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PARENT AND CHILD — DUTY OF MOTHER TO SUPPORT CHILD WHEN FATHER IS ALIVE — Plaintiff obtained a divorce from defendant, and at the time of the divorce voluntarily undertook to care for and support their twenty-one year old son, who was afflicted with tuberculosis and unable to support him-

self. The son resided with his mother until his death. She instituted this action against the father to recover for the care and support of the son from the time of the divorce until his death and for funeral expenses, relying upon a statute¹ imposing upon specified classes or relatives of poor persons a duty to maintain them, which statute the plaintiff contended imposed a duty upon the father to support their adult son while he was unable to support himself. *Held*, that the liability imposed by the statute was joint and several and that the plaintiff, in the absence of an express agreement, could not recover. *Tesch v. Tesch*, 65 S. D. 637, 277 N. W. 328 (1938).

Many states have enacted statutes for the relief of indigent persons, requiring them to be supported by their kindred within certain specified degrees, if those kindred are able to furnish support.² This differs from the duty of a parent to support a minor child in that it rests entirely on statute, is enforceable only by actions in compliance with the statutory provisions, and makes parents and children liable for the support of each other, under the conditions named, regardless of age.³ While there was some question at common law of the nature of the duty of a parent to support minor children, the better view today, supported by ample authority,⁴ is that the obligation is legal as well as moral. The primary duty to support rests upon the father,⁵ although a number of states have enacted legislation providing that husband and wife shall be jointly liable for necessities furnished the family. Under these statutes it would appear that to the extent therein provided the duty of the mother to support minor children is equal to that of the father.⁶ The question of the mother's duty to support minor children arises most frequently in cases where the parents have been divorced or separated, or where the father has died. In several cases it has been held that where the care and custody of minor children has been awarded to the mother in a divorce proceeding, or assumed by her, this carries with it the obligation to support them.⁷ Similarly, it has been held that where

¹ 1 S. D. Comp. Laws (1929), § 191, provides: "It is the duty of the father, the mother, and the children, of any poor person who is unable to maintain himself by work, to maintain such person to the extent of their ability."

² Mich. Comp. Laws (1929), § 8209; Mass. Gen. Laws (1932), c. 117, § 6; 62 Pa. Stat. Ann. (Purdon, 1930), § 1012; Ill. Rev. Stat. (1937), c. 107, § 1; 3 Mont. Rev. Codes (1935), § 5843.

³ *Duffy v. Yordi*, 149 Cal. 140, 84 P. 838 (1906); *Condon v. Pomeroy-Grace*, 73 Conn. 607, 48 A. 756 (1901); *Sanborn County v. Lutter*, 46 S. D. 363, 193 N. W. 55 (1923).

⁴ See TIFFANY, *DOMESTIC RELATIONS*, 3d ed., 322-324 (1921); *Porter v. Powell*, 79 Iowa 151, 44 N. W. 295 (1890); *Dunbar v. Dunbar*, 190 U. S. 340, 23 S. Ct. 757 (1902); *Rounds Bros. v. McDaniel*, 133 Ky. 669, 118 S. W. 956 (1909); *Treasurer & Receiver General v. Sermini*, 229 Mass. 248, 118 N. E. 331 (1918).

⁵ *Porter v. Powell*, 79 Iowa 151, 44 N. W. 295 (1890); *Alvey v. Hartwig*, 106 Md. 254, 67 A. 132 (1907); *Leibold v. Leibold*, 158 Ind. 60, 62 N. E. 627 (1902).

⁶ See Iowa Code (1935), § 10459; Mass. Gen. Laws (1932), c. 209, § 7; Minn. Stat. (1927), § 8620; N. H. Pub. Laws (1926), c. 290, § 4; Ore. Code (1930), § 33-206; S. D. Comp. Laws (1929), § 175; Tenn. Code (1932), § 8463.

⁷ *Brow v. Brightman*, 136 Mass. 187 (1883); *Brown v. Smith*, 19 R. I. 319, 33 A. 466 (1895); *Stone v. Duffy*, 219 Mass. 178, 106 N. E. 595 (1914).

the divorce was in consequence of the mother's fault and she has obtained custody of the children, the duty to support them rests upon her.⁸ But the better view is that the liability of the parent to support the minor children is not affected by divorce, and that the duty remains upon the parent primarily liable.⁹ Logic and reason favor the view that the right of minor children to look to their father for support should not be affected by the fortuitous circumstance that one or the other parent was at fault.¹⁰ In the event of the death of the father, the duty to support minor children devolves upon the widowed mother to the extent of her ability.¹¹ However, the widow is not bound to support her minor children out of her own property, if they have estates or incomes of their own, but is entitled to indemnity out of their estates for the money expended by her on their support and maintenance.¹² It has been asserted that the mother will be shown special favor in the allowance of indemnity out of children's estates for past maintenance and support and that the courts will not require so strict a showing as might be required of the father.¹³ The general rule is that this liability of a parent for support of children ceases upon the child's coming of age, and that there is no duty upon either a father or mother, in the absence of statute, to support an adult child.¹⁴ However, where a child is so mentally or physically defective as to be unable to provide for himself and continues to reside in the custody and care of his parent or parents, it has been held that the duty of the parent

⁸ *Hyde v. Leisenring*, 107 Mich. 490, 65 N. W. 536 (1895).

