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College Education As a Legal Necessary

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I. SCOPE

This note seeks to determine whether a college education is a legal necessary, or perhaps it would be better to say for what purposes it may be necessary. Then we shall consider what consequences may flow from calling it a necessary, and how intelligent legal planning can achieve the most favorable consequences. Controversy over whether a college education is a necessary has centered primarily in two areas. The first major area is the divorce situation in which the court is petitioned to include in the support decree a sum for the college education of the child. The second area involves suits against minors to enforce their contractual obligations for advanced education. In either of these two litigational settings, if the court finds that a college education is a necessary then it will impose upon the parents a legal obligation to provide it, since it is well-accepted that parents have a legal obligation to provide their children with necessaries. In addition, in the event that a determination is made that a legal obligation exists on the part of the parents, various tax consequences will follow. Therefore, this note, after first determining under what circumstances, if any, a college education is a necessary, will investigate several relevant, and possible common, tax consequences resulting from the creation of the legal obligation. Finally, the note will conclude with a brief examination of the actions available to enforce an existent obligation to supply a college education.

II. IS A COLLEGE EDUCATION A NECESSARY?

The answer to the query whether a college education is a necessary which parents[1] have a legal duty to provide for their children[2] will differ somewhat from state to state. Two situations must be distinguished. There appears to be no state which imposes such a duty—

1. It is common for the dnty of support to be said to be that of the father, so the use of the word parent commonly has reference to that fact. But should the father for some reason be unable to perform this duty, it is quite likely that the mother will then be required to furnish the support, so parent would in that sense refer to the mother. Dependent upon the applicable state statute, it may be provided, in effect, that the father is primarily liable and the mother is secondarily liable. Hereinafter, reference to the father's obligation is meant to be that of the parent who has the responsibility for support. See CONN. GEN. STAT. ANN. § 46-10 (1958); NEB. REV. STAT. § 42-201 (1960); W. VA. CODE ANN. § 4752 (1961).

2. As will be seen by some of the cases, the problem also arises as to other types of educational training. When the term college education is hereafter used, it is meant to include consideration of such things as vocational training, professional education, and training in particular arts.

at least no legally enforceable duty—on a parent when the parents and children are living together.[3] If the parents, however, are divorced many states then take the position that under certain circumstances such a duty exists, which duty is consequently enforced in the form of a divorce decree ordering the father to provide sufficient funds for child support to permit the child to obtain a college education.[4] A brief historical examination of the common law position on a parent's duty to support his children provides a framework for a consideration of the law as it exists today, and as it may be expected to evolve.

The common law has long recognized that a man has a duty to support and maintain his family; this duty has been codified into the statutes of the various states.[5] A primary element of such duty is the recognition that a child needs and is entitled to receive some education. Indeed Blackstone long ago recognized the need for education: "The last duty of parents to their children is that of giving them an education suitable to their station in life: a duty pointed out by reason, and of far the greatest importance of any."[6]

Just what is the nature and extent of the common law support duty? The judicial language frequently employed in reference to a parent's duty of support is that he must provide his children with the bare necessities of life—commonly said to include food, shelter, clothing, medical attention, and education.[7] As the nation's basic standard of living is raised the law can be expected to recognize a broadening of the concept of necessaries and a corresponding expansion of the parental duty of support. With particular reference to education, the importance of the support duty to provide a grammar school education has been given emphasis by the enactment of compulsory school attendance laws.[8] Here, then, in statutory form is recognition that a

3. But note the interesting statutory language found in R.I. GEN. LAWS ANN. § 33-15-1 (1956): "To the extent that any such minor child has property or an estate of his or her own, or that there is income or principal of any trust for his or her benefit, which may be used to provide such child with an education in a college, university, or private school, such natural guardians shall not be obligated either jointly or separately to provide such an education. The foregoing sentence shall not be deemed to create by implication any obligation to provide such an education where none would otherwise exist. . . ."

