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## INTRODUCTION

The onrush of statutory and decisional law speaking to the joint issue of juvenile emancipation and constitutional rights is a matter of common knowledge.[1] The resulting enlargement of the canopy protecting the personal rights and privileges of

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1. Recent cases of special note on the subject include: Goss v. Lopez, 419 U.S. 565 (1975) (suspension from school without notice or hearing denies student due process of law); In re Roger S., 19 Cal. 3d 655, 566 P.2d 997, 139 Cal. Rptr. 861 (1977) (minor child fourteen years of age or older has a right to a hearing before his parents may have him put into a state mental hospital); Planned Parenthood of Mo. v. Danforth, 428 U.S. 52 (1975) (right of a minor to have an abortion during the first trimester of pregnancy); Carey v. Population Servs. Int'l., 97 S. Ct. 2010 (1977) (right of children under sixteen years of age to purchase contraceptives); Tinker v. Des Moines School Dist., 393 U.S. 503, 511 (1968) (students in school as well as out of school are "persons" under the constitution).

minors now incorporates most of those guarantees associated with the area of criminal law.[2] However, even though juvenile rights have expanded tremendously in certain areas of the law, two glaring statutory "Achilles heels" remain in the California Civil Code which deserve immediate legislative and judicial attention.[3] In short, while the child proceeds to obtain the same constitutional rights and guarantees as an adult, the minor remains an economic slave to his or her parents under current California law.

Historically the touchstones of the indenturing of children in California are three-fold. First, the wording of Sections 197 and 5118 of the California Civil Code, speaking of the parent's entitlement to the child's earnings; second, the restricted applicability of section 36.1 of the California Civil Code, granting the superior court jurisdiction only where the minor's contract is submitted to the court for approval;[4] and third, the surprising

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2. *E.g.*, Kent v. United States, 383 U.S. 541 (1966) (waiver hearing of juvenile court jurisdiction must measure up to the essentials of due process and fair treatment); In re Gault, 387 U.S. 1 (1966) (juvenile court adjudication of delinquency must comport with the requirements of due process; child has right to appointed counsel where he cannot afford one; constitutional privilege against self-incrimination is applicable to juvenile proceedings; absent a valid confession, a juvenile must be afforded the rights of confrontation and sworn testimony of witnesses available for cross-examination); In re Winship, 397 U.S. 358 (1970) (proof beyond a reasonable doubt as required by the due process clause is necessary when a child is charged with an act that would constitute a crime if committed by an adult); In re Michael M., 11 Cal. App. 3d 741, 89 Cal. Rptr. 718 (1970) (plea of guilty in a juvenile proceeding may not be accepted unless the defendant affirmatively waives his privilege against self-incrimination and confrontation on the record); In re M.G.S., 267 Cal. App. 2d 329, 72 Cal. Rptr. 808 (1968) (due process of law is a requisite to the constitutional validity of juvenile court proceedings); People v. Lara, 67 Cal. 2d 365, 432 P.2d 202, 62 Cal. Rptr. 586 (1967) (minor's age does not render him incapable of waiving his rights); People v. Olivas, 17 Cal. 3d 236, 551 P.2d 375, 131 Cal. Rptr. 55 (1976) (juvenile may not be held by the Youth Authority for a term exceeding that which might be imposed upon an adult misdemeanant committing the same offense); In re Ricky H., 2 Cal. 3d 513, 468 P.2d 204, 86 Cal. Rptr. 76 (1970) (waiver of counsel in fear of parental reprisal invalid); In re Dana J. v. Superior Court, 4 Cal. 836, 484 P.2d 595, 94 Cal. Rptr. 619 (1971) (minor entitled to a free transcript of trial for use on appeal if he personally is unable to afford counsel without regard to his parents' financial status); In re Jean M., 16 Cal. App. 3d 96, 93 Cal. Rptr. 679 (1971) (sufficiency of evidence for determination that a minor had knowingly been about a place in which narcotics were unlawfully used).

3. These are sections 197 and 5118 of the California Civil Code. For text, *see* notes 8-9, *infra*, and accompanying text.

4. CAL. CIV. CODE § 36.1 (West 1954) provides:

> In any order made by the superior court approving a contract of a minor for the purposes mentioned in section 36 of this code, the court shall have power, notwithstanding the provisions of any other statutes, to require the setting aside and preservation for the benefit of the minor, either in a trust fund or in such other savings plan as the court shall approve, of such portion of the net earnings of the minor, not exceeding

lack of ability to enforce the law.[5] Furthermore, the struggle for economic emancipation of the minor child has become more difficult as a result of California courts' continued reliance upon a distinction between "wages" and "property" of the child.

Before addressing a remedy, this article shall examine the problem in more detail and propose that the legislative and judicial intention to allow minor children to retain their own earnings already exists. In the process, the inadequacy of the present statutory solutions, the inviability of a distinction between "wages" and "property" of a child and the need for greater protection of children's earnings will be presented.

## THE PROBLEM

### *Civil Code Sections 197 and 5118*

At common law, the services and earnings of a minor child belonged absolutely to the child's father while the child lived with and was supported by him.[6] This common law parental prerogative was early accepted in the United States as part of the traditional law of England. With Sections 197 and 5118 of the Civil Code, California stands with virtually every other jurisdiction in the United States in holding that the parent having legal custody and control of his or her unemancipated minor child has a right to the child's services and earnings.[7]

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one-half thereof, as the court may deem just and proper, and the court may withold approval of such contract until the parent or parents or guardian, as the case may be, shall execute and file with the court his or their written consent to the making of such order. For the purposes of this section the net earnings of the minor shall be deemed to be the total sum received for the services of the minor pursuant to such contract less the following: All sums required by law to be paid as taxes to any government or governmental agency; reasonable sums expended for the support, care, maintenance, education and training of the minor; fees and expenses paid in connection with procuring such contract or maintaining the employment of the minor; and the fees of attorneys for services rendered in connection with the contract and other business of the minor.

Pragmatically, all contracts with minors must be submitted for the superior court's approval if protection from the minor's power to disaffirm the contract pursuant to Civil Code § 35 is to be obtained.

5. The California Codes prescribe no penalties for failure to obey the court order setting aside a portion of the minor's earnings in trust.

