after considering all relevant factors including:

- (1) The financial resources of the child;
- (2) The financial resources of the custodial parent;
- (3) The standard of living the child would have enjoyed had the marriage not been dissolved;
- (4) The physical and emotional condition of the child, and his educational needs; and
- (5) The financial resources and needs of the non-custodial parent.

(Italics indicate phrase added in Kentucky’s adaptation of Uniform Act § 309).

⁶⁶ See, e.g., *Barrickman v. Barrickman*, 296 S.W.2d 475 (Ky. 1956); *Beutel v. Beutel*, 189 S.W.2d 933 (Ky. 1945).

the primary responsibility of support on the father,⁶⁷ KRS § 403.210 (Uniform Act § 309) has been interpreted as equalizing the support obligation.⁶⁸

When considering the child's best interest, a mutual obligation simply makes sense. Such a mutual obligation does not mean that each parent should be, or is, equally responsible in the sense that each must contribute an equal dollar amount. Support should be geared to the ability to pay.⁶⁹ However, both parents should be under the same duty. Given an equal duty, yet taking into account the ability to pay, each spouse might be required to maintain life insurance.⁷⁰ The fact that one parent is custodian does not make that parent less responsible for the child's support and certainly does not make the child less dependent on that parent's support. If life insurance is to be used to secure support for the child, it seems reasonable that both parents, mother and father, custodian and non-custodian, should be required to maintain life insurance for the child's benefit.

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⁶⁷ See note 61 *supra* for Kentucky's statute.

⁶⁸ *Brooks v. Burkeen*, 549 S.W.2d 91 (Ky. 1977).

⁶⁹ *Foster & Freed*, *supra* note 62, at 484.

Foster and Freed suggest that even with an equal legal duty of support, "[a]s a practical matter, . . . usually it will be the father who bears the major responsibility in that regard because of the advantages our society accords the man in employment and the discriminations it works against women." *Id.*

⁷⁰ It is interesting to note that of single parent households, female heads of households are less apt to carry life insurance (72%) than are male heads of households (96%). AMERICAN COUNCIL OF LIFE INSURANCE, LIFE INSURANCE FACT BOOK '77, at 34 (1977).