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Babes in Briefs: Is The Education of Infants A Necessary?

Robert S. Wiener

BABES IN BRIEFS:
IS THE EDUCATION OF INFANTS A NECESSARY?

by

Robert S. Wiener*

INTRODUCTION

This paper examines the legal and equitable ramifications[1] and sociological implications[2] of education as a necessary for infants. What determines an infant's contractual liability? How does the law reflect and affect the societal role of infants? What is its view of the education of infants and social classes, parental power, and gender? How has it or should it have changed?

Even if an infant disaffirms a common law contract, the court of equity may recognize a quasi-contract if the subject matter is a necessary. Can education be a necessary so that an infant is liable for its procurement? As a matter of law, the answer depends on whether the education is common school, arts, religious, college, professional, such as apprenticeships, pharmacy, stenography, aviation, and correspondence courses, or from books. If the type of education can be a necessary, the trier of fact considers parental approval, job training, cheaper alternatives, and the social status, special suitability, and educational background of the infant to determine whether it is a necessary for the particular infant.

I. COMMON LAW CONTRACTS

An infant (also called a minor) is a person who lacks the capacity to contract due to youth. The age of contractual capacity, twenty-one at common law,[3] has been statutorily reduced to eighteen by most states.[4] A common law contract

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* Assistant Professor, Lubin School of Business, Pace University Westchester

formed by an infant is voidable at best, that is, valid but able to be avoided by the infant.[5] The public policy rationale for this rule is that infants, as a matter of law, do not have the capacity to fully appreciate the obligations of a contract and "the law still guards the interests of minors against their own assumed improvidence and want of sound judgment"[6] and from others who might take advantage of them.

An infant can disaffirm and thereby avoid contracts for lack of contractual capacity before achieving majority and for a reasonable time thereafter.[7] To disaffirm, the infant must be in privity of contract. An adult who forms a contract for an infant intended third party beneficiary cannot assert the infant's right of disaffirmance. In keeping with the rule that legal rights are one's own, if an adult permits an infant to contract or creates a suretyship contract to obtain a contract for an infant, the infant's right to disaffirm is not barred.[8] Age misrepresentation by an infant, innocent or fraudulent, generally will not prevent disaffirmance of the contract.[9]

An infant who disaffirms a contract must give back any consideration received, but need not place the other party in status quo and that is not possible if the property received during infancy has been spent, consumed, or destroyed. Regarding intellectual benefit derived from education, an infant "is not precluded from disaffirming the contract and recovering the consideration that he paid, by the fact that he cannot return the instruction received."[10] However, materials, such as books received for a correspondence course, must be returned.[11]

A voidable contract formed by an infant may be expressly or impliedly ratified when the infant gains contractual capacity at the age of majority. Implied ratification results from failure to disaffirm within a reasonable time of becoming a major.[12] A reasonable time period may be as long as thirteen months.[13]

Infants who act like adults by marrying, conceiving children, or enlisting for war, may be held to have made valid common law contracts under case or statutory law.[14] Some states have reduced the age of contractual capacity for educational loans to sixteen by statute.[15] The theory may be that infants wise enough to appreciate the value of higher education should have contractual capacity. This paper focuses on contracts made by infants who lack contractual capacity.

II. QUASI-CONTRACTS

A. Creation

Infants can avoid all common law contractual liability. This principle standing alone would make parties reluctant to form any contracts with infants, including those for necessaries. Therefore, the court of equity has the power to create a fictional quasi-contract when the disaffirmed common law contract was for necessaries for the infant. "And the reason anciently assigned was, that without this power he might be exposed to perish of want."[16] The equitable remedy for non-performance of a quasi-contract is quantum meruit or reasonable value. Contracts and quasi-contracts should be distinguished. "[A]n unexecuted contract for necessaries may be disaffirmed unless it be otherwise provided by statute."[17] Even executed contracts for necessaries can be disaffirmed. A common law contract, once disaffirmed, is not binding. Only an equitable quasi-contract created in the case of necessaries is unavoidable. Application of these principles can be confusing and, therefore, warrants further analysis. In the Rhode Island case of *Pardey v. American Ship-Windlass Co.*,[18] Frank B. Pardey contracted with the American Ship-Windlass Company on 17 April 1893 "to work for the [Company] in the pattern-making business for the term of three years and a half ...."[19] Pardey was to be compensated with a salary and "reasonable and proper instruction as a pattern maker. The contract further provided that the sum of $1 per week from the wages earned should be retained by the [Company] till the end of the term, and should then be paid to [Pardey], with interest from the end of each year, but that if [Pardey] should leave the employment before the end of the term, or be discharged for cause, the money retained should be forfeited. At the time of entering the employment [Pardey] was a minor [eighteen years old] .... [Pardey] attained his majority in July, 1895, and left the defendant's employment of his own accord September 7, 1895. The amount of wages retained under the contract ... is $124."[20]

Frank B. Pardey disaffirmed the contract. The court decided that "[Pardey] is mistaken in his supposition that the contract was voidable; for, though it is true generally that a minor cannot bind himself by his contracts, for want of legal capacity, it is equally well settled that he may bind himself by a contract for necessaries, if reasonable, or by a contract beneficial to him."[21] A modern court would decide that Pardey could avoid a common law contract created when he was an infant.

The court found that the contract was for necessaries and "As the contract was binding on [Pardey], and he has violated it by leaving the employment, he must be considered to have forfeited the wages retained as provided by the contract ...."[22] A modern court would find that a disaffirmed common law contract is not binding and cannot be breached. A liquidated damages clause, such as the forfeiture clause here, is avoided with the contract. If the instruction received by Pardey was a necessary, he is "bound" only to a quasi-contract and owes the company quantum meruit, the reasonable value of consideration received and not returned. The court would find that the "wages retained" were "wages earned" and award them to Pardey as quantum meruit or, perhaps, on a theory of constructive bailment.