4. The first case of record appears to be Esteb v. Esteb, 138 Wash. 174, 244 Pac. 264 (1926). Other cases seeming to strongly indorse the duty as laid down in the *Esteb* case are: Hale v. Hale, 55 Cal. App. 2d 879, 132 P.2d 67 (1942); Titus v. Titus, 311 Mich. 434, 18 N.W.2d 883 (1945); Pass v. Pass, 238 Miss. 449, 118 So. 2d 769 (1960); Payette v. Payette, 85 N.H. 297, 157 Atl. 531 (1931); Jackman v. Short, 165 Ore. 626, 109 P.2d 860 (1941).

The usual procedure for accomplishing this is by reopening the case at a later date for amendment of the decree, and not by inclusion in the original decree.

5. *E.g.*, OHIO REV. CODE ANN. § 3103.33 (Baldwin 1964).

6. 1 BLACKSTONE, COMMENTARIES 450.

7. 39 AM. JUR. *Parent and Child* § 37 (1942).

8. *E.g.*, OHIO REV. CODE ANN. § 3321.04 (Baldwin 1964).

grammar school education is so important for all children that the law will require parents to send their children to school.

However, the law has generally recognized that the parents' duty to provide their children with necessaries is in large measure a discretionary matter, with the discretion being entrusted to the parents. Obviously, the compulsory school attendance laws constitute a limiting exception to parental discretion. Thus, it seems accurate to conclude that in the normal family situation parents have a duty to adequately support and provide for their children, although this duty in most instances will not be legally enforceable.

The law further recognizes that even though the marital relationship is dissolved or disrupted the parental duty of support nevertheless continues (in fact, as we shall see, it may even increase),[9] although when disruption of the marital state occurs the discretion as to the proper exercise of the duty passes from the parents to the court.[10] In turn, the courts will often, as a matter of course, give such discretion to the mother, or whoever else obtains custody of the child, and the courts will then give legal sanction to the mother's exercise of this discretion.[11] The continuation of the support duty beyond the termination of the marital relationship is both necessary and just, for the child's needs continue even if the parents separate, and the parents should not be able to shun their responsibilities toward either their children or society by becoming legally separated or divorced.

Presently, while no courts have seen fit to inquire into the parents' exercise of discretion as to whether their children should have a college education as long as the marital relationship remains intact, the interruption or cessation of this relationship has prompted many courts to exercise their discretion and provide in the divorce decree, usually by amendment of the original decree upon motion by the mother,[12] that the father must provide the children with a college education.

The historic judicial breakthrough in this area was *Esteb v. Esteb*,[13] decided in 1926. The Washington Supreme Court, while recognizing that a divorced father has a duty to provide his child only with

9. See note 13 *infra* and accompanying text.

10. Professor Madden has pointed out the duty of a father to educate his child. As is the case with the providing of all necessaries, the father as head of the household has wide discretion, but when he deserts, or is divorced and loses custody of the child, then this discretion passes to the court. MADDEN, DOMESTIC RELATIONS § 113 (1931).

11. Esteb v. Esteb, *supra* note 4.

12. See authorities cited note 4 *supra*.

13. 138 Wash. 174, 244 Pac. 264 (1926). This case, in the writer's opinion, is a leading case not just because it was the first such decision, but also because it is a well-reasoned opinion.

necessaries, went on to hold that some kind of an education is a necessary, the particular kind and amount of education being relative to the father's station in life and to the child's intellectual capabilities. The court in that case said that the mother, having custody of the child, had the discretion to determine the proper education necessary for the child. The father was ordered to provide the college education for his child; and in so doing the court considered the father's stable financial situation as well as the child's proven genius. It is now clear that this case represented the beginning of a major change in legal thinking.

This early decision has been followed in many states where the domestic relations courts have, on motion and hearing, amended the divorce decrees to include a provision for the college education of the minor child.[14] Almost all courts now recognize that the duty exists if the circumstances indicate that the father is financially able to provide the necessary funds and the child is intellectually capable of profiting from a college education. A recent decision in which the relevant factors were discussed and the duty found to exist is *Pass v. Pass*.[15] Here the mother petitioned the court to modify the divorce decree to allow the child to receive funds from the father to attend college. In permitting the modification of the decree, the court noted the

