

DOMESTIC RELATIONS

DIVORCE-LIABILITY OF HUSBAND TO SUPPORT CHILD
AWARDED TO WIFE

Due to the aggression of her husband, a wife obtained a divorce decree in 1900 which contained no provision for alimony or the support of their minor child the custody of whom was awarded to the wife. In 1941, upon the decease of her husband she submitted a bill for necessities furnished the adult child who had always been an incompetent. The court denied the wife relief holding the father was under no legal obligation.¹

The English common law recognized only a moral obligation for the father to furnish necessities to his minor children which could not be enforced except by proceeding under St. 43 Eliz. c. 2.² Despite the fact that a third party could not recover against the father for necessities,³ a mother divorced and having custody of a child, was allowed to sue for the child's support under the guise of her own necessities.⁴

A few American jurisdictions follow the English reasoning and absolve the father from liability even where there has been no separation of the parents. Such cases hold that to allow any other conclusion would be to deny the father the control of his own household, leaving him powerless to protect himself from the extravagance of his children.⁵ Although the poor laws require contribution from the parent, it has been held that these laws were intended only to indemnify the public against the maintenance of paupers and not to reimburse third persons who furnished goods on the father's credit.⁶

When a mother seeks to have a divorce decree modified in order to provide for maintenance of a child in her custody, the reasons given by the courts to deny relief vary. Some courts have said that the duty of support is correlative with the right to the custody, services, society and

¹ *Brunswick v. First-Central Trust Co., Exr.*, 66 Ohio App. 242 (1940), Ohio Bar Mar. 17, 1941.

² MADDEN, *DOMESTIC RELATIONS* (1931) p. 384.

³ *Mortimore v. Wright* 6 M. & W. 482 (1840), Exch.; *Shelton v. Springett*, 11 C. B. 452 (1851), *Blackburn v. Mackey*, 1 Car. & P. 1 (1823) *Abbot, C. J.*—"The question deeply affects society; for if persons in trade are allowed to trust young men, and compel their fathers to pay them, any man who had a family might be ruined."

⁴ *Bazely v. Forder*, L.R. 3 Q.B. 559 (1868).

⁵ *Gordon v. Potter*, 17 Vt. 347 (1845); *In re Ganey*, 93 N. J. Eq. 389, 116 Atl. 19 (1921) *aff'd* 94 N. J. Eq. 502, 119 Atl. 925; *White v. Mann*, 110 Ind. 74, 10 N.E. 629 (1886); *McConnell v. Lamontagne*, 82 N.H. 423, 134 Atl. 718 (1926).

⁶ *Freeman v. Robinson*, 38 N.J.L. 383, 20 Am. Rep. 399 (1876); *Kelley v. Davis*, 48 N.H. 187, 6 Am. Rep. 499 (1870).

earnings of the child and once this is removed, the duty ceases,⁷ or that an award of the children to the mother accomplishes a transfer of parental duties as well as rights.⁸ It has also been held that the failure of the mother to request aid in the divorce decree operates as an estoppel,⁹ for the law presumes that every question involved in the suit in which the judgment was rendered was passed upon by the court, and that the claim for maintenance was decided adversely to the wife.¹⁰

The majority of courts in this country impose a duty on the father to support a minor child, the duty persisting after the divorce. The courts allow the decree to be modified whenever the circumstances of the case require it.¹¹ The reasons for the courts' conclusions differ. Some say that the obligation arises out of the parental status alone,¹² while others recognize that it is more practical for the father to be the provider.¹³ Some hold that a "natural duty" arises from the child's immaturity and inability to care for itself.¹⁴ It has been said that the design of statutes is to prevent the child from becoming a public charge.¹⁵ Some cases are based on an implied contract in which the mother is considered the agent of the father.¹⁶ There are decisions which insist that the mother has no right to incur expenses on the child's behalf until the father neglects or

⁷ *Husband v. Husband*, 67 Ind. 583, 33 Am. Rep. 107 (1879); *Weeks v. Morrow*, 40 Me. 151 (1855); *Iroquois Iron Co. v. Industrial Commission*, 294 Ill. 106, 128 N. E. 289, 12 A.L.R. 924 (1920) (child abandoned parent).

⁸ *Brown v. Smith*, 19 R.I. 319, 33 Atl. 466, 30 L.R.A. 680, (1895); *Fitler v. Fitler*, 33 Pa. 50 (1859); *Brow v. Brightman*, 136 Mass. 187 (1883); *Hall v. Green*, 87 Me. 122, 47 Am. St. Rep. 311, 32 Atl. 796 (1895).