6. *See* J. MADDEN, HANDBOOK OF THE LAW OF PERSONS AND DOMESTIC RELATIONS § 120, at 403-07 (1931).

7. The following states endorse the general rule that the father, parent, or guardian having legal control and custody of an unemancipated minor child has

Section 197 of the Civil Code provides:

> The mother of an unmarried minor child is entitled to its custody, services and earnings. The father of the child, if presumed to be the father under subdivision (a) of Section 7004, is equally entitled to the custody, services and earnings of the unmarried minor. If either the father or mother be dead or unable or refuse to take the custody or has abandoned his or her family, the other is entitled to its custody, services and earnings.[8]

Civil Code Section 5118 provides: "The earnings and accumulations of a spouse and the minor children living with, or in the custody of, the spouse, while separate and apart from the other spouse, are the separate property of the spouse."[9]

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a right to the child's services and earnings: Williams v Williams, 202 Ala. 539, 1 So. 41 (1919); L.A.M. v. State, 547 P.2d 827 (Alas. 1976); Pickthall v. Steinfeld, 12 Ariz. 230, 100 P. 779 (1909); Lopez v. Waldrum Estate, 249 Ark. 558, 460 S.W.2d 61 (1970); Burge v. City & County of San Francisco, 41 Cal. 2d 608, 262 P.2d 6 (1953); McEntyre v. Jones, 128 Colo. 461, 263 P.2d 313 (1953); Kenure v. Brained & Armstrong Co., 88 Conn. 265, 91 A. 185 (1914); Kosciuszko Bldg. & Loan Ass'n. v. Konzan, 50 A.2d 786 (Del. 1947); Hunt v. Calacino, 114 F. Supp. 254 (D.C. Cir. 1953); Covey v. Eppes, 153 So. 2d 3 (Fla. 1963); Rhodes v. State, 76 Ga. App. 667, 47 S.E.2d 293 (1948); Tuckey v. Lovell, 8 Idaho 731, 71 P. 122 (1902); Ekendahl v. Svolos, 388 Ill. 412, 58 N.E.2d 585 (1945); Siebeking v. Ford, 128 Ind. App. 475, 148 N.E.2d 194 (1958); Vaupel v. Bellach, 261 Iowa 376, 154 N.W.2d 149 (1967); Ping Mining & Mill Co. v. Grant, 68 Kan. 732, 75 P. 1044 (1904); Cashen v. Riney, 239 Ky. 779, 40 S.W.2d 339 (1931); Lewis v. Southern Advance Bag & Paper Co., 147 So. 532 (La. 1933); Fuller v. Blair, 104 Me. 469, 72 A. 182 (1908); Lucas v. Maryland Drydock Co., 182 Md. 54, 31 A.2d 637 (1943); Detore v. Demers Bros., 312 Mass. 531, 45 N.E.2d 745 (1943); Fox v. Schumann, 191 Mich. 331, 158 N.W. 168 (1916); Miller v. Monsen, 228 Minn. 400, 37 N.W.2d 543 (1949); Gulf Refining Co. v. Miller, 153 Miss. 741, 121 So. 482 (1929); Gilman v. C.W. Dart Hardware Co., 42 Mont. 96, 111 P. 550 (1910); Mitchell v. Mosher, 362 S.W.2d 532 (Mo. 1962); Spomer v. Allied Elec. & Fixture Co., 120 Neb. 399, 232 N.W. 767 (1930); Warren v. Delong, 57 Nev. 131, 59 P.2d 1165 (1936); Lessard v. Great Falls Woolen Co., 83 N.H. 576, 145 A. 782 (1929); Caforo v. Caforo, 14 N.J. Misc. 331, 184 A. 779 (1936); Cole v. Jaeger, 80 N.Y.S.2d 92 (1947), *aff'd*, 78 N.Y.S.2d 381, 273 App. Div. 911 (1948), *appeal and rearg. denied*, 79 N.Y.S.2d 519, 273 App. Div. 1008 (1948); Goodyear v. Goodyear, 257 N.C. 374, 126 S.E.2d 113 (1962); 14 N.D. CENT. CODE § 09-18 (1971); Bluebird Baking Co. v. McCarthy, 36 N.E.2d 801 (Ohio 1935); Sweet v. Crane, 39 Okla. 248, 134 P. 1112 (1913); Potter v. Davidson, 143 Ore. 101, 20 P.2d 409 (1933); Gaydos v. Domobyl, 301 Pa. 523, 152 A. 549 (1930); Lottinville v. Dwyer, 68 R.I. 263, 27 A.2d 305 (1942); Lide v. Fidelity & Deposit Co. of Md., 191 S.C. 297, 4 S.E.2d 263 (1939); Hodkinson v. Parker, 70 S.D. 272, 16 N.W.2d 924 (1944); Smith v. Smith, 220 S.W.2d 627 (Tenn. 1949); Gulf, C. & S.F. Ry. Co. v. Ballew, 66 S.W.2d 659 (Tex. 1933); Chase v. Smith, 5 Vt. 556 (1833); Weade v. Weade, 153 Va. 540, 150 S.E. 238 (1929); American Prod. Co. v. Villwock, 7 Wash. 2d 246, 109 P.2d 570 (1941); Cook v. Virginian Ry Co., 97 W. Va. 420, 125 S.E. 106 (1924); Patek v. Plankinton Packing Co., 179 Wisc. 442, 190 N.W. 920 (1922); Kreigh v. Cogswell, 45 Wyo. 531, 21 P.2d 831 (1933).

Three jurisdictions appear to recognize that at a minimum, the earnings of a minor do not absolutely belong to the parent: Hahuna v. Unna, 6 Hawaii 485 (1884); Jaremillo v. Romero, 1 N.M. 190 (1857); Kuchenmeister v. Los Angeles & S.L.R. Co., 52 Utah 116, 172 P. 725 (1918).

8. CAL. CIV. CODE § 197 (West Supp. 1977).

9. CAL. CIV. CODE § 5118 (West Supp. 1978). Prior to its amendment in 1971, § 5118 stated that: "the earnings and accumulations of the wife, and of her minor

On their face, these code sections deprive the unmarried minor child absolutely of any right to remuneration such child may receive in return for the child's labor, in favor of vesting such right in the child's parent or parents. The parents retain the right to the child's earnings irrespective of the child's wishes. The child has no right to control the use of the funds, nor does the child acquire any interest in property purchased in part or in whole with his or her earnings.