As with common law contracts, an infant, to be liable on a theory of quasi-contract, must be in privity of contract for the necessaries. If an obligation is assumed by a relative or friend to benefit an infant, the infant is an intended third party beneficiary of the contract formed and not personally liable. "It is essential to recovery that necessaries shall have been furnished on the credit of the infant. If furnished on the credit of his parent or guardian, he is not liable."[23] Therefore, the New York Court of Appeals held that "since the primary duty of support of an infant is on his father, the action for necessaries could not be maintained against the infant [because] the complaint does not allege that the services were rendered in reliance on the infant's credit [nor] that the services were performed at the request of the infant ...."[24]

A few cases relieve an infant of liability for necessaries even in quasi contract if an adult with legal responsibility for the infant is ready and willing to provide them. Even if a contract was formed by the infant, "an infant living with his father or guardian who is able and willing to furnish him with every thing suitable and necessary to his position in life cannot make a binding promise to pay even for necessaries."[25]

In general, an infant who disaffirms a contract for legally necessary education is liable in quasi-contract. If the education is not a necessary, a disaffirming infant is free of both legal and equitable liability. Whether education can be a necessary is determined as a matter of law by its type. Whether possibly necessary education is a necessary for a particular infant is a matter of fact.

B. Can This Type of Education Be a Necessary?

What is a necessary? "[T]he law has never limited its definition of the term *necessaries* to those things which are strictly essential to the support of life,--as food, clothing, and medicine in sickness."[26]

Can education be a necessary? According to Blackstone, an infant may be obligated for "necessary meat, drink, apparel, physic and such other necessaries; and likewise for his good teaching and instruction, whereby he may profit

himself afterwards."[27] If "profit" is the test of good teaching and instruction, is it limited to money or does it include non-monetary rewards? Most courts ask if the minor "would be better enabled to earn a livelihood"[28] as a result of the education. However, one court decided that piano playing was a necessary despite no short-term financial benefits.[29]

Necessaries are distinquished from non-necessaries or luxuries. To be a necessary, education "must be actually necessary, in the particular case, for use, not mere ornament, for substantial good, not mere pleasure; and must belong to the class which the law generally pronounces necessary for infants."[30] If the education is in fact necessary, things essential to its proper study are also necessaries.[31]

What class of education may be a necessary? Under English case law, "I have no doubt that the proper education of an infant stands in the same position under English law as food and clothing supplied to him."[32] American case law is in accord. "The authorities are agreed that a proper education is a necessary."[33] What is a proper education?

1. Common School Education

In 1844, the Vermont Supreme Court in *Middlebury College v. Chandler*[34] stated that "a good common school education, at the least, is now fully recognized as one of the necessaries for an infant. Without it he would lack an acquisition which would be common among his associates, he would suffer in his subsequent influence and usefulness in society, and would ever be liable to suffer in his transactions of business. Such an education is moreover essential to the intelligent discharge of civil, political, and religious duties."[35] This view of common school education is accepted as a matter of law.[36]

What is a good common school education? The supreme court in Virginia, in 1884, found "that it is a reasonable inference" that an infant who "was studying English, Latin, Greek and mathematics" from age ten to thirteen "had acquired a fair education."[37] Additional education was not considered necessary.

What is today's equivalent of a good common school education? The answer probably is a "public school and high school" education.[38]

2. Arts Education

Can education in the arts be a necessary? In *Sisson v. Schultz*,[39] Burt Sisson, "a piano turner [sic]" sued Herman Schultz for $5 for tuning a piano at the request of Schultz's wife and daughter.[40] "The father had provided piano lessons for [his 12 year old daughter] and at the time she was taking

one lesson a week. The piano was out of tune, no question of that and there is testimony, undisputed, that for the daughter to pursue her studies and become proficient in music, the piano had to be kept in tune.... [T]here is evidence that it had not been tuned for two or three years."[41] Although the only precedent was that instruction in music and painting was not a necessary,[42] the trial court judge apparently found that piano tuning could be a necessary and submitted the question to the jury which decided that it was. The Supreme Court of Michigan affirmed stating that the question of whether a piano tuning was a necessary was "a close one" and the trial court had not reversibly erred.

3. Religious education

"No cases can be found either in England or in any of the United States where the definition of instruction [of infants] has been carried so far as to include religious instruction."[43] "[T]he rent of a pew in a church where divine worship is held and religious instruction given is [not] included in the list of articles known to the common law as necessaries."[44] In this 1873 Connecticut case, the pew was rented for the wife and a daughter of the defendant without his authority or assent.[45] The judgment of the court seems, at least in part, to result from reluctance to classify the teaching of all religions as a necessary. "And indeed in this country, where there is no established church and every one is permitted to worship God according to the dictates of his own conscience, no distinction could be made among the thousand different tenets and precepts that are taught upon the Sabbath under the name of religious instruction."[46] Perhaps, if such a distinction could constitutionally be made, this court would have found some religious instruction necessary.