14. While most cases in which the duty has not been found to exist can be reconciled with the majority trend because of the particular circumstances of the case, *e.g.*, Golay v. Golay, 35 Wash. 2d 122, 210 P.2d 1022 (1949); Peck v. Peck, 272 Wis. 466, 76 N.W.2d 316 (1956), a few cases seem to have rejected the idea that any duty on the part of the divorced father exists under any circumstances. Haag v. Haag, 240 Ind. 291, 163 N.E.2d 243 (1959); Morris v. Morris, 92 Ind. App. 65, 171 N.E. 386 (1930); Mitchell v. Mitchell, 81 Ohio L. Abs. 88, 158 N.E.2d 546 (Ct. App. 1959); Commonwealth v. Martin, 196 Pa. Super. 355, 175 A.2d 138 (1961); Commonwealth v. Wingert, 173 Pa. Super. 613, 98 A.2d 203 (1953). However, the above cited Ohio case does not accurately reflect the present status of the law in that state, and Pennsylvania may be in the process of changing its law. For comment on the law in these jurisdictions, see note 16 *infra*.

While any compilation and classification of decisions on a point of law is dangerous because of the possibility of inadvertently omitting cases or the problem of properly categorizing decisions that are unclear in language and which turn on particular factual situations, it may be a worthwhile risk in this instance inasmuch as no such attempted compilation has been brought to the writer's attention. For cases in which the father was ordered to furnish support for a college education, see Wells v. Wells, 230 Ala. 430, 161 So. 794 (1935); Hale v. Hale, 55 Cal. App. 2d 879, 132 P.2d 67 (1942); O'Berry v. O'Berry, 36 Ill. App. 163, 183 N.E.2d 539 (1962); Hart v. Hart, 239 Iowa 142, 30 N.W.2d 748 (1948); Titus v. Titus, 311 Mich. 434, 18 N.W.2d 883 (1945); Pass v. Pass, *supra* note 4; Refer v. Refer, 102 Mont. 121, 56 P.2d 750 (1936); Payette v. Payette, *supra* note 4; O'Brien v. Springer, 202 Misc. 210, 107 N.Y.S.2d 631 (Sup. Ct. 1951) (citing to another New York decision); Herbert v. Herbert, 198 Misc. 515, 98 N.Y.S.2d 846 (Sup. Ct. 1950); Mitchell v. Mitchell, 170 Ohio St. 507, 166 N.E.2d 396 (1960); Jackman v. Short, 165 Ore. 626, 109 P.2d 860 (1941); Atchley v. Atchley, 29 Tenn. App. 124, 194 S.W.2d 252 (E.S. 1945); Esteb v. Esteb, *supra* note 4.

15. 238 Miss. 449, 118 So. 2d 769 (1960).

child's proven scholastic abilities as well as her great desire to obtain a college education. These favorable attributes of the child, taken in conjunction with the father's substantial income from a pension and a farm which he owned and his overall satisfactory financial position, were enough to charge the father with the duty. The court went on to point out that a college education was necessary for the child to properly discharge her responsibilities as a citizen of the state because of the present emphasis society places upon advanced educational training.

While two courts have expressly stated that in the absence of a binding support contract the father has no such duty,[16] these cases are in the distinct minority. Even in those cases in which the courts have not recognized the existence of such a duty, there has been either an indication in positive language that under different circumstances the duty might be found to exist, or sufficient factual differences have existed to limit the holdings so as not to preclude the finding of a duty under differing circumstances in another case. An illustrative case is a recent Wisconsin decision, *Peck v. Peck*,[17] in which an

16. Mitchell v. Mitchell, *supra* note 14. But the present law of Ohio is not correctly represented by this case. A lower court held that the duty of support includes providing necessaries, and that such necessaries include a college education. Calogeras v. Calogeras, 82 Ohio L. Abs. 438, 163 N.E.2d 713 (Juv. Ct. 1959). In addition, the Ohio Supreme Court, in partially reversing Mitchell v. Mitchell, *supra*, has taken a somewhat intermediate position, merely stating that it is not an abuse of discretion for a trial court granting a divorce to award funds for a college education as part of its support decree, while at the same time expressly stating that it was taking no position as to whether the college education was a necessary. Mitchell v. Mitchell, 170 Ohio St. 507, 166 N.E.2d 396 (1960). It is somewhat unfortunate that the Ohio court took this neutral position—it still leaves the status of the law in Ohio very much in doubt.