Generally the basis for the rule entitling the parents to the child's earnings has been predicated on the reciprocal obligation of the parents to support the child. In discussing the father's right to a child's earnings, Justice Finch in *Wardrobe* v. *Miller*[10] cited that rationale as controlling authority, stating:

> The right to a child's services and earnings is reciprocal to the duty to support . . . . It is certainly perfect while the period of the child's nurture continues. But if this is all, it can be of little consequence, because the child's labor and services are for that period of little value; nor could compensation be thus afforded for the many years when the child was entirely helpless . . . . His right to their [his children's] services, like his right to their custody, rests upon the parental duty of maintenance, and it is said to furnish some compensation to him for his own services rendered to the child.[11]

Thus, where the parent has no legal duty to support the child,[12] the parent can claim no interest in the earnings of the child.[13]

### *Judicial Interpretation of Sections 197 and 5118*

The philosophy underlying Sections 197 and 5118 of the Civil Code provided the basis for the California courts to disallow the minor's interest in a series of early cases.

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children living with her or in her custody, while she is living separate from her husband, are the separate property of the wife." In its present form, § 5118 entitles whichever spouse who has custody of a minor child to that child's earnings.

10. 53 Cal. App. 370, 200 P. 77 (1921). *See* notes 24-25, *infra*, and accompanying text.

11. *Id.* at 375, 200 P. at 79.

12. *See, e.g.*, In re Marriage of Dawley, 17 Cal. 3d 342, 551 P.2d 323, 131 Cal. Rptr. 3 (1976) (apart from contractual agreement stepfather has no legal duty to support minor stepdaughter).

13. *See, e.g.*, Santos v. Santos, 32 Cal. App. 2d 62, 89 P.2d 164 (1939) (man living with a woman under belief that they were actually married when in fact they were not legally married could not claim right to share of services and earnings of minor children of the woman).

In *Macchi v. LaRocca*[14] the child was an intervenor in a suit commenced to obtain equal division of certain property acquired by the minor's natural father and a woman in the course of an unlawful marriage. The father admitted in his answer to the complaint that his minor child had earned approximately $5,600.00 during the period of cohabitation of the parties, and that the greater portion thereof was used by the father in the purchase of the property. The court found, however, that the father was entitled to use the child's earnings as he saw fit, and whether they were used to meet the household expenses or in the purchase of property was no concern of the child. "In the absence of an express agreement. . . the minor son acquired no interest in the property purchased in part with his earnings and no trust resulted in his favor."[15]

It might appear that the *Macchi* decision recognized the possibility, at least, of a minor acquiring some interest in property purchased with his earnings, if the prerequisite of an express agreement can be shown to the satisfaction of the court. As evidenced by the following cases, however, the practical difficulties of proving such an express agreement between parents and children make the possibility suggested in *Macchi*, of a minor acquiring an interest in his earnings, a virtual impossibility where the minor remains at home.

In *Smith v. Smith*,[16] the plaintiff, who was the son of the defendants, brought an action to recover a sum of money, alleged to have been turned over by him in small amounts during his minority and for a period of time thereafter to the defendants. He alleged that the wages and salary earned by him had been given to the defendants pursuant to an agreement, wherein the defendants had agreed to keep and invest the wages, salary, and income, preserving them until they should be returned to the plaintiff on demand. In finding that no such agreement existed, the court stated:

> It does not necessarily follow from the mere fact that a party has delivered money or property of any kind to another that the latter has agreed to return the same to the former. Indeed, in the absence of any showing to the contrary, the presumption is that money paid by one to another was due the latter, and that a thing delivered by one to another belonged to the latter.[17]

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14. 54 Cal. App. 98, 201 P. 143 (1921).
15. *Id.* at 100-01, 201 P. at 144.
16. 38 Cal. App. 388, 176 P. 382 (1918).
17. *Id.* at 392, 176 P. at 383. The *Smith* court also reaffirmed by implication the traditional rule that minor children do not have the unilateral privilege to emancipate themselves without the express or implied consent of their parents. *Id.* *See* note 48, *infra*, and accompanying text.

This "gratuitous service" rule was again applied in *Ruble v. Richardson*.[18] Plaintiff brought an action against the executor of the estate of her aunt for breach of an alleged contract to render services. The contract, alleged by the plaintiff, was an agreement wherein plaintiff would remain in the household of the aunt and act as a daughter and perform the duties of a daughter until the aunt should die. In return, the aunt was to amply provide for and adequately compensate her niece in her will. In rejecting evidence of express and implied promises of compensation, the court stated the rule as follows:

> Ordinarily, where services are rendered and voluntarily accepted, the law will imply a promise upon the part of the recipient to pay for them; but where services are rendered by members of a family, living in one household, to each other, or necessaries are supplied by one near relation to another, the law will presume that they were gratuitous favors merely, prompted by friendship, kindness and the relationship between them. And in such case, before the person rendering the service can recover, the express promise of the party served must be shown or such facts and circumstances as will authorize the jury to find that the services were rendered in the expectation of one of receiving, and by the other of making compensation therefor.[19]

In *Wood v. James*,[20] a similar claim was brought by the plaintiff against the estate of her mother to recover under an agreement to compensate her for services provided as a nurse. Although recognizing the general rule that a child who is living with his parent is not entitled to compensation for services rendered to his parent,[21] the court allowed the plaintiff to recover after finding that she had been called away from her own home in another country to nurse her mother, thus eliminating "the suspicion with which the courts sometimes look at claims of children against estate of deceased persons . . . ."[22]

From the foregoing it can be seen that despite the suggestion in *Macchi, supra*, that children need only present evidence of an express agreement to obtain an interest in their earnings, unless the minor child can overcome the "suspicion with which the courts sometimes look at claims of children,"[23] he or she will not

18. 188 Cal. 150, 204 P. 572 (1922).
19. *Id.* at 157, 204 P. at 575.
20. 15 Cal. App. 253, 114 P. 587 (1911).
21. *Id.* at 259, 114 P. at 575.
22. *Id.*
23. *Id.*

recover. The parental right to the child's earnings creates a strong presumption against such an agreement. This presumption was overcome in *James* only because the daughter could present independent witness testimony regarding the mother's agreement to pay for her daughter's services and the daughter's residence apart from her mother's house.