4. College education

Can college education be a necessary?[47] The 1844 *Middlebury College case* distinguished between a good common school education and collegiate study. The court found that a college education could not be a necessary for "it is obvious that the more extensive attainments in literature and science must be viewed in a light somewhat different. Though they tend greatly to elevate and adorn personal character, are a source of much private enjoyment, and may justly be expected to prove of public utility, yet in reference to men in general they are far from being necessary in a legal sense. The mass of our citizens pass through life without them .... I speak only of the regular and full course of collegiate study."[48]

More recent cases have been more open to finding that a college education could be a necessary. The 1912 New York Court of Appeals observed that "circumstances ... may exist where even [a classical or professional] education might properly be found a necessary as matter of fact."[49] In 1930,

the Supreme Judicial Court of Massachusetts stated in dictum that "under present day conditions, as in the past [citing *Middlebury College*], a college education is not, as matter of law, a necessary" but "very likely circumstances could be shown which would warrant that conclusion as matter of fact."[50] The Supreme Court of Michigan noted in 1930 that "[w]hile it has been held in several cases that a higher or classical or professional education is not a necessary, the holding is usually qualified by the statement that circumstances may exist where such an education may be a necessary as a matter of fact."[51]

In modern society, does a college education come within the legal definition of a necessary? The *Middlebury College* court's observation that a common school education "is now" fully recognized as a necessary implies that it was not always so and that other education might be so recognized in the future. That case's tests of what is common among associates, the lack thereof resulting in suffering in subsequent influence and usefulness in society, and being ever liable to suffer in business transactions may apply today to a college education.[52]

In fact, an increasing number of jobs on all levels now require college education.[53] Society has sufficiently changed since 1844 and 1930 to find a college education a legal necessary.[54]

5. Professional education

The *Middlebury College* ruling that college education cannot be a necessary did not apply to all education outside the common school. As the court said, "I would not be understood as making any allusion to professional studies, or to the education and training which is requisite to the knowledge and practice of mechanic arts. These partake of the nature of apprenticeships, and stand on peculiar grounds of reason and policy."[55]

a. *Apprenticeships:* Apprenticeships can be necessary. Under the apprenticeship contract in *Pardey*, he "was to work for the [Company] in the pattern-making business" for a salary and "reasonable and proper instruction as a pattern maker."[56] The court, referring to *Middlebury College*, decided that "[i]t is a contract for necessaries, and is beneficial to the plaintiff, since it stipulates for his instruction in the useful art of pattern making, by which he would be better enabled to earn a livelihood."[57]

b. Pharmacy: As the *Supreme Court of Iowa said,* "it is conceded that a course in pharmacy may come within the definition of necessaries for which a minor may be bound by contract."[58] In this case, the male infant "entered the pharmacy department of Highland Park College ... for a course

of 12 weeks' instruction" and "quit the school soon thereafter" suing only "to recover the unearned portion of the sum so paid."[59] Therefore, the issue of whether the course was indeed a necessary was not raised.

c. Stenography: A course in "the science or art of stenography" can be a necessary.[60]

d. Aviation: The Brooklyn Municipal Court of New York decided in 1934, as a matter of law, that "aviation instruction to prepare an infant to be a mechanic is a contract for necessaries."[61] On the other hand, the Supreme Judicial Court of Massachusetts correctly decided in 1938 that education in elementary aviation, as a limited commercial pilot and as a transport pilot was not a necessary as a matter of law, but possibly as a matter of fact.[62]

e. Correspondence Courses: What of mail-order education correspondence courses?[63] In 1909, a Maine trial court judge instructed the jury that "a course of correspondence instruction in the electrical engineering course ... seems to stand on intermediate ground, being between that of a trade and a learned profession."[64] The jury decided that here such education was a necessary and the appellate court affirmed the decision.

6. Books

Education can also be gained directly from books. The Michigan Court of Appeals decided as a matter of law that reference books can be necessaries.[65]

B. Is This Education a Necessary for This Minor?

Whether a type of education that can be a necessary is a necessary in a specific case is a question of fact. "What is a proper education in a given case depends on the circumstances of the case."[66] Some factors considered may stay in the jury room, but "The practical meaning of the term [necessaries] has always been in some measure relative, having reference as well to what may be called the conventional necessities of others in the same walks of life with the infant, as to his own pecuniary condition and other circumstances."[67]

1. Parental Approval

Parental approval is a criterion for determining if education is a necessary. In 1912, New York's Court of Appeals said of unapproved engineering education, "the [infant] resided with a parent or guardian able and anxious to give him any kind of an education that he desired, and that in defiance of parental authority he perversely took his own course to his injury and the overthrow of family discipline."[68]

Therefore, if the infant and the parent or guardian disagree on the infant's education, the parent or guardian can prevent the infant from forming quasi-contracts for education. The infant is thereby given additional protection -- able to avoid quasi-contractual as well as common law contractual liability. The practical effect is that a party contracting with an infant to provide otherwise necessary education to that infant must first get parental or guardian approval or risk not only disaffirmance of the contract, but loss of a quantum meruit claim for the education's reasonable value. The rationale seems to be that what is necessary to an infant is best determined by parents and guardians: "Honor your father and your mother"[69] and "Father knows best." Surely, parents should decide what education for their children they want to fund, but the public policy served here is parental discipline, not the necessary education of infants.[70]

2. Job Training

Courts often consider job training the prime purpose of education,[71] that is, education "by which he would be better enabled to earn a livelihood."[72] If it will not achieve this goal, the education is not a necessary.[73] This view ignores education for the "intelligent discharge of civil, political and religious duties."[74]

3. Cheaper Alternatives

Courts consider the existence and quality of free or cheaper alternatives to the chosen education relevant to determine what constitutes a necessary.

