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Parent and Child-College Education-Necessaries

PARENT AND CHILD—COLLEGE EDUCATION—NECESSARIES—The facts of this case are few, and may be stated briefly. Appellant was divorced husband asking for relief from making further payments towards support of his minor son in the custody of the appellee, his former wife. Said son was seventeen years of age, just ready for and desirous of entering college. Appellant under the divorce decree was bound to pay $9,500 as alimony in $100 monthly installments, and $50 monthly for the support of the child. He alleged in his petition that he had remarried, that his family now consisted of his wife and her two minor children by a former marriage, and that his present and sole income as a coal dealer was only from $3,000 to $3,500 annually, said sum being insufficient to enable continuance of such payments. Appellee in a special answer set up declaration that fifty dollars a month was necessary to meet expenses incident to the son's attending college. This appeal was prosecuted from a judgment denying the petition. *Held*, Judgment reversed, new trial granted. *Morris v. Morris*, Appellate Court of Indiana, May 16, 1930, 171 N. E. 386.

The obvious question of the case is "can a general college education be included as a necessary?" It is well established that the duty of a father to provide for a minor child in the custody of another is restricted to "necessaries." *Esteb v. Esteb*, 138 Wash. 174; 244 Pac. 264. Schouler, in his classification of common law duties, places the duty to educate second only to the parent's duty to protect his child, and adds that this education should be consistent with the station in life of the parties. Blackstone pronounced it by far the greatest duty of all in importance. Schouler, *Domestic Relations*, v. 1, par. 774.

But the common law failed to make provision for enforcing the moral or legal obligation of the parent to maintain and educate. The parental duty to give children an education suitable to their station in life was not compulsory at common law. *School Board District v. Thompson*, 24 Okla. 1; 103 Pac. 578. It was presumed that affection implanted by Providence was more effective than law. But the omissions of the common law have been covered by statutory enactments and a development of the theory of an implied contract to provide, resting on an implied authorization to the one furnishing such provisions. Today it is an undisputed question that education, speaking generally is a necessary. *McLean v. Jackson*, 123 Ga. A. 51; 76 S. E. 792; *Cory v. Cook*, 24 R. I. 421; *Middlebury College v. Chandler*, 16 Vt. 683; 42 Am. Dec. 537; 14 R. C. L. 258.

But the difficulty arises in determining what degree of education shall be included in the category of necessaries. Whether an article is a necessary is a question of law for the court, but whether a particular class, quantity, quality, or degree of said necessaries is suitable to the condition and the estate of the infant is for the determination of the jury. *Garr v. Haskett*, 86 Ind. 373; *Henderson v. Fox*, 5 Ind. 489.

The earliest leading case on this point held that a classical or a general college education was not to be included as a necessary. *Middlebury College v. Chandler, supra.*

In *Peacock v. Linton*, 22 R. I. 328, 47 Atl. 887, a father was held not liable for services rendered in tutoring his son at fifty cents per hour during vacation in preparation for college. A later case states that circumstances may exist where even general college education and professional

courses might properly be found to be necessaries. *Int. Text Book Co. v. Connelly,* (1912) 206 N. Y. 188; 99 N. E. 722. In that case it was also judicially suggested that such might be allowed in a case where the infant's ability and prospects justified it. Thus the earlier cases seem to have confined themselves to elementary or vocational education, and even in the later cases a college, university or professional education has generally been excluded. 14 R. C. L. 258.

A recent case, however, held a college education to be a necessary in view of the following attending circumstances. The child desiring a college education had a special aptitude in her studies as evidenced by the fact that she was by special permission allowed to study Greek in her first year of high school. She was desirous of majoring in English with intention of teaching. The father had securities valued at $9,000 to $11,000 and a yearly income of some $3,000. The child had no other means of support. The court readily held her college education to be a necessary. *Esteb v. Esteb, supra.*

From the cases it is found that the following major elements are considered in determining what kind of education is necessary: (1) infant's position in life and station in society, (2) fortune of the child and of its parent, (3) adaptability of the child, and (4) the demand of the times. In the principal case no stress is laid upon the first element by the appellee. The fortune of the parent is obviously limited as shown by appellant's petition, which was competently supported by evidence.

The importance of this element of fortune of parent or child may be stressed by reference to cases involving credits on a guardian's account for maintainance and education of his ward. These cases are likewise silent as to what degree of education should be allowed, but they make qualifying statements to the effect that said maintainance and education must be reasonable in view of the ward's means, prospects, and capacity. *Alexander v. Hillebrand,* 140 Mich. 490, 103 N. W. 849; *Houseal and Patterson v. Gibbes,* 1 Bailey's Equity (S. Ca.), 23 Am. Dec. 186. In this country a guardian is usually permitted to incur such expenses at least to the extent of the income of the estate even without any special court order. Some courts go so far as to allow without order expenditures out of the principal if such are reasonable and proper, and such as the court would have ordered if applied to. *Preble v. Longfellow,* 48 Me. 279; *Pfefferle v. Herr,* 75 N. J. Eq. 219; *Hobbs v. Harlan,* 10 Lea 126 (Tenn.) 43 Am. Rep. 309. Unquestionably if the income of an estate were more than adequate to provide a college education of any kind, the courts would not interfere with such expenditure.

The adaptability of the child is not stressed by appellee. The fourth element might form basis of argument against the holding of the principal case. In *Breed v. Judd,* (1 Gray (Mass.) 455) the court said that the word "necessaries" was flexible and "not an absolute term, having relation to the infant's condition in life, to the habits and pursuits of the place in which and the people among whom he lives, and to the changes in those habits and pursuits occurring in the progress of society." Clearly demands are different today from those of 1844 when *Middlebury College v. Chandler, supra,* was decided. Then a college education was the exception, now it is the rule. But in view of all elements to be considered and the weight

of authority, the court might properly hold that a general college education is not yet accepted as a necessary. P. J. D.