At times, the parent entitled to the custody and control of his or her children can exercise the right to receive the children's earnings or to recover their wages even when the children have left the parent's home. In *Wardrobe v. Miller*,[24] for example, the natural father was allowed to recover the reasonable value of his minor sons' services provided to their stepfather after the children had gone to live with their mother following an argument with their father.[25]

### THE INADEQUATE STATUTORY SOLUTIONS TO THE PROBLEM

In view of the absolute right of the parents to their children's earnings, the parents were, at common law, the proper persons to make a contract covering their children's services. However, practical difficulties arose with such a contract. First, since the child was not a necessary party to the contract, other means were required to induce the child to conform to its terms. Second, such a contract could not be specifically enforced. Third, the contract expired when majority was reached. Finally, even where the minor had executed his own contract, it was subject to the usual disabilities of any contract by a minor.[26]

In 1927, in an effort to meet these practical difficulties, especially with respect to motion picture contracts, section 36 of the Civil Code was enacted to provide a proceeding whereby the minor's contract could be made binding on the child.[27] The

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24. 53 Cal. App. 370, 200 P.77 (1921).

25. *Id.* at 375, 200 P. at 80. The opinion of the court, written by Presiding Justice Finch, emphasized both the fact that the natural father had not waived his right to the earnings of his sons and also the fact that the minor sons were not received into the stepfather's family as permanent members thereof, but rather were merely allowed to reside with them temporarily pursuant to an express agreement to that effect. The principles accepted as having a direct application to the case would have allowed the natural father to recover even if the children's work had been done against his express consent or even in the event that the stepfather had requested the father to take his children away and he had neglected to do so.

26. *See* Howell, *The Work of the 1939 California Legislature*, 13 S. CAL. L. REV. 1, 44 (1939).

27. CAL. CIV. CODE § 36 (West Supp. 1977) provides:

(a) A contract, otherwise valid, entered into during minority, cannot be disaffirmed upon that ground either during the actual minority of the

statute did not, however, depose the parents of their rights to the earnings under such a contract. Children remained the economic servants of their parents under such contracts until 1938, when, due largely to the controversy over the earnings of Jackie Coogan, the well-known child actor, Sections 36.1[28] and 36.2[29] of the Civil Code were added, giving the court approving a contract under section 36 the power to set aside up to one-half

person entering into such contract, or at any time thereafter, in the following cases:

(1) A contract to pay the reasonable value of things necessary for his support, or that of his family, entered into by him when not under the care of a parent or guardian able to provide for him or them; provided, that these things have been actually furnished to him or to his family.

(2)(i) A contract or agreement pursuant to which such person is employed or agrees to render artistic or creative services, or agrees to purchase, or otherwise secure, sell, lease, license or otherwise dispose of literary, musical or dramatic properties (either tangible or intangible) or any rights therein for use in motion prictures, television, the production of phonograph records, the legitimate or living stage, or otherwise in the entertainment field, where such contract or agreement has been approved by the superior court in the county in which such minor resides or is employed or, if the minor neither resides in or is employed in this state, where any party to the contract or agreement has its principal office in this state for the transaction of business.

(ii) As used in this paragraph, "artistic or creative services" shall include, but not be limited to, services as an actor, actress, dancer, musician, comedian, singer, or other performer or entertainer, or as a writer, director, producer, production executive, choreographer, composer, conductor or designer.

(3) A contract or agreement pursuant to which such person is employed or agrees to render services as a participant or player in professional sports, including, without being limited to, professional jockeys, where such contract or agreement has been approved by the superior court in the county in which such minor resides or is employed or, if the minor neither resides in or is employed in this state, where any party to the contract or agreement has its principal office in this state for the transaction of business.

(b) The approval of the superior court referred to in paragraphs (2) and (3) of subdivision (a) may be given upon the petition of either party to the contract or agreement after such reasonable notice to the other party thereto as may be fixed by said court, with opportunity to such other party to appear and be heard; and its approval when given shall extend to the whole of said contract or agreement, and all of the terms and provisions thereof, including, but without being limited to, any optional or conditional provisions contained therein for extension, prolongation or termination of the term thereof.

28. *See* note 4, *supra*, for text.

29. CAL. CIV. CODE § 36.2 (West 1954) provides:

The superior court shall have continuing jurisdiction over any trust or other savings plan established pursuant to section 36.1 and shall have power at any time, upon good cause shown, to order that any such trust or other savings plan shall be amended or terminated, notwithstanding the provisions of any declaration of trust or other savings plan. Such order shall be made only after such reasonable notice to the beneficiary and to the parent or parents or guardian, if any, as may be fixed by the court, with opportunity to all such parties to appear and be heard.

the minor's earnings in a trust fund or other savings plan for the benefit of the child.

While children receive a legally protected interest in their earnings under these statutes, the laws are not of universal application. By their terms, sections 36.1 and 36.2 apply only to contracts by the minor itself where the contract is submitted to the superior court for approval under Section 36 of the Civil Code. Hence, where parents contract for their children's services themselves, or where a contract executed by the children is not submitted to the superior court under section 36, absolute parental power over the children's earnings remains. While movie producers, corporate studios, or professional sports team owners may, in seeking economic security, habitually insist that their contracts with minors be submitted to the superior court for approval to prevent the minor's disaffirmance, these contracts concern only a small portion of working children. As one commentator suggested in an early analysis of the laws:

> [I]t would seem that a readjustment of the whole question of parental right to all the earnings of a minor child is in order. The concept of property right in the services and earnings of the minor child was never intended for the modern situations of child workers of exceptional ability. Indeed it is at least a question whether in regard to any children it is in accord with contemporary ideas.[30]

Even after the adoption of Sections 36.1 and 36.2 of the Civil Code, that portion of children's wages not set aside by the court for their benefit remains subject to unilateral appropriation by their parents.