⁹ *Burritt v. Burritt*, 29 Barb. (N.Y.) 124 (1859).

¹⁰ *Rich v. Rich*, 88 Hun. 566, 34 N. Y. Supp. 854, 68 N. Y. St. Rep. 823 (1895).

¹¹ *KEEZER, Marriage and Divorce* (2d ed. 1923) p. 419, 30 OHIO JUR., *Parent and Child*, Sec. 48; *Poland v. Poland*, 63 Wash. 597, 116 Pac. 2 (1911); *Duvall v. Duvall*, 215 Iowa 24, 244 N.W. 718, 83 A.L.R. 1242 (1932) (foster child); *Cordes v. Cordes*, 8 Ohio Dec. 670, 37 Ohio Law Bull. 225 (1896); *Campbell v. Campbell*, 14 Ohio L. Abs. 481 (1933) (the court saying that it had no jurisdiction to reduce amounts provided for in agreement but could increase the same); *Hoffman v. Hoffman*, 15 Ohio St. 427 (1864); *Monahan v. Monahan*, 14 Ohio App. 116 (1919); *Straub v. Straub*, 29 Ohio App. 373, 163 N.E. 590 (1928); *Heckert v. Heckert*, 57 Ohio App. 421, 11 Ohio O. 115, 14 N.E. (2d) 428 (1936).

¹² *Johnson v. Latty*, 210 Fed. 961 (1912), (where remarriage of the mother did not release the father from a duty to support a minor child); *Spain v. Spain*, 177 Iowa 249, 158 N.W. 529, L.R.A. 1917D 319, Ann. Cas. 1918E 1225 (1916); *Corbett v. Corbett*, 123 Ohio St. 76, 174 N.E. 10 (1930), aff'd 129 Ohio St. 543 (1935); *Barrett v. Barrett*, 44 Ariz. 509, 39 Pac. (2d) 621 (1934); 15 CORN. L.Q. 624 (1930).

¹³ *Porter v. Powell*, 79 Iowa 151, 44 N.W. 295, 7 L.R.A. 176, 18 Am. St. Rep. 353 (1890); *Alvey v. Hartwig*, 106 Md. 254, 67 Atl. 132, 11 L.R.A. (N.S.) 678, 14 Ann. Cas. 250 (1907).

¹⁴ *State ex rel Sherwood v. Sherwood*, 13 Ohio App. 403, 32 Ohio C.A. 518 (1921).

¹⁵ *Schuman v. State*, 6 Ohio N.P. 244, 9 Ohio Dec. 513 (1899).

¹⁶ *PARSONS, CONTRACTS*, Vol. I (9th ed. 1904) p. 307; *Spencer v. Spencer*, 97 Minn. 56, 105 N.W. 483, 2 L.R.A. (N.S.) 851, 14 Am. St. Rep. 695 (1906); *Burgoyne v. Smith*, 19 Ohio N.P. (N.S.) 75, 27 Ohio Dec. 56 (1916); *Barrett v. Barrett*, 44 Ariz. 509, 39 Pac. (2d) 621 (1934) *supra* not 12.

refuses to make suitable provision for the child,¹⁷ and that an express contract may be a requisite or at least the mother must request that the father furnish necessaries to the child.¹⁸ Earlier Ohio cases indicate that a father is bound at his peril to know when his minor children need further provision, and lack of notice will be no defense in an action of neglect.¹⁹

There is some question whether the duty is primarily the father's. The tendency toward imposing equal liability on the wife is shown by Ohio G. C. sec. 7997,²⁰ cited by the court in the principal case, as well as in Ohio G. C. sec. 10507-8.²¹ This thought is reiterated in Ohio G. C. sec. 8032 defining the rights and duties of parents separated or divorced.²² Despite the wording in the statutes, there is much authority interpreting the duty as being primarily on the father.²³ In *Pretzinger v. Pretzinger*,²⁴ a leading case, the court stated, "It is not the policy of the law to deprive children of their rights on account of the dissensions of their parents to which they are not parties; or to enable the father to convert his own misconduct into a shield against parental liability."

¹⁷ *Hickman v. Hickman*, 8 Ohio Dec. Rep. 602, 9 Ohio Law Bull. 55 (1883); *Hackenburg v. Hackenburg*, 17 Ohio C.C. (N.S.) 456, 32 Ohio C.D. 223 (1911) aff'd 88 Ohio St. 567 (1913).