Commonwealth v. Martin, *supra* note 14. The status of the law in Pennsylvania, if uncertain, is at least interesting. While the state's highest court appears to have been silent on the issue, the language of the intermediate courts suggests a changing view. In one case, the court expressly held that, even though the father was financially well off and the child possessed unusual capabilities, the father had no legal duty to send her to college. Commonwealth v. Wingert, *supra* note 14. Recently in Commonwealth v. Martin, *supra* note 14, although no duty was found in the absence of a contract, the court's language indicates that the view may change. Also note the concurring opinion which says that the duty should exist when the father has sufficient funds. *But see* Commonwealth v. Howell, 198 Pa. Super. 396, 181 A.2d 903 (1962). Further confusion is added by a dictum in Commonwealth *ex rel.* Ulmer v. Sommerville, 200 Pa. Super. 640, 190 A.2d 182 (1963), to the effect that the law of Pennsylvania is that under certain circumstances the duty exists. However, the court had no real basis for this conclusion and may have just wanted to put its own views into the record.

The following are decisions in which courts have refused to order the father to provide child support for a college education: Haag v. Haag, *supra* note 14; Streitwolf v. Streitwolf, 58 N.J. Eq. 570, 43 Atl. 940 (1899); Mitchell v. Mitchell, *supra* note 14; Commonwealth v. Martin, *supra* note 14; Golay v. Golay, *supra* note 14; Peck v. Peck, *supra* note 14.

17. 272 Wis. 466, 76 N.W.2d 316 (1956).

application for modification of a prior divorce decree to include provision for the child's college education was denied. The precise holding of the court was only that the lower court had not abused its discretion in refusing to modify the prior decree. The court not only refused to say that such a duty could never exist, but even quoted from a prior Wisconsin decision which stated that a financially capable father should provide additional education beyond the high school level for his children if they so desired. But, in contrast to that situation, the court noted that here the father's low income and his outstanding debts combined with his duty to his second wife were such that it was clear he did not have the financial ability to provide any funds for additional child support. Obviously, this case cannot, on its facts and the language of the court, be said to be contrary to the line of decisions represented by the *Esteb* case. Rather, it is entirely consistent with the current trend.

Examining the legal terminology employed by the courts in considering the question, we find that, while the majority of courts have expressly stated that under proper circumstances a college education is a necessary, others have not seen fit to employ the term "necessary," and have merely ruled that the lower court did not abuse its discretion in ordering the father to provide funds for a college education.[18] On the other hand, a court may take the position that, even though the parents are separated, the father retains his discretion as to what support is necessary for his child, and the court will not under any circumstances inquire into the exercise of this discretion.[19] A few courts have expressly held that a college education is not a necessary,[20] and that it is an abuse of discretion for the lower court to order the father to provide the funds.[21]

At common law the father's duty of support was generally limited to the period of the child's minority. This is no less true today, and it has been held that the father has no duty to provide college education beyond his child's minority.[22] An understandable exception to this rule is generally made in the case of a physically incapacitated child, who, upon reaching majority, is unable to care for himself. In such instances, the parental duty of support, including a provision for college education, may be extended beyond the child's minority; this certainly seems justified in light of the obvious fact that a physi-

18. *E.g.*, Mitchell v. Mitchell, *supra* note 16. However, if a father is under a duty to provide his children only with necessaries, then by implication if he must provide a college education it is a necessary.

19. Streitwolf v. Streitwolf, *supra* note 16.

20. Morris v. Morris, *supra* note 14.

21. Haag v. Haag, *supra* note 14.

22. Werner v. Werner, 7 N.J. Super, 229, 72 A.2d 894 (1950). What age constitutes the end of the period of minority would depend upon the law of the state.

cally impaired child's need for a college education may be even greater than that of a normal child.[23] Of course, the father's duty may be extended beyond the child's minority by agreement of the parties.[24]

From this brief survey of the judicial decisions certain definite conclusions as to the extent of the parental duty in divorce situations can be drawn, as well as some conclusions as to the underlying reasons for the present trend, and an evaluation of its judicial soundness.