## THE LEGISLATIVE AND JUDICIAL OBJECTIVE: PARENTAL SUPPORT OF THE CHILD INDEPENDENT OF THE CHILD'S ESTATE

California statutes make it clear that the parents are responsible for support of the child without any reference to the child's earnings. Section 196 of the Civil Code provides in part that "[t]he parent entitled to the custody of a child must give him support and education suitable to his circumstances."[31] Nowhere does it appear that the parents have discretion to use the children's earnings to support their children. Section 196(a) of the Civil Code states in part that "[t]he father as well as the mother of a child must give him support and education suitable to his circumstances. A civil suit to enforce such obligations may be maintained in behalf of a minor . . . ."[32] Again, there is

30. Note, *Recent California Legislation in the Law of Persons, Industrial Relations, and Social Welfare*, 28 CAL. L. REV. 450 (1940).

31. CAL. CIV. CODE § 196 (West Supp. 1977).

32. CAL. CIV. CODE § 196(a) (West Supp. 1977).

no discretion to resort to the child's earnings. In fact, the terms are mandatory, and it would be a perversion of the thrust of the statute to add "from the minor's own earnings". Section 199 of the Civil Code continues:

> The obligation of a father and mother to support their natural child under this chapter including, but not limited to, sections 196 and 206, shall extend only to, and may be satisfied only from the earnings and separate property from each, if there has been a dissolution of their marriage as specified by section 4350.[33]

To extrapolate from the above, the obligation for support must come from community earnings of the father and mother during marriage, not from the children's earnings. Additionally, Civil Code Section 207 states that "[i]f a parent neglects to provide articles necessary for his child who is under his charge, according to his circumstances, a third person may in good faith supply such necessaries and recover the reasonable value thereof from the parent."[34] Of cumulative and increasing significance, again note the utter lack of reference to any responsibility of the child to support itself. Section 205 of the Civil Code reiterates the ongoing primary responsibility of a parent for support of the child even after the parent's death.[35]

Finally, Civil Code Section 242 provides, "Every individual shall support his or her spouse and child and shall support his or her parent when in need. The duty imposed by this section shall be subject to the provisions of sections 196, 206, 246, 4700, 4801, and 5131 and 5132."[36] Despite repeated references by the courts to the obligation of support being reciprocal with the parental rights of section 197, section 242, strangely enough, makes no reference to that single statute which is the bulwark

33. CAL. CIV. CODE § 199 (West Supp. 1977). The term "dissolution," as employed in Civil Code § 4350, refers only to dissolution by virtue of death, divorce, or annulment. Hence, a mere de facto separation would not limit the parental obligation to support their unemancipated minor children to the separate property and earnings of each spouse under Civil Code § 199.

34. CAL. CIV. CODE § 207 (West 1954).

35. CAL. CIV. CODE § 205 (West Supp. 1977). Section 205 provides in part that:

> If a parent chargeable with the support of a child dies, leaving it chargeable to the county, or leaving it confined in a state institution to be cared for in whole or in part at the expense of the State, and such parent leaves an estate sufficient for its support, the supervisor of the county or the director of the state department having jurisdiction over the institution involved, as the case may be, may claim provision for its support from the parents' estate by civil action . . . .

36. CAL. CIV. CODE § 242 (West Supp. 1977).

of the parents' claim to the earnings of their minor children. These sections of the Civil Code are clearly indicative of the legislative intention that the child's earnings should not be the primary source of his or her support.

This objective is further supported by the provisions of Section 1504 of the California Probate Code giving the court the power to defray the costs of the support, maintenance, and education to parents of a minor, whose income is such as to provide for his support, maintenance and education in a manner more expensive than his parents can reasonably afford, out of the income of the minor's own property.[37] Even here there is reference to the need of a court order prior to a unilateral appropriation by the parents of any of the children's earnings. Under section 1504 the court must direct that an allowance be made to the parent before the child's property can be appropriated.[38]

The necessity of direct court supervision of the disposition of property belonging to a minor child is not unique to a parent's petition to apply the child's property towards his education and support. California Probate Code Section 1430 provides that where a minor has property belonging to him which does not exceed $2000.00 in value, the amount or property due the minor may be paid or delivered to a parent of the minor entitled to the custody of the minor to hold in trust for the minor until his majority, upon written assurance verified by the oath of such parent that the total estate of the minor, including the property to be paid or delivered, does not exceed $2,500.00 in value.[39]

Section 1430.5 of the same California Code states that where there is money belonging to the minor in excess of $2,000.00 but not exceeding $20,000.00, or where the sole asset of the minor's guardianship is money in excess of $2,000.00 but not exceeding $20,000.00, a parent of the minor entitled to his custody, or the person holding the money belonging to the minor, may file a verified petition in the superior court of the county where the minor resides, or in the superior court of the county having jurisdiction over the disposition of such money, requesting the

37. CAL. PROB. CODE § 1504 (West Supp. 1977).

38. *Id.* Section 1504 states in part:

> . . . the expenses of the support, maintenance and education of such minor may be defrayed out of the income of his or her own property, in whole or in part, *as judged reasonable, and as directed by the court* . . . . (emphasis added).

Civil Code § 201 provides a further limitation by specifying that only a "proper court" may make such an allowance. CAL. CIV. CODE § 201 (West Supp. 1977).

39. CAL. PROB. CODE § 1430 (West Supp. 1977).

court to take jurisdiction over the disposition of the property.[40] Section 1430.5 further provides that in such case the court may order a termination of any guardianship and that such money or property be deposited or invested, subject to withdrawal only upon order of the court, or the court may prescribe such other conditions as it deems in its discretion to be in the best interests of the minor.

Both of these sections of the Probate Code restrict the authority of the parent over the child's property. If the parent receives property under the authority of either section, he or she takes custody of the property solely as trustee for the minor. The parent acquires no rights in the child's property whatsoever. The only control that the parents may exercise over the property is that which the court has bestowed upon them.

Apart from such judicially granted authority, the legislature has also codified the principle that "[t]he parent as such has no control over the property of the child."[41] The fact that the child acquires the property while supported by the parent, or even as the beneficiary of property paid for by the parent, does not entitle the parent to an interest in the property.[42] The conclusion is unavoidable that the parental obligation of basic support and maintenance of the child under California statutory law is in fact independent of any parental right to the child's earnings.

Modernly it would seem that the legislative intention expressed in the statutes has been given full force and effect by the California judiciary.