⁹ *In re Application for Support of Minor Children*, 164 Iowa 208, 145 N. W. 467 (1914); *Rowell v. Rowell*, 97 Kan. 16, 154 P. 243 (1916); *Gilley v. Gilley*, 79 Me. 292, 9 A. 623 (1887); *Alvey v. Hartwig*, 106 Md. 254, 67 A. 132 (1907); *Pretzinger v. Pretzinger*, 45 Ohio St. 452, 15 N. E. 471 (1887); *De Brauwere v. De Brauwere*, 203 N. Y. 460, 96 N. E. 722 (1911). The cases commonly hold that a mother may either sue the father directly for support of the children or may reopen the divorce proceeding and obtain a decree directing him to compensate for their support. In this connection, see note in 38 L. R. A. (N. S.) 508 (1912).

¹⁰ *Gilbert v. Gilbert*, 149 Ky. 638, 149 S. W. 964 (1912); *White v. White*, 169 Mo. App. 40, 154 S. W. 872 (1913). In these cases the wife was at fault, but the court held that the father had a duty to support minor children although they were in her care and custody.

¹¹ *Welch v. Welch*, 200 N. Y. S. 652 (S. Ct. 1923); *Girls' Industrial Home v. Fritchey*, 10 Mo. App. 344 (1881); *Alling v. Alling*, 52 N. J. Eq. 92, 27 A. 655 (1893).

¹² *In re Besondy*, 32 Minn. 385, 20 N. W. 366 (1884); *Mowbry v. Mowbry*, 64 Ill. 383 (1872); *Englehardt v. Yung's Heirs*, 76 Ala. 534 (1884); *Pyatt v. Pyatt*, 46 N. J. Eq. 285, 18 A. 1048 (1890).

¹³ *In re Besondy*, 32 Minn. 385, 20 N. W. 366 (1884); *Ellis v. Soper*, 111 Iowa 631, 82 N. W. 1041 (1900). In connection with the right of the mother to compensation from child's estate for value of support furnished, see 28 MICH. L. REV. 211 (1930).

¹⁴ *McCafferty v. Flinn*, 14 Del. Ch. 307, 125 A. 675 (1924); *Studebaker Bros. Mfg. Co. v. De Moss*, 62 Ind. App. 635, 113 N. E. 417 (1916); *Wright v. Coleman*, 137 Miss. 699, 102 So. 774 (1925); *In re Willis' Estate*, 94 Misc. 29, 158 N.Y.S. 985 (1916); *Treasurer & Receiver General v. Sermini*, 229 Mass. 248, 118 N. E. 331 (1918).

to support continues even though the child has come of age.¹⁵ Just how far this doctrine extends, in the absence of express statutes providing for the support of the poor or the insane, is not clear. It has been rejected in an action by a third party against the father to recover for the support of an insane adult child,¹⁶ and in an action by the mother to recover from the estate of the father for support and care rendered an incompetent adult child subsequent to the divorce of the father and mother.¹⁷ In the principal case the court referred to a statute¹⁸ providing that one parent is not bound to compensate the other parent for the voluntary support of his child without an agreement for compensation. In view of this statute the doctrine of continuing duty to support an incompetent adult child would not be applicable to an action by the mother against the father, based upon the theory that the obligation of the father was primary and unaffected by the divorce. Accordingly, the decision rests upon the interpretation of the poor law as imposing joint and several liability without restriction of age, and would appear to be correct.

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¹⁵ *Schultz v. Western Farm Tractor Co.*, 111 Wash. 351, 190 P. 1007 (1920) (crippled son held entitled to share in judgment recovered for death of father measured by need for support both before and after reaching majority); *Rowell v. Town of Vershire*, 62 Vt. 405, 19 A. 990 (1890) (father of feeble minded adult daughter held not entitled to recover from town for her support); *Crain v. Mallone*, 130 Ky. 125, 113 S. W. 67 (1909) (money expended by a mother in care of an adult child of unsound mind held not chargeable against him as an advancement); *Gaydos v. Domabyl*, 301 Pa. 523, 152 A. 549 (1930) (right of demented adult son to recover damages for wrongful death of mother held to turn on whether he was residing with her, in which case she would have duty to support).

¹⁶ *Central Ky. Asylum v. Knighton*, 113 Ky. 156, 67 S. W. 366 (1902).

¹⁷ *In re Stephenson's Estate*, 216 Mich. 320, 185 N. W. 669 (1921).

¹⁸ 1 S. D. Comp. Laws (1929), § 193: "A parent is not bound to compensate the other parent or a relative for the voluntary support of his child without an agreement for compensation, nor to compensate a stranger for the support of a child who has abandoned the parent without just cause."