It can safely be concluded that the majority of American jurisdictions find that, under certain circumstances, a college education is a necessary which a divorced father has a legal obligation to provide for his children. The extent of the obligation will be commensurate with the father's station in life, so the courts definitely must, and do, take into consideration the father's financial situation. On the other hand, no matter how wealthy the father may be, if the child has neither the aptitude[25] nor desire for a college education, a court can hardly say that such education is a necessary for the child. At least one court has noted as another relevant factor to be viewed in determining the existence of the duty the background of the mother, mentioning particularly her "superior breeding, intelligence and education."[26] If the child is self-sustaining, the court may justly find that the father has no duty to provide an education.

In a sense then, a college education certainly is a necessary.[27] Nevertheless, if it is to be termed a necessary, such terminology must be kept in its relative perspective. This proper perspective is vividly demonstrated by the judicially prescribed status of the law in the state of Washington. This state was the first to find a college education to be a necessary;[28] but the same court, some years later, emphasizing that characterization as a necessary depends in part upon the father's station in life, held that, because of his inadequate financial position, a divorced father had no obligation to provide his child with a college education.[29]

The courts generally have reached just and reasonable results in

23. Strom v. Strom, 13 Ill. App. 2d 354, 142 N.E.2d 172 (1957) (child had polio).

24. Robrock v. Robrock, 167 Ohio St. 479, 150 N.E.2d 421 (1958). This would change somewhat the nature of the duty to that of a contractual obligation enforceable at law.

25. O'Brien v. Springer, 202 Misc. 210, 107 N.Y.2d 631 (1951) (emphasizing aptitude).

26. Herbert v. Herbert, 198 Misc. 515, 517, 98 N.Y.S.2d 846, 847 (1950).

27. Illustrative that calling the education a necessary is merely a vehicle for finding the duty is a case where the court found that a college education fit into a statutory provision for additional child support in "exceptional circumstances." Herbert v. Herbert, *supra* note 14.

28. Esteb v. Esteb, *supra* note 14.

29. Golay v. Golay, *supra* note 14.

the divorce situations, but further reform needs to be briefly considered. The law now recognizes the needs of the child whose parents are separated, but what of the child whose family is intact, or whose mother or father has died? His need for a college education may be no less, his capacity may be as great, and his parent's or parents' financial capabilities equally sufficient. Should his opportunity for a college education depend upon whether his parents obtain a legal separation or divorce? Granted that these are all equities in favor of the child, they are not the only factors to be considered. The law, and perhaps justly so, has been reluctant to take sides in family disputes (*e.g.*, parental immunity from tort liability to their children). The present trend, however, is toward a breaking down of intra-family immunities from suit. Nevertheless, the policy against judicial interference with parental authority continues to command considerable respect. The need for the law to intervene may actually be so slight as to be unjustified, for it appears that in most cases where a capable child wants to go to college his parents will send him even if they have to borrow money to do so.[30] In addition, for the prospective student whose parents either refuse or are unable to finance his education, a wealth of scholarships, student loans, and part time work are available to provide assistance, adding credence to the adage that anyone who wants a college education can get it if he has the attitude and aptitude. All these arguments considered, nevertheless, the possibility exists that sooner or later some state will enact a compulsory college school attendance law. Such a law is, of course, contingent upon a number of factors, including more and better educational facilities and instructors, additional available financial aid, and better equipped vocational schools, but it remains as a distinct possibility for future generations, if not for our own.

III. Contracts by a Minor

Another situation in which the issue of whether college education is a necessary has been raised involves the enforceability of minors' contracts for college education.[31] If a college education is a necessary, then any contract for such education entered into by the minor child will be enforceable against the child, and also against the parent[32] who has the legal obligation to support the child and provide him with the necessities of life.

After first briefly considering the status of minors' contracts in

30. Even if the obligation exists, the child might be denied standing to maintain an action to enforce it. See note 104 *infra* and accompanying text (remedies).

31. Howard, *Is a College Education a Legal Necessity?*, 34 Ohio Bar 295 (1961).

32. *E.g.*, Porter v. Powell, 79 Iowa 151, 44 N.W. 295 (1890).

general, we will then consider specifically the extent of the parents' obligation by examining the case law upon minors' contractual obligations for higher education.