> Notwithstanding the broad latitude permitted the trial court in support matters, and acknowledging the existence of conflicting views, we conclude that the soundest and most substantial statutory and judicial authority supports the rule that parents bear the primary obligation to support their child and that resort may be had to the child's own resources for his basic needs only if the parents are financially unable to fulfill that obligation themselves . . . . While section 246 (authorizing the court to consider the child's need, relative wealth,

40. CAL. PROB. CODE § 1430.5 (West Supp. 1977).

41. CAL. CIV. CODE § 202 (West 1954).

42. *See, e.g.*, Estate of Tetsubami Yano, 188 Cal. 645, 206 P. 995 (1922) (although Japanese alien was not legally qualified to either hold or to convey title to real property in 1922, his two year old daughter, born in the United States and thus a native American citizen, could rightfully hold title to real property in her name, even though the land was paid for, conveyed to her, and cultivated by her father).

> and income in determining the amount due for support) allows consideration of the child's independent wealth and income, this section does not authorize the court to relieve entirely a financially capable parent of his or her obligation to support the child . . . . Although the parent, if financially able, must provide the child's basic minimum support needs, the child's income may be used to supplement the parent's contribution in order to permit the child to live in a more expensive manner by way of special education, travel, etc. It follows as a corollary, however, that only if the parent is unable to provide minimum level support should the child's outside income relieve the parent entirely of his support obligation.[43]

In the case of *Osterberg v. Osterberg*,[44] the court appeared to adopt the principal that despite the technical wording of section 197,[45] the section can only be interpreted as a "right to" earnings, akin to the distinction, hearkening back to law school days, between "defeasible fees," "right to reenter" and "automatic reversion." In that case the father had agreed to convey property to the son in consideration of his aid and assistance in maintaining the home and farm, and in helping to educate his brothers and sisters. In discussing the father's defense to his son's claim, the court said:

> There is no merit in the contention that the deed was made without consideration since the agreement to convey the title was made during William's minority and that his father was entitled to his earnings, under section 197 of the Civil Code, until he reached the age of his majority . . . . The circumstances of this case indicate that the father waived his legal right to his son's wages during his minority.[46]

However, the historical acceptance of the dependency of the parental obligation of support upon the parental right to the child's earnings lead early courts to conclude that the right continued until relinquishment was effected by emancipation.

Emancipation was and is, basically, an economic doctrine which can occur at any chronological age to terminate the parent's duty of support, maintenance, and education, provided the minor is self-sufficient.[47] Traditionally, emancipation has been regarded as the prerogative of the parents. Children do not have the unilateral privilege to emancipate themselves. Without the express or implied consent of their parents, unmarried children remain in their custody and control until reaching the age of majority and the parents retain their rights to the children's earnings.[48]

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43. Armstrong v. Armstrong, 15 Cal. 3d 942, 947-48, 544 P.2d 941, 944, 126 Cal. Rptr. 805, 808 (1976).

44. 68 Cal. App. 2d 254, 156 P.2d 46 (1945).

45. *See* note 8, *supra*, and accompanying text.

46. 68 Cal. App. 2d 254, 260, 156 P.2d 46, 49-50 (1945).

47. *See generally* 32 CAL. JUR. 3d *Family Law* § 201 (1977).

48. *See, e.g.*, Smith v. Smith, 38 Cal. App. 388, 176 P. 382 (1918) (no emancipation found by court where the only evidence of parents' relinquishment of

In 1965, however, one court, reasoning in *County of Alameda v. Kaiser*,[49] rejected the entire concept of emancipation by agreement and found the concept irrelevant to the parental obligation of support. The court then went on to explain:

> The term "emancipation" implies treatment of the individual as a chattel. Slavish adherence to definition of the word, perhaps carelessly adopted in the first place, has lead some jurisdictions to infer that the obligations of the parent to his child are based wholly upon his right to the child's earnings, and that relinquishment of the right requires release from the liability. This "rule" has been contradicted or questioned by text writers . . . .[50]

If the "rule" retained any vitality, it was destroyed in *Bryant v. Swoap*[51] where the court found that the parental duty to support their needy children unable to provide for themselves by work persists even if the child is emancipated or reaches the age of majority.[52]

In no instance do the statutes or decisions provide that the earnings of a child may be used for his support. They merely refer to use of the child's property as a supplemental means of improving the minor's lifestyle by use of funds under direct court supervision.

> The law is well settled that the primary duty to support a minor rests upon his parents, and that the estate of the minor can only be resorted to where the parents are unable to fulfill the obligation in whole or in part. (Citations.) Parental liability for child support is not affected by the fact that the child is possessed of property and has an estate of his own. Parents are primarily liable for the support of their children, and the children's estates may not be resorted to for that purpose so long

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right to minor child's earnings was testimony of child himself) (*see* notes 12-13, *supra*, and accompanying text; Slater v. California State Auto Ass'n, 200 Cal. App. 2d 375, 19 Cal. Rptr. 290 (1962) (partial emancipation in form of relinquishment to minor son of his earnings while in military service found where parents at no time claimed any interest in those earnings or in the automobile purchased by the son with those earnings).

49. 238 Cal. App. 2d 815, 48 Cal. Rptr. 343 (1965). In *Kaiser*, a mother was held to be liable for the medical expenses of her son despite the fact that he was twenty years old, was living apart from his mother, and had previously been employed.

50. *Id.* at 817, 48 Cal. Rptr. at 344.

51. 48 Cal. App. 3d 431, 121 Cal. Rptr. 867 (1975).

52. In *Swoap*, the "emancipated" daughter was fifteen when married and was legally divorced within a period of one year thereafter, returning home to live with her parents. The court based its ruling on Civil Code § 206 which states in part: "It is the duty of the father, the mother . . . of any person in need who is unable to maintain himself by work, to maintain such person to the extent of their ability. . . ." CAL. CIV. CODE § 206 (West Supp. 1977).

as the parents are able to perform the duty of support and maintenance.[53]

Given such clearly affirmative statements of the law, it would seem that a minor child should surely be legally entitled to retain his or her own earnings. However, this has not been the case. Instead, the courts have chosen to make an artificial distinction between wages and property. Both the parents' and the child's "right to" the minor's earnings depends upon whether the sum is classified as "wages" or as "property" (including compensation for injuries), yet the distinction between "wages" and "property" (and property income) is not always easily recognized.