Is private education a necessary if free public education is available? In the 1902 case of *Cory v. Cook*,[75] the Rhode Island court did not believe "that, simply because the state, through its public-school system, furnishes the facilities for a common-school education, the father cannot be held liable for anything in the way of supplemental or additional training for the child. ... If the child lives in a city like Providence, for instance, where, under its very superior system of public schools, which system includes both mental and manual training, he can obtain at the public expense an education which is probably equal, if not, indeed, superior, in practical value to a college education of a century ago, it may perhaps be doubted whether the father could be legally held liable for anything in addition thereto in the way of educational training. But where, as in the case at bar, the child lives in a country town, the schools of which do not furnish, and cannot be expected to furnish those facilities for a broad education, including a business or commercial training, which many city schools do furnish, we do not think it would be reasonable to hold that the father, by reason of the existence of public schools in the town, is necessarily relieved from all liability for the additional training of his

child."[76]

Eugene F. Bear, an 18 year old infant, executed a $265 promissory note for board and tuition for one session of common school education at Randolph Macon Academy. Whether "the sending of a boy to a distant academy, or boarding school, when there was a good public school and high school convenient to his home" was necessary was held a question of fact with "ample room for different conclusions to be drawn therefrom by reasonable men."[77] The Virginia Supreme Court of Appeals in 1921 approved putting the question to the jury.

Under the facts of *In re Johnstone's Estate*[78], the infant perhaps was found by the jury to have had cheaper alternatives. Robert B. Johnstone Jr. "was at the top of his class in high school."[79] He attended Dartmouth College in Hanover, New Hampshire paid for by a bank loan to his parents. "[T]here was available to the minor a full tuition scholarship to the University of Chicago. The [trial] Court could have found from the evidence that the minor might have received from Dartmouth either a scholarship or a loan on more favorable terms than the one received from La Salle National Bank." The appellate court affirmed the jury's decision that a Dartmouth College education was not a necessary.

Judicial review of consumer judgment contrasts with the law's hands-off policy on most business judgements. A court might even decide that public school education is more beneficial to the student than private school education.[80]

4. Social Status

The infant's social status can determine whether a type of education is a necessary. "[T]hat such an education and training as will fit one for the ordinary duties of life in the sphere in which he moves ... should be so classed [with necessaries], we have no doubt."[81] "[I]t is then for the jury to determine whether, under all the circumstances, the things furnished were actually necessary to the position and condition of the infant ...."[82] For example, college education might be a necessary if there are "extraneous circumstances ... such as wealth, or station in society ...."[83]

What is a necessary is relative, as the 1909 Maine Supreme Judicial Court said, determined "by taking into consideration the infant's state and condition in life ... what might be considered necessaries for one infant would not be so considered for another whose status is different as to rank, fortune, and social position. The question is one to be determined from the facts surrounding each particular case."[84] In 1912, the New York Court of Appeals reiterated this reasoning.[85] Edward Connelly subscribed for a course of correspondence instruction in "Complete Steam Engineering" for $75.20 payable in $5 monthly installments.[86] The court stated

that "[t]he word 'necessaries,' as used in the law, is a relative term ... and depends on the social position and situation in life of the infant as well as upon his own fortune and that of his parents. What would be necessary in a legal sense for an infant with ample means of his own might not be so for one with no means at all."[87] In American case law, one's means determine one's needs.

The 1844 Virginia Supreme Court applied this principle and agreed with the lower courts that the infant E.C. Hayes's "circumstances and prospects in life did not call for or justify further outlay in his education and support; and that common sense and prudence required that he be put to some business, so as to support himself."[88] Here, the step-father "and his wife chose to maintain this boy ..., and to clothe him finer than other youths in the neighborhood, and give him a classical education, and furnish him with a riding-horse and other equipments for his pleasure; all these were luxuries and accomplishments; but, in no sense of the word, or of the law, could they be called or construed to be necessaries."[89] Don't get too uppity, says the law. Get a job.

The wealth of an infant or the infant's parents alone will not assure the proving of a necessary, especially if the contract is ancillary to a questionable necessary and the parents are ready and willing to pay. In *Moskow v. Marshall*,[90] a landlord sued for quantum meruit on the lease by two minors of a "suite of rooms in 'a privately owned dormitory ... used exclusively for students at Harvard College'."[91] Not only must the plaintiff prove that the living quarters were "essential to a college course",[92] he has to prove that the college education itself was a necessary. In this case, Richard B. Marshall and Lewis R. Burchill entered their second year at Harvard College in September 1928. The court considered their financial resources. "Burchill prepared for college at an academy 'located one hundred twenty miles from his home, where the annual fee was $1,050.' The father of ... Marshall is associated with a firm or corporation 'in the bond business.'"[93] But, it is not sufficient to find that "'[a] college course was not extravagant or unreasonable in respect of either defendant, considering his father's means and manner of living and his own prospects in life,' do not go far enough for this purpose. The affirmative fact of necessity is not established by the negation of extravagance and unreasonableness."[94] The landlord lost.

Using social status to determine whether education is a necessary for an infant has troubled only the Supreme Judicial Court of Massachusetts in a 1938 case governed by New York law, and then not enough to reverse the trial court's decision. "[John P. Adamowski's] father was a weaver. The money which the plaintiff [infant] paid was in part saved by himself from his manual labor and in part contributed by his family from their savings. In this country ... any

stratification of society is transient and shifting. Many a young man without capital or influential connection attains education and advancement in life through his own labors. It would be hard to say that education in aviation was less necessary for the plaintiff than it would have been for another more affluent.... The judge found that the courses in instruction were not necessaries for the plaintiff. That finding was proper, though possibly not required as matter of law."[95] Perhaps the court wanted to avoid a finding that the education was a necessary which would have prevented, at least in part, the infant's recovery of the $1,600 he had paid.