The general rule is, with some exceptions, that a minor may at his election void contracts to which he is a party.[33] One of these exceptions is that a contract for necessaries will not be voidable at the election of the minor.[34] Necessaries for which minors may bind themselves to pay the reasonable value thereof include, as basic minimums for all children, such things as food, clothing, and shelter,[35] similar to the necessaries which parents have a duty to provide. Other items may be necessaries depending upon circumstances. For example, where it was clearly indicated that serious physical pain and suffering would result to a minor unless his tooth was extracted, dental services provided the minor constituted a necessary for which the minor was legally bound to pay.[36]

One leading case in which the issue of whether a minor child would be held to his contract for a college education is the *Middlebury College* case.[37] In that early case, the court refused to hold a minor liable for the expenses he incurred at college, basing its decision on the theory that the contract between the college and the minor was not for a necessary, and therefore was voidable at the election of the minor. The court reasoned that although a higher education was a source of some pride and not without its utility, still, it was something which most persons went through life without, and clearly was not a necessary within the legal meaning of the word. This case represents one end of the spectrum—the extreme that as a matter of law a college education is not a necessary.

In examining the other cases on this point, it is difficult to formulate any simple conclusion. While in several of the cases the minor did not, technically speaking, contract for a college education, there is a definite analogy, for the training sought was either in addition to or beyond that obtained at the high school level.[38] In most instances, the courts have stated that the question must be determined by examining

33. See, *e.g.*, Crandall v. Coyne Elec. School, Inc., 256 Ill. App. 322 (1930), where a minor brought suit to rescind the contract.

34. McLean v. Jackson, 12 Ga. App. 51, 76 S.E. 792 (1912).

35. *Ibid.*

36. *Ibid.*

37. Middlebury College v. Chandler, 16 Vt. 683, 42 Am. Dec. 537 (1844).

38. Mauldin v. Southern Shorthand & Business Univ., 126 Ga. 681, 55 S.E. 922 (1906) (course in stenography); Adamowski v. Curtiss-Wright Flying Serv., Inc., 300 Mass. 281, 15 N.E.2d 467 (1938) (instruction in aviation); Nielson v. International Textbook Co., 106 Me. 104, 75 Atl. 330 (1909) (course in electrical engineering); Icovinco v. Haymes, 191 Misc. 311, 77 N.Y.S. 2d 316 (Sup. Ct. 1948) (voice lessons).

the particular circumstances,[39] and several decisions have stated that it was a jury issue.[40] In this regard the language from one early decision is pecularily worth quoting:

> It is practically impossible to lay down any general definition of the term necessaries which will be applicable in all cases. That which is luxury to-day may become a necessity to-morrow. What is deemed necessaries for one person may not be for another. The question depends largely upon the rank, social position of the infant, or other like circumstances. Each case must stand upon its own peculiar facts. The question is ordinarily one of fact, to be determined by the jury. Generally speaking, necessaries for an infant include support and maintenance, food, lodging, clothing, medical attention, and education suitable to his station in life.[41]

Certainly in terms of sheer numbers the decisions in which the minor has been allowed to void the contract or in which the courts have expressly found that the education was not a necessary[42] greatly outweigh the decisions to the contrary.

The result reached, however, in a 1930 Michigan decision is probably a more accurate reflection of the way most courts would resolve the question today. The court, upholding a jury finding that piano lessons for the minor were a necessary, noted the child's particular aptitude for music and the father's ability to pay.[43] This case is similar to many of those which, despite denying the existence of an enforceable contract, have recognized that circumstances could be such that an enforceable contract would exist.[44] A recent New York decision came close to enforcing a minor's contract for special advanced instruction. A gifted young teenager had been given advanced instruction to cultivate his natural artistic talents. The court indicated that such instruction might very well have been a necessary, but refused to enforce the contract on other grounds.[45]

39. "It is recognized that a proper education is a necessary. But what is a proper education depends on circumstances." Crandall v. Coyne Elec. School, Inc., *supra* note 33, at 324.