## THE DIFFICULTIES IN DETERMINING WHETHER THE CHILD'S ACCUMULATIONS ARE "WAGES" OR "PROPERTY"

The California Legislature has provided no clear, definitive statement distinguishing wages from property. Section 5118 of the Civil Code, for example, incorporates both the "earnings" and the "accumulations" of the child,[54] further clouding the issue of when an item is "property," to which the parent has no right, or "accumulations," to which the parent is entitled. Even the meaning of the word "earnings," used in the statute, has been broadened to include more than wages.[55] The problem of deciding whether the property belongs to the child or his parent becomes even greater when the property is acquired by means other than employment or investment. Nowhere is this classification problem better exemplified than in the field of tort law.

Parental immunity in tort was first recognized in the United States in Mississippi.[56] The doctrine was quickly adopted as the general rule. At an early date, California also recognized the right of the parent to recover from a third party for loss of an injured child's earnings.[57] Aside from the parents, the child had

53. In re Marriage of Cosgrove, 27 Cal. App. 3d 424, 432, 103 Cal. Rptr. 733, 738 (1972). *See also*, Armstrong v. Armstrong, 15 Cal. 3d 942, 544 P.2d 941, 126 Cal. Rptr. 805 (1976).

54. *See* note 9, *supra*, and accompanying text.

55. In re Marriage of Imperato, 45 Cal. App. 3d 432, 119 Cal. Rptr. 590 (1975). "The word 'earnings' is broader in scope than 'wages' and 'salary.' It can encompass income derived from carrying on a business as a sole proprietor where the earnings are the fruit or award for labor and services without the aid of capital." *Id.* at 437, 119 Cal. Rptr. at 593.

56. Hewlett v. George, 68 Miss. 703, 9 So. 885 (1891).

57. Fennerty v. Cummings, 132 Cal. App. 48, 22 P.2d 37 (1933). However, where the parent has emancipated the child, or has, as guardian in the child's action by pleading or testimony, waived his rights to the recovery or estopped

a separate right to recover for his injuries,[58] and a father suing as a guardian ad litem for loss of the child's earning capacity was estopped from suing on his own behalf.[59] At this time, it was possible to distinguish the causes of action against the third party between the parents' right to recover for loss of their child's earnings, the child's separate right to recover for his injuries (or property loss), and the child's recovery of his earnings through an action of his guardian ad litem (where a parent waives his rights to the child's earnings).

However, in 1959 California recognized the right of children to be free from willful misconduct on the part of a parent and allowed a child to sue his stepparent for an intentional tort.[60] More recently, in *Gibson v. Gibson*,[61] the courts further expanded the child's right to sue the parent in tort by permitting an unemancipated minor to sue his father for negligence.

These cases illustrate the impossibility of the continued viability of a scheme of classification between "property" of the child and "earnings" of the child. If the child sues the parent in tort and recovers for his injuries, must the court then allocate between compensation for injuries suffered by the child or to his or her property and compensation for lost earnings and services

himself from subsequently asserting such right, then the child is permitted to recover these items. *Id.* at 50, 22 P.2d at 38.

58. Durkee v. Central Pac. R.R., 56 Cal. 388 (1880). The parents' cause of action is for the loss of the child's services and earnings and for medical and other expenses proximately caused by the injury. However, the cause of action of the child is for those injuries caused which are personal to himself, such as pain and suffering (both physical and mental), disfigurement, and so forth. *Id.* at 392.

59. Girard v. Irvine, 97 Cal. App. 377, 275 P. 840 (1929).

60. Gillett v. Gillett, 168 Cal. App. 2d 102, 335 P.2d 736 (1959). In *Gillett*, an eight year old child was allowed to recover $30,000 in damages from her stepmother in a cause of action for assault and battery. The injury had necessitated the removal of the plaintiff's spleen and a kidney. *See generally*, Note, *Parental Liability to a Minor Child for Injuries Caused by Excessive Punishment*: Gillett v. Gillett, 11 HASTINGS L.J. 335 (1960).

61. 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971). Gibson overruled the previously settled rule of Trudell v. Leatherby, 212 Cal. 678, 300 P. 7 (1931), that an unemancipated minor has no cause of action against his parents, or one standing *in loco parentis* toward him, for a tort based on simple negligence The rationale of Gibson, as expressed by Justice Sullivan, was that "when there is negligence, the rule is liability, immunity is the exception . . . in the absence of statute or compelling reasons of public policy." *Id.* at 922, 479 P.2d at 653, 92 Cal. Rptr. at 293.

of the child which the parents may demand? Such a result would be absurd and was clearly not intended by the legislature.

The difficulties of classifying money due the minor as property or earnings are further demonstrated by *Pollock v. Industrial Accident Commission*.[62] In that case, a minor's employer had made payment on a Worker's Compensation claim directly to the minor, justifying the payment under Section 212 of the Civil Code[63] and Section 4650 of the Labor Code.[64] In answering the employer's contention, the court stated:

> The expression "as wages" found in section 9(b) of the [Workmen's Compensation] Act [Labor Code section 4650] does not mean that such disability payments, or any award of the commission, shall constitute wages, or that such payments shall constitute "wages" as that term is used in section 212 of the Civil Code. Obviously an award for injury under the act is not paid to the employee as wages, but as compensation for the injury.[65]

The court then when on hold that, under the provisions of the Probate Code, the employer's indebtedness had not been discharged.

The California Supreme Court in *Pollock* found it "obvious" that compensation for injury was not paid as "wages" under Section 212 of the Civil Code.[66] Later the California Legislature adopted, in language substantially similar to section 212, Section 3605 of the Labor Code.[67] Section 3605 provides that compensation due a minor can be paid directly to him until his parents or guardian give written notice of their claim to such compensation to the insurance carrier or employer. However, under Section 202 of the Civil Code, the parent as such has no control over the child's property.[68] Therefore, in adopting Section 3605 of the Labor Code, the legislature must have intended one of two alternatives: that compensation for injuries be reclassified as "wages"; or that the claim of the parent or guardian to the compensation be subject to the provisions of the Probate Code, wherein the proceeds are delivered to the parent or guardian in trust for the minor.