The courts give great weight to social status. Education necessary for one infant may not be necessary for another with equal educational background and intellectual ability, but lower social status. Why do most courts seem to accept fixed social classes? Is the law recognizing a psychological need developed by habituation to a certain style of life? Are necessaries determined by the class into which one is born and infants discouraged from aspiration and motivation for improvement? Are lower classes not expected to be educated above their current status? Or are less affluent infants being protected from liability beyond their financial means, whereas the wealthy can afford imprudent expenses?[96] Should infants of lower social status go to work rather than get more education? Is that advice wise? Is money spent on education a poor investment, or is it in fact an effective way to elevate social status? Or does the law ratify the self-fulfilling prophecy that all those who have not yet achieved higher social status have not because they cannot?

5. Special Suitability

Special suitability of an infant for particular education might also be considered. For example, "that he exhibited peculiar indications of genius or talent, which would suggest the fitness and expediency of a college education for him, more than for the generality of youth in community."[97] Also, in *Sisson*, "The daughter was 12 years old, showed aptitude for music, and was the pianist of the neighborhood."[98] On the other hand, ordinary proficiency, even in Harvard College, is not sufficient; "Nor does the fact that the defendants were able to continue in college until the second year of the course prove that for them a college education was necessary."[99]

6. Educational Background

An infant's educational background may be used to determine whether further education is a necessary. The Georgia Supreme Court considered in 1906 "the particular sphere in society or calling in life which her previous education and attainments had prepared and fitted her to occupy or fill."[100]

In the *International Text-Book Co.* v. Doran[101] case of 1907, James W. Doran, not yet 21, signed a contract for written instruction "of a preliminary and suitable nature in arithmetic, algebra, geometry, and mechanical drawing.... He had previously spent two years in a high school." The Supreme Court of Errors of Connecticut held that "Education furnished to an infant may be necessary to him, but only when it is suitable to his wants and condition. Whether education of a merely preliminary character, such as was furnished in the present case, was a necessary to one who had spent two years at a high school, was a question of fact ...."[102] The court appears to think that although the instruction may be part of a good common school education, Doran should have learned the material the first time around. The finding may be that remedial education is not a necessary.

7. *Gender*

It seems that formal education of women was historically less common and courts were less likely to consider it necessary for them.[103] In the reported cases, women were educated only in piano playing,[104] stenography,[105] and religion.[106] Discussing college education, the *Middlebury College* court considers "men in general".[107] In *Adamowski*, the judge's conception of class fluidity refers to "many a young man"[108] and may not extend to young women.[109] Gender stereotyping is now rejected, and what education is necessary should be determined by the same standards for both young men and young women.

CONCLUSION

How we view education tells us volumes about our society. Exploration of the legal and sociological aspects of the education of infants reveals, embedded in the law, acceptance of discredited views on such issues as parental power over infant children, continued separation of the classes, and the purpose of education.

We should reconsider the assumptions underlying the cases concerning infants' contracts for education. As society changes, so must our view of what types of education can be necessaries. A college education is as much a necessary today as a common school education was in 1844. Even if it is appropriate for the law to play a role in the determination of the allocation of limited educational resources, it should be careful not to establish public policy that entrenches the status quo simply because of tradition. The minds of infants are our most valuable resource and should be nurtured to achieve the highest goals of which they are capable without regard to parental control, social status, and gender. Changes should therefore be considered in statutory law, common law, and equitable principles.

The babes in briefs are our hope for the future. In today's American society their education, including a college education, is necessary and should be recognized as such by the law.

ENDNOTES

1. Judges deciding contracts cases usually rely on recent opinions from the same jurisdiction. In this area of the law, perhaps due to the relatively small number of reported cases, courts often cite old opinions from other jurisdictions; therefore, all cases discussed are treated as belonging to a single body of law.

2. This paper deals with contract law, but a growing body of divorce cases considers if education is a necessary to an infant and therefore the legal responsibility of the parent who pays support. Although the issue raised is whether education is a "necessary" and the cases are sometimes cited in contract cases, these are not cases in which an infant disaffirms a contract. There is overlap of public policy in these two scenarios, but also a difference. Whereas if education is found to be a necessary in disaffirmance cases infants pay for their education, in divorce cases such a finding results in payment by a parent. *See* Ogle v. Ogle, 275 Ala. 483, 156 So.2d 345 (1963); Ex parte Bayliss, 550 So.2d 986 (Ala. 1989); Haag v. Haag, 240 Ind. 291, 163 N.E.2d 243 (1968); Jonitz v. Jonitz, 25 N.J. Super 544, 96 N.Y.S. 422 (1930); Cohen v. Cohen, 82 N.Y.S.2d 513 (1948); Calogeras v. Calogeras, 10 Ohio St. 2d 441, 163 N.E.2d 713 (1959); Jackman v. Short, 165 Or. 626, 100 P.2d 860 (1941); Esteb v. Esteb, 138 Wash. 153, 244 P. 264 (1926).

3. Restatement, Second, Contracts § 14, comment a.

4. The Legal Status of Adolescents 1980 (U.S. Dept. of Health 1981). The reduction in the age of majority has apparently significantly reduced the number of cases concerning the contractual capacity of infants.

5. *See* 2 Williston on Contracts § 226; Restatement, Second, Contracts § 14.

6. Adamowski v. Curtiss-Wright Flying Serv., 300 Mass. 281, 15 N.E.2d 467 (1938).

7. International Text-Book Co. v. Doran, 80 Conn. 307, 68 A. 255, 256-57 (1907).

8. *See* 2 Williston § 327; 10 Williston § 1214.