40. *E.g.*, Cory v. Cook, 24 R.I. 421, 53 Atl. 315 (1902); Nielson v. International Textbook Co., *supra* note 38; Sisson v. Schultz, 251 Mich. 553, 232 N.W. 253 (1930).

41. McLean v. Jackson, *supra* note 34.

42. Mauldin v. Southern Shorthand & Business Univ., *supra* note 38; Crandall v. Coyne Elec. School, Inc., *supra* note 33; Adamowski v. Curtiss-Wright Flying Service, Inc., *supra* note 38; Moskow v. Marshall, 271 Mass. 302, 171 N.E. 477 (1930); Nielson v. International Textbook Co., *supra* note 38; La Salle Extension Univ. v. Campbell, 131 N.J.L. 343, 36 A.2d 397 (1944); Turner v. Gaither, 83 N.C. 357, 35 Am. Rep. 574 (1880); International Text-Book Co. v. Connelly, 206 N.Y. 188, 99 N.E. 722 (1912); Siegel v. Hodges, 20 Misc. 2d 243, 191 N.Y.S.2d 984 (Sup. Ct. 1959); Icovinco v. Haymes, 191 Misc. 311, 77 N.Y.S.2d 316 (Sup. Ct. 1948); Hogue v. Wilkinson, 291 S.W.2d 750 (Tex. Civ. App. 1956); Gayle v. Hayes' Administrator, 79 Va. 542 (1884); Middlebury College v. Chandler, *supra* note 37.

43. Sisson v. Schultz, *supra* note 40.

44. *E.g.*, International Text-Book Co. v. Connelly, supra note 42; Crandall v. Coyne Electrical School, Inc., *supra* note 33; Moskow v. Marshall, *supra* note 42.

45. Siegel v. Hodges, *supra* note 42.

Just what circumstances are determinative is unsettled, but the minor's high school record, his aptitude, and his financial situation would be important factors. Equally important would be the general social climate in which he lives. Evidence that without the education the minor's chances for gainful employment would be greatly reduced would be persuasive. If others of a same or similar social standing were receiving advanced educational instruction, has need for it would seem to increase accordingly.

The rationale of the *Middlebury* decision, that most persons never get the opportunity for higher education, should be reconsidered in a society in which a college education is as common as a grammar school education was when that decision was rendered—and that court did recognize that a grammar school education was a necessary. After considering the various policies underlying the treatment of minors' contracts, it is suggested that as a matter of law a minor should be bound by his contract for a college education. The primary cause for treating contracts as voidable at the minor's election is to protect the minor from adults who would take unfair advantage of his youth and lack of experience. However, a minor contracting for a college education would be old enough and probably of sufficient intelligence to contract on equal terms with the adult party. In addition, it is doubtful that the other contracting unit, the educational institution, would often take advantage of such minor even if it were able to do so. Considering the growing need for higher education and for college graduates, a policy which encourages minors to contract for a higher education is certainly wise and would serve a greater public interest than an outmoded and unrealistic overprotective approach toward minors. This public interest would also include a need for encouraging increased enrollment in various types of trade schools.

The paucity of reported cases, especially cases of recent vintage dealing with this area, suggests the lack of litigation on the question. In most instances, it would seem likely that institutions of higher education would require the parent to be a party to the contract. However, at least one source has predicated that "in accordance with modern educational theory and practice" it has become increasingly apparent that "colleges today expect the student to make his own arrangements for enrollment and for the payment of fees."[46] If this is an accurate statement of present trends, it may be that litigation will increase and that the few reported cases refusing to hold minors to such contracts will be supplemented by decisions enforcing such contracts.

46. BLACKWELL, CURRENT LEGAL PROBLEMS OF COLLEGES AND UNIVERSITIES 1949-1953, 26 (1949).

Today a college education is becoming as essential to a person's livelihood as a grammar school education was fifty years ago. Courts recognize a public policy, that, if possible, all of the citizens of a state should obtain a college education.[47] Such education is rapidly becoming necessary for one to properly discharge his duties as a citizen and to meet the challenges of our highly competitive society.[48] It has been correctly pointed out that the duty is one owed not only to the child but to the people of the state as well.[49] One not properly equipped to enter the world of economic competition may soon be found upon the social welfare rolls of his state. Certainly, in these times of economic growth and technological achievement and scientific discovery, a college education can no longer be looked upon as a luxury for the wealthy few.