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62. 5 Cal. 2d 205, 54 P.2d 695 (1936).

63. CAL. CIV. CODE § 212 (West 1954). Section 212 authorizes an employer to pay wages of the minor to such minor until the employer receives notice that the minor's parent or guardian claims them.

64. CAL. LABOR CODE § 4650 (West 1971). Section 4650 provides that where an injury causes temporary disability, a "disability payment which shall be payable for one week in advance as wages" shall be paid to the employee.

65. 5 Cal. 2d 205, 209, 54 P.2d 695 at 697.

66. *Id.*

67. CAL. LABOR CODE § 3605 (West 1971).

68. *See* note 4, *supra*, and accompanying text.

Under the provisions of the California Probate Code, debts due a minor, other than wages, cannot be discharged by payment to the minor. Hence, for example, when a minor has a disputed claim for damages against a third person, Section 1431 of the Probate Code allows either parent (or the parent having the care, custody or control of the minor) to compromise or execute a covenant not to sue on such claim.[69] Before such a compromise or covenant is valid, however, section 1431 specifies that it must be approved by the superior court of the county in which the minor resides. The court in its discretion may order that the funds be deposited or invested, and until such deposit or investment is made, the compromise or covenant is not effective.

Where the court approves a compromise or a covenant not to sue on a minor's disputed claim for damages, Probate Code Section 1510[70] provides that where the value of the property to be paid under the court's approval does not exceed $10,000.00, the court may, in addition to directing the appointment of a guardian of the minor's estate or the deposit or investment of such funds, allow all or any part of the money or the property be paid or delivered to a parent of the minor without bond, if the amount does not exceed $1,000.00 and the terms and conditions of Section 1430 of the Probate Code[71] are met. Even in this instance, however, where the parent of the child receives the proceeds, Section 1432 of the California Probate Code requires the parent to account for any such funds received when the child reaches the age of majority.[72]

Where the value of the property to be paid exceeds $10,000.00 and there is no guardian of the minor's estate, section 1510 requires that the court must either appoint a guardian and order the property to be paid to him, or that it must direct that the proceeds due the minor be invested or deposited, subject to withdrawal only upon order of the court. Furthermore, section 1510 expressly gives the court the power to prescribe such conditions as it may deem to be in the best interests of the minor and to retain jurisdiction over any part of the money paid,

69. CAL. PROB. CODE § 1431 (West Supp. 1977).
70. CAL. PROB. CODE § 1510 (West Supp. 1977).
71. *See* note 39, *supra*, and accompanying text.
72. CAL. PROB. CODE § 1432 (West 1956).

delivered, deposited, or invested until the minor reaches the age of eighteen years. Nowhere does this legislation express any intention that the parents of the unemancipated minor should have a right by virtue of either section 197 or section 5118 of the Civil Code to appropriate even a portion of the minor's recovery for their own use.

It would therefore seem entirely inconsistent with the judicial interpretation of the meaning of compensation and the legislative intent, as expressed in the Probate Code, to assume that Section 3605 of the Labor Code was intended to allow the minor's recovery for injury to be unilaterally appropriated by his parent or guardian. Rather, it seems more likely the statute was adopted subject to the provisions of the Probate Code in an effort to prevent possible double recovery by both the minor and his parent or guardian in lieu of *Pollock*, and to insure that the minor child actually receives the benefit of such compensation.

Furthermore, in light of Section 202 of the California Civil Code and the foregoing analysis, it would appear that expanding the provisions of the Probate Code to protect children's earnings (derived from any source) would surely be more reasonable and equitable than predicating such protection upon a continued reliance on a classification scheme of "wages" and "property." Such a scheme while perhaps theoretically achievable is, in practice, impossible to accomplish. To disallow protection simply because the child's earnings cannot be conclusively shown to be "property" is entirely unfair and contrary to the spirit and intention of the Probate Code.

## CONCLUSION

The writers are convinced beyond a peradventure of doubt that the glaring inequities inherent in Civil Code Sections 197 and 5118 demand immediate corrective action on the part of the legislature or an affirmative declaration on the part of the judiciary that the laws are intended to be subject to the provisions of the California Probate Code protecting the child's interest in his property. As was initially pointed out, one need only venture into the burgeoning field of juvenile law to observe the continuing recognition of minors' constitutional rights.[73] In the face of such a direction, can Sections 197 and 5118 of the Civil Code be considered viable? The sections are reminiscent of

73. *See* notes 1 and 2, *supra*.

servitude abolished by the Thirteenth Amendment to the Constitution.[74] In fact, their thrust bespeaks of more than involuntary servitude, approaching the level of slavery. Were the sections of the Civil Code to be blindly adhered to, would it not raise the issues, in a dissolution, of which parent retains "custody" of the earnings of the minor and whether the parent who loses custody of the child has been divested of his or her theretofore (alleged) vested rights in the child's earnings without due process of law?

The quagmire surrounding the distinction between "wages," "property" and "compensation for injuries" quickly engulfs the courts when such a distinction is attempted. Further, the underlying rationale predicated on the obligation of support, entitling the parent to his or her child's earnings no longer exists.[75] Instead it has been replaced by a policy of extending unto minors protection of their constitutional and financial rights. Clearly, therefore, the time has arrived wherein the minor's right to retain his own "wages" and "earnings," derived from any source, whether as the fruit of his labor or as income from property or compensation for injuries, should be recognized by both the legislature and the courts. The protections against the parents' unilateral appropriation of the child's property contained in the California Probate Code and discussed herein should be expanded to protect *all* of the child's property.[76]

74. U.S. CONST. amend. XIII, § 1, provides: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

75. This was the conclusion drawn by the courts in both County of Alameda v. Kaiser, 238 Cal. App. 2d 815, 48 Cal. Rptr. 343 (1965), and Bryant v. Swoap, 48 Cal. App. 3d 431, 121 Cal. Rptr. 867 (1975), discussed in the text accompanying notes 49-51, *supra*.

76. The authors believe that further reform may be necessary to accomplish this end, including the adoption of appropriate provisions in the California Penal Code to insure that the requirements of the Probate Code are complied with. It is not certain that the superior court's present powers of contempt will be adequate for enforcement.