9. Myers v. Hurley Motor Co., 273 U.S. 18, 47 S.Ct. 277 (1927). In some cases, what is apparently fraud may, in fact, not

be. The (form) contract in the International Text-Book correspondence-course cases "provided that a student not of age enrolling on the installment plan must furnish a written guaranty for the payment of the installments, signed by a parent, guardian, or other responsible party." There was no guarantor in *Doran* because, at the direction of the sales agent, Doran wrote "21" as his age when he was not yet 21. Therefore, there was neither innocent nor fraudulent misrepresentation because there was no scienter on the part of the infant and no reliance by the agent. International Text-Book Co. v. Doran, 80 Conn. 307, 68 A. 255, 256 (1907).

10. Adamowski v. Curtiss-Wright Flying Serv., 300 Mass. 281, 15 N.E.2d 467, 469 (1938).

11. International Text-Book Co. v. Doran, 80 Conn. 307, 68 A. 255, 256 (1907).

12. International Text-Book Co. v. Doran, 80 Conn. 307, 68 A. 255, 257 (1907).

13. Nielson v. International Textbook Co., 106 Me. 104, 75 A. 330, 331 (1909).

14. Restatement, Second, Contracts § 14, comment b.

15. The Model Minor Student Capacity to Borrow Act states that "Any written obligation signed by a minor sixteen or more years of age in consideration of an educational loan received by him from any person is enforceable as if he were an adult at the time of execution ...." Uniform Laws Annotated, Master Ed., Vol. 13. This statute has been adopted by Arizona, Mississippi, North Dakota, Oklahoma, and Washington. California adopted it in 1970, but repealed it in 1972. Other states, such as New York, have adopted similar statutes. "A contract hereafter made by an infant after he has attained the age of sixteen years in relation to obtaining a loan or extension of credit ... for the purpose of defraying all or a portion of the expenses of such infant's attendance upon a course of instruction in an institution of the university of the state of New York or any other institution for higher education ... may not be disaffirmed by him on the ground of infancy." N.Y. Educ. Law § 281 (McKinney 1990).

16. Middlebury College v. Chandler, 16 Vt. 683, 685-86 (1844).

17. Wallin v. Highland Park Co., 127 Iowa 131, 102 N.W. 839, 839 (1905).

18. Pardey v. American Ship-Windlass Co., 20 R.I. 147, 37 A. 706 (1897).

19. *Id.*

20. *Id.* at 706.

21. *Id.*

22. *Id.* at 707.

23. 2 Williston on Contracts § 240 at 51.

24. Siegel & Hodges v. Hodges, 9 N.Y.2d 747, 214 N.Y.S.2d 452, 452-53, 174 N.E.2d 533 (1961).

25. International Text-Book Co. v. Connelly, 206 N.Y. 188, 99 N.E. 722, 725 (1912). In *Pardey*, the court considered it relevant that "The contract ... was made with the sanction of [Pardey's] father." Pardey v. American Ship-Windlass Co., 20 R.I. 147, 37 A. 706, 707 (1897). "An infant is liable for necessaries suitable to his rank and condition, when he has no other means of obtaining them except by the pledge of his own personal credit. But if he is under the care of a parent or guardian, who has the means, and is willing to furnish him what is actually necessary, the infant can make no binding contract for any article whatever, without the consent of his legal protector and adviser." Kline v. L'Amoureux, 2 Paige (N.Y.) 419 (1931).

26. Middlebury College v. Chandler, 16 Vt. 683, 686 (1844).

27. 1 Cooley's Blackstone, 412 Attributed to Lord Coke in the plaintiff's brief in Middlebury College v. Chandler, 16 Vt. 683, 684 (1844); Kilgore v. Rich, 83 Me. 305, 22 A. 176, 176 (1891).

28. Pardey v. American Ship-Windlass Co., 20 R.I. 147, 37 A. 706, 707 (1897).

29. Sisson v. Schultz, 251 Mich. 553, 232 N.W. 253 (1930).

30. McKanna v. Merry, 61 Ill. 177, 178-79 (1871).

31. Piano tuning was found necessary for proper piano instruction. Sisson v. Schultz, 251 Mich. 553, 232 N.W. 253 (1930).

32. Walter v. Everard, 2 Q.B. 369, 376 (1891).

33. Sisson v. Schultz, 251 Mich. 553, 232 N.W. 253, 253 (1930).

34. 16 Vt. 683, 686 (1844).

35. Middlebury College v. Chandler, 16 Vt. 683, 686 (1844). *Accord* International Text-Book Co. v. Connelly, 206 N.Y. 188, 99 N.E. 722, 725 (1912).

36. Bear's Adm'x v. Bear, 131 Va. 447, 109 S.E. 313 (1921); Sisson v. Schultz, 251 Mich. 553, 232 N.W. 253, 253 (1930).

37. Gayle v. Hayes' Adm'r & Als., 79 Va. 542, 547 (1884).

38. Bear's Adm'x v. Bear, 131 Va. 447, 109 S.E. 313, 315 (1921).

39. 251 Mich. 553, 232 N.W. 253 (1930).

40. Apparently, this case was based not on the minor daughter's quasi-contractual liability, but on a father's responsibility at common law for his infant child's necessaries. Liability in this 1930 case does not extend to the mother even though she expressly assented to the contract.

41. Sisson v. Schultz, 251 Mich. 553, 232 N.W. 253, 253 (1930).

42. De Moss v. Giltner, 5 Ky. Rep. 691 (1884).

43. St. John's Parish v. Bronson, 40 Conn. 75, 76 (1873).

44. *Id.*

45. Here, as in *Sisson*, the suit is against the father for the education of an infant child based on a contract formed by the child and her mother.

46. St. John's Parish v. Bronson, 40 Conn. 75, 76-77 (1873).

47. In the context of the obligations of divorced parents, "[t]he furnishing of a private college education to one's children is not a necessary for which [a parent] can be obligated to pay unless 'unusual circumstances' warrant such a holding." Hawley v. Doucette, 349 N.Y.S.2d 801 (1973).