¹⁸ *Christoff v. Christoff*, 6 Ohio C.C. 512, 3 Ohio C.D. 562 (1892); *Douglass v. Douglass*, 22 Ohio C.C. 423, 12 Ohio C.D. 439, aff'd 45 Ohio Law Bull. 378 (1899) (where divorce was due to the aggression of the mother); *Harker v. Wolff*, 42 Ohio App. 540, 182 N.E. 592 (1931) (but a provision had already been set for the child's support).

¹⁹ *Moore v. State*, 18 Ohio C.C. (N.S.) 482, 24 Ohio C.D. 487 (1910); *State v. Teal*, 77 Ohio St. 77, 83 N.E. 304 (1907).

²⁰ "The husband must support himself, his wife, and his minor children out of his property or by his labor. If he is unable to do so, the wife must assist him as far as she is able."

²¹ "The wife and husband are the joint natural guardians of their minor children and are equally charged with their care, nurture, welfare and education and the care and management of their estates. The wife and husband shall have equal powers, rights, and duties, and neither parent has any right paramount to the right of the other concerning the custody of the minor or the control of the services or the earnings of such minor, provided that if either parent, to the exclusion of the other, is maintaining and supporting the child, such parent shall have the paramount right to control the services and earnings of the child. Neither parent shall forcibly take a child from the guardianship of the parent legally entitled to the custody."

²² "When a husband and wife are living separate and apart from each other or are divorced and the question as to the care, custody, and control of the offspring of their marriage is brought before a court of competent jurisdiction in this state, they shall stand upon an equality as to the care, custody, and control of such offspring, so far as it relates to their being either father or mother thereof."

²³ *MADDEN, DOMESTIC RELATIONS* (1931) p. 383; *Gully v. Gully*, 184 S.W. 555; aff'd 171 Tex. 233, 231 S.W. 97, 15 A.L.R. 564 (1921); *Young v. Young*, 7 Ohio C.C. (N.S.) 419, 18 Ohio C.D. 179 (1905) (afterborn child); *Porter v. Powell*, *supra* note 13; *Sauer v. Sauer*, 69 Ohio St. 539, 70 N.E. 1130 (1903); *Alvey v. Hartwig*, *supra* note 13; *Industrial Commission v. Drake*, 103 Ohio St. 628, 134 N.E. 465 (1921); *Craner v. State*, 21 Ohio L.Abs. 260 (1936); (1930) 15 CORN. L.Q., 624.

²⁴ 45 Ohio St. 452, 15 N.E. 471, 4 Am. St. Rep. 542 (1895).

*Fulton v. Fulton*²⁵ reached a contrary result, but may be distinguished on the ground that the divorce was due to the aggression of the mother. *Quaere*, whether this distinction is based on equitable social policy?

If the ultimate liability is on the father, how long does it continue? Ohio G. C. sec. 7997 refers to minor children. The termination of such minority is fixed by statute at twenty-one years²⁶ and the cases do not modify this age limit.²⁷ Criminal statutes²⁸ set the penalty for violation of the duty.²⁹ The court in the principal case might have afforded relief for period of the incompetent's minority had the mother asked for the support money at an earlier date,³⁰ but the statute of limitations had already run in the instant case.

Does an adult child, by virtue of his incompetency, occupy a different status from other children past their minority? The problem must be clarified in order to know whether charity or the male parent will carry the burden. By statute in Ohio a parent is liable for support of a child who is an inmate of a state institution.³¹ In thirty jurisdictions it is provided that, if able, the parents are liable for the support of their poor children who are unable to support themselves. These statutes are applicable to indigent adult children³² and allow suit by the institution against the father's estate.³³ California has a statute which permits an adult child who is unable to support himself, to maintain an action of an equitable nature against the parent to enforce the statutory liability.³⁴ The common law recognizes a father's duty to furnish necessities to an unmarried adult child who is permitted to remain in the father's home

²⁵ 52 Ohio St. 229, 39 N.E. 729, 49 Am. St. Rep. 720, 29 A.L.R. 679 (1895).

²⁶ Ohio G. C. sec. 8023.

²⁷ 30 OHIO JUR., *Parent and Child*, Sec. 52; KEEZER, *Marriage and Divorce* (2d ed. 1923) pp. 423; Breuer v. Dowden, 207 Ky. 12, 268 S.W. 541, 42 A.L.R. 146 (1925) (where child subsequently became incompetent after reaching the age of majority); Van Doren v. Eby, Dayton 411 (Ohio, 1872); Thiessen v. Moore, 105 Ohio St. 401, 137 N.E. 906 (1922); Blake v. Blake, 20 Ohio L.Abs. 3 (1935); Mieszkalski v. Mieszkalski, 44 Ohio App. 152, 184 N.E. 709, 37 Ohio Law Rep. 435 (1932); 1928 Opns. Atty. Gen. 2282.