48. Middlebury College v. Chandler, 16 Vt. 683, 686 (1884).

49. International Text-Book Co. v. Connelly, 206 N.Y. 188, 99 N.E. 722, 725 (1912).

50. Moskow v. Marshall, 271 Mass. 302, 171 N.E. 477, 479 (1930).

51. Sisson v. Schultz, 251 Mich. 553, 232 N.W. 253, 253 (1930). This question was also raised, but not directly addressed, in *In re Johnstone's Estate*. 64 Ill. App. 2d 447, 212 N.E.2d 143 (App. Ct. 1965).

52. Esteb v. Esteb, 138 Wash. 174, 181, 244 P. 264, 266-67 (1926)("The rule in *Middlebury College v. Chandler* ... was clearly based upon conditions which existed at that time. An opportunity at that early date for a common school education was small, for a high school education less, and for a college education was almost impossible to the

average family, and was generally considered as being only within the reach of the most affluent citizens.... But conditions have changed greatly in almost a century that has elapsed since that time. Where the college graduate of that day was the exception, to-day such a person may almost be said to be the rule.... That it is the public policy of the state that a college education should be had, if possible, by all its citizens, is made manifest by the fact that the state of Washington maintains so many institutions of higher learning at public expense. It cannot be doubted that the minor who is unable to secure a college education is generally handicapped in pursuing most of the trades or professions of life, for most of those with whom he is required to compete will be possessed of the greater skill and ability which comes from such an education.")

53. "Hundreds of thousands of jobs, once performed creditably without a college degree, are going to college graduates today as employers take advantage of an oversupply of them.

College graduates are being found more and more among the nation's bakers, traveling salespeople, secretaries, bookkeepers, clerks, data processors and factory supervisors. And they are shutting out qualified high school graduates from many jobs, according to Labor Department officials, corporate executives and economists." N.Y. Times, 18 June 1990, at A1, col. 1.

54. In 1988, 58.9 percent of high school graduates ages 18-24 were attending or had attended college. Source: Bureau of Labor Statistics. "[R]oughly 25 percent of the work force" are college graduates. N.Y. Times, 18 June 1990, at A1, col. 1. The number of total annual college graduates rose from 27,410 in 1900, to 122,484 in 1929-30, to 999,548 in 1979-80. Source: Department of Education, Center for Education Statistics. The total United States resident population was 75,994,575 in 1900, 122,775,046 in 1930, and 226,545,805 in 1980. Source: Department of Commerce, Bureau of the Census. Therefore, as a percentage of the total resident population, total annual college graduates were .0361 in 1900, .0998 in 1930, and .4412 in 1980. By any measure, college graduates are far more common today than in 1930 and certainly than in 1844.

55. Middlebury College v. Chandler, 16 Vt. 683, 686 (1844).

56. Pardey v. American Ship-Windlass Co., 20 R.I. 147, 37 A. 706, 706 (1897).

57. *Id.* at 707. *See* Cooper v. Simmons, 7 H.& N. 707(1862)("[I]n which the indenture of apprenticeship provided for the instruction of the infant in the art of a rim and mortice cock maker, and it was held that the apprentice was held by his contract of service.")

58. Wallin v. Highland Park Co., 127 Iowa 131, 102 N.W. 839, 839 (1905). It is not clear whether the concession was made by the defendant or the court.

59. *Id.*

60. Mauldin v. Southern Shorthand & Business Univ., 126 Ga. 681, 55 S.E. 922 (1906).

61. Curtiss v. Roosevelt Aviation School, U.S. Aviation Rep. 133, Air L. Rev. 382, 382 (1934).

62. Adamowski v. Curtiss-Wright Flying Serv., 300 Mass. 281, 15 N.E.2d 467, 468 (1938).

63. Three cases from different states concern correspondence courses from the International Text-Book Co.. International Text-Book Co. v. Doran, 80 Conn. 307, 68 A. 255 (1907); Nielson v. International Textbook Co., 106 Me. 104, 75 A. 330 (1909); International Text-Book Co. v. Connelly, 206 N.Y. 188, 99 N.E. 722 (1912).

64. Nielson v. International Textbook Co., 106 Me. 104, 75 A. 330, 330-31 (1909).

65. Publishers Agency v. Brooks, 14 Mich. App. 634, 166 N.W.2d 26, 29 (Mich. Ct. App. 1968)(A "14 volume New American Educator Encyclopedia, a 2 volume Webster dictionary, a 4 volume science library, a 1 volume World Atlas, a 3 volume reference library and certain upkeep services ...." were purchased. The court determined that whether the books were a necessary was a question of fact for the jury.)

66. Sisson v. Schultz, 251 Mich. 553, 232 N.W. 253, 253 (1930).

67. Middlebury College v. Chandler, 16 Vt. 683, 686 (1844).

68. International Text-Book Co. v. Connelly, 206 N.Y. 188, 99 N.E. 722, 725 (1912).

69. Exodus 20:12, The Torah: The Five Books of Moses (1962).

70. Perhaps teaching of the decalogue is viewed as the most necessary education.

71. Cory v. Cook, 24 R.I. 421, 53 A. 315 (1902)("[E]nable him to earn a respectable and honest living in his chosen vocation ....")

72. Pardey v. American Ship-Windlass Co., 20 R.I. 147, 37 A. 706, 707 (1897).

73. Gayle v. Hayes' Adm'r & Als., 79 Va. 542, 547(1884) ("[C]ommon sense and prudence required that he be put to some business, so as to support himself.")