²⁸ Ohio G.C. sec. 1639-46; Ohio G.C. sec. 13008; Ohio G.C. sec. 12431; Ohio G.C. sec. 12790.

²⁹ Schuman v. State, *supra* note 15; State v. Sanner, 81 Ohio St. 393, 90 N.E. 1007, 26 L.R.A. (N.S.) 1093 (1910); State v. Stouffer, 65 Ohio St. 47, 60 N.E. 985 (1901); Elem v. State, 5 Ohio App. 12, 24 Ohio C.C. (N.S.) 296, 26 Ohio C.D. 376 (1915); Josh v. Josh, 120 Ohio St. 151, 165 N.E. 717 (1929).

³⁰ Burgoyne v. Smith, *supra* note 16.

³¹ Ohio G.C. sec. 1815-9.

³² VERNIER, *AMERICAN FAMILY LAWS* (1936) vol. 4, pp. 56.

³³ *In re Weiss*, 26 Pa. Dist. R. 143, 45 Pa. Co. Ct. 214 (1917); *In re Harnish's Estate*, 268 Pa. 128, 110 Atl. 760 (1920); *In re Boles's Estate*, 316 Pa. 179, 173 Atl. 664 (1934); but see *In re Roberts' Estate*, 30 Pa. Ct. 383 (1904) (recovery allowed from mother's estate). Also 1935 Atty. Gen. Opns. 4558, and 1936 Atty. Gen. Opns. 5350 (when in reference to detention hospitals the state must pay the whole expense).

³⁴ Paxton v. Paxton, 150 Cal. 667, 89 Pac. 1083 (1907).

if the child is so weak mentally or physically as to be unable to support himself.³⁵ The reason for continuing liability in such a case is probably based on the theory that since the father voluntarily assumed control and custody of the child, he is also obligated to furnish support. Thus when the child is removed from the father's home (by separation or divorce of the parents), the father's duty ceases unless the courts can base the responsibility on the fact of parentage alone, or upon the ground that the father can best bear the expense. If the age of majority were set not by rule of thumb but as a measure of dependency, the incompetent, as a needy dependent, would still be owed a means of support. The courts have been hesitant to accept this latter reasoning. *In re Van Denburgh*³⁶ the court imposed liability on the father to pay the funeral expenses of an incompetent child over twenty-one who was not living in the father's home. The decision, however, was based on agency doctrines since the father had authorized the mother to employ the undertaker.

Possible deviations from precedent would be to determine the age of majority as one of dependency, and then to allow the mother reimbursement according to quasi-contract doctrines. Inasmuch as parents have a legal obligation to support an adult child in a state institution, and with the added factor that a father is primarily liable, the same duty could be said to persist when the child is maintained in a private home. The court in the principal case follows the great weight of authority but expresses its reluctance in laying down an apparently harsh rule because of the necessity of following existing statutory law.

H. G.

³⁵ 20 R.C.L. 586; 20 OHIO JUR., *Parent and Child*, *supra* note 27; see Breuer v. Dowden, *supra* note 27 in which the court, speaking in dictum, said that if the child had been ill when he became of age, the father might have been liable; Rowell v. Town of Vershire, 62 Vt. 405, 19 At. 990, 8 L.R.A. 708 (1890); 1928 Opns. Atty. Gen. 2282, *supra* note 27 (administrative officers were instructed to use their own discretion as to supporting out of charity a blind young man whose father was able to support him); Blake v. Blake, *supra* note 27 (no modification of a former decree for alimony was permitted where an adult child was in an institution for the feeble-minded); Cromwell v. Benjamin, 41 Barb. (N.Y.) 558 (1863); Gilmanton v. Sanbornton, 56 N.H. 336 (1876); Crain v. Mallone, 130 Ky. 125, 113 S.W. 67, 22 L.R.A. (N.S.) 1165, 132 Am. St. Rep. 355 (1908); Becker v. Industrial Commission, 137 Ohio St. 139, 17 Ohio O. 478, 28 N.E. (2d) 361 (1940).

³⁶ 164 N. Y. Supp. 966, 178 App. Div. 237 (1917).