74. Middlebury College v. Chandler, 16 Vt. 683, 686 (1844).

75. 24 R.I. 421, 53 A. 315 (1902).

76. *Id.* at 316. This case deals with a father's duty to provide necessary education to his child.

77. Bear's Adm'x v. Bear, 131 Va. 447, 109 S.E. 313 (1921).

78. In re Johnstone's Estate, 64 Ill. App. 2d 447, 212 N.E.2d 143 (App. Ct. 1965).

79. *Id.* at 145.

80. See Borden v. Borden, 130 N.Y.S.2d 831 (1954). In this Manhattan child support case, the father was not required to pay for his child's education at a segregated private school when public school education was available. The court discussed at length the role of public schools in society and the importance of integration to the community citing Brown v. Board of Ed. of Topeka, 347 U.S. 483, 74 S.Ct. 686 (1954).

81. Cory v. Cook, 24 R.I. 421, 53 A. 315, 316 (1902).

82. Bear's Adm'x v. Bear, 131 Va. 447, 109 S.E. 313 (1921).

83. Middlebury College v. Chandler, 16 Vt. 683, 686 (1844). The court in *Sisson* noted that Schultz "owned a farm in Lapeer county where he and his family resided. He owned an automobile, paid his bills, and lived as comfortably as the ordinary farmer." 251 Mich. 553, 232 N.W. 253 (1930).

84. Nielson v. International Textbook Co., 106 Me. 104, 75 A. 330, 330 (1909).

85. International Text-Book Co. v. Connelly, 206 N.Y. 188, 99 N.E. 722 (1912). Called "[t]he leading case" in Sisson v. Schultz, 251 Mich. 553, 232 N.W. 253, 253 (1930).

86. International Text-Book Co. v. Connelly, 206 N.Y. 188, 99 N.E. 722, 724 (1912).

87. *Id.* at 725.

88. Gayle v. Hayes' Adm'r & Als., 79 Va. 542, 547 (1884).

89. *Id.*

90. 271 Mass. 302, 171 N.E. 477 (1930).

91. *Id.* at 478.

92. *Id.* at 479.

93. *Id.* at 478.

94. *Id.*

95. Adamowski v. Curtiss-Wright Flying Serv., 300 Mass. 281, 15 N.E.2d 467 (1938).

96. The court in *Sisson* said of the $5 fee for a piano tuning, "The amount involved is small and easily within the father's means." Sisson v. Schultz, 251 Mich. 553, 232 N.W. 253, 254 (1930).

97. Middlebury College v. Chandler, 16 Vt. 683, 686 (1844).

98. Sisson v. Schultz, 251 Mich. 553, 232 N.W. 253 (1930).

99. Moskow v. Marshall, 271 Mass. 302, 171 N.E. 477, 479 (1930).

100. Mauldin v. Southern Shorthand & Business Univ., 126 Ga. 681, 55 S.E. 922 (1906).

101. International Text-Book Co. v. Doran, 80 Conn. 307, 68 A. 255 (1907).

102. *Id.* at 256.

103. Whereas 22,173 men graduated from college in the United States in 1900, only 5,237 women graduated that year, a ratio of 4.23:1. By comparison, in 1979-80, 470,000 men and 465,000 women graduated, a ratio of 1.01:1. Source: Department of Education, Center for Education Statistics.

104. Sisson v. Schultz, 251 Mich. 553, 232 N.W. 253 (1930).

105. Mauldin v. Southern Shorthand & Business Univ., 126 Ga. 681, 55 S.E. 922 (1906).

106. St. John's Parish v. Bronson, 40 Conn. 75 (1873).

107. Middlebury College v. Chandler, 16 Vt. 683, 686 (1844).

108. Adamowski v. Curtiss-Wright Flying Serv., 300 Mass. 281, 15 N.E.2d 467 (1938). "Man" and "men" often meant "person" and "people", but the context of these usages suggests that the authors intended to be gender specific.

109. Mothers are discriminated from fathers in Sisson v. Schultz, 251 Mich. 553, 232 N.W.253 (1930) and St. John's Parish v. Bronson, 40 Conn. 75 (1873) in which the mothers enter into agreements for their children and the fathers were sued (either because the wives lacked contractual capacity or lacked property rights).

THE LIABILITY OF THE AGENT OF AN UNDISCLOSED OR PARTIALLY DISCLOSED PRINCIPAL

by

Gary K. Sambol*

Introduction

When an agent, acting within the scope of his authority on behalf of a principal, enters into a contract with a third party, the agent is usually not liable to the third party for the contract's performance.[1] However, under certain circumstances, an agent may be liable as a party to the contract. The purpose of this article is to discuss the rules of agency law which determine the liability of an agent who acts within the scope of his authority.[2] In the first part of this article, I present the general rules in the abstract. Next, I discuss the theoretical justifications for and the theoretical difficulties with these rules. Specifically, I attempt to point out the theoretical difficulties which arise when these rules are applied to cases where an agent negotiates a contract on behalf of a business which, unbeknownst to the third party, is owned by someone other than the agent, or if owned by the agent, is incorporated. I suggest that, in such cases, agent liability may result even where it is not a fair conclusion that the third party or the agent manifested an intent for the agent to be liable or that the third party relied on the liability of the agent. Finally, I discuss an approach found in a few cases which denies agent liability where it is not a fair conclusion that the third party dealt with the agent as an individual, rather than as an agent, or relied on his individual liability.

General Rules

Whether an agent is liable as a party to a contract made

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* Lecturer, Rutgers University School of Business - Camden and Rutgers University School of Law - Camden. I wish to thank Sherrie L. Gibble and Jay M. Feinman for their helpful comments on earlier drafts of this article.