A further word might be said with regard to the limitations upon the phrase college education itself. It would logically seem to include expenses for tuition, food and lodging, books, and other supplies. Beyond this the inclusion of such expenses as fraternity dues and other miscellaneous items would depend upon the financial circumstances of the party charged with the duty. Moreover, various circumstances, such as finances and the social strata from which the child comes, would vary the type of university to which the child would be entitled to attend from the state university to the more exclusive privately endowed schools.

IV. Consequences

Having determined that in certain limited instances courts do consider a college education to be a legal necessary, the consequences that follow from such a holding need to be considered. Before considering the legal consequences as such, attention should be brought to legal planning that should reasonably be expected to follow as a result of the decisions in the divorce situations.

A. *Income Taxation*

The trend of the great majority of jurisdictions should sound a warning for alert and enlightened planning by husbands (and counsel) who are involved in divorce proceedings. Whether or not it is likely that the court will incorporate this provision in the original decree, one should consider the possibility of future modification of the decree to include a provision for college education.[50] If the hus-

47. Hale v. Hale, *supra* note 4.
48. Pass v. Pass, *supra* note 4.
49. *Ibid.*
50. Most often the procedure for providing the college education involves a motion to amend the original decree. See note 4 *supra.*

band is never to have the use of this money, he would naturally like to avoid having it included in his taxable income. If he cannot deduct this amount from his gross income, he must endure what in a sense may be called a double penalty. How can the imposition of this double penalty possibly be avoided, if at all?

First, it is clearly provided in the Internal Revenue Code that "periodic payments" by a husband as alimony are deductible from his gross income[51] and are includible in the income of the wife.[52] Secondly, it is equally clear that amounts specifically designated to be paid as support for the children are neither deductible by the husband[53] nor income to the wife or children.[54] Therefore, if a specifie sum were designated by the decree as payable for the college education of the children, this amount undoubtedly would be treated as payable for the support of the children, and hence, not tax deductible by the husband. The husband's attorney, if aware of the various complications, has the opportunity to avoid the application of this rule with a little planning and the co-operation of the wife and the court. An obvious solution is for the parties to the divorce proceeding to enter into a settlement agreement, the general terms of which might be as follows. The wife would promise to support the children and finance their higher education, at the same time surrendering any further claim for alimony or support, in consideration of a sum of money to be paid her by the husband, said sum being sufficient to provide adequately for the wife and children. The terms of this suggested agreement would not appear to introduce a specific sum payable for the support of the children as to be taxable to the husband, and it is likely that the court would agree to the incorporation of this agreement into the divorce decree. It would be to the mutual advantage of all persons concerned to have such an agrcement, and counsel for both parties should seriously consider the advantages to be gained by including this provision in a settlement agrcement. In most instances, it would actually be of mutual benefit to the husband and the wife for the wife's income, rather than the husband's, to include the child support payments from the trust, for it is likely that the wife will have a lower tax bracket; thus, a net saving will occur

51. INT. REV. CODE OF 1954, § 215.

52. INT. REV. CODE OF 1954, § 71. A number of cases have made it clear that where the decree provides for periodie payment of single sums for alimony and child support, without any specific allocation, the entire amount is taxable to the wife and deductible from the husband's gross income. *E.g.*, Joslyn v. Commissioner, 230 F.2d 871 (7th Cir. 1956).

53. INT. REV. CODE OF 1954, § 71(b). The specific Code language is "any payment which the terms of the decree, instrument, or agreement fix, in terms of an amount of money or part of the payment . . . ."

54. INT. REV. CODE OF 1954, § 215.

by including items in her income instead of her husband's income. This tax saving may then enable the husband to make larger support payments than he would otherwise be able to do. Another advantage, both practical and financial, for providing in the original agreement for the payments sufficient to provide for the college education is preventive in nature. The matter having been taken care of at the initial stage, there will be no need for a reopening of the proceedings in the future, which would work a hardship, from the standpoints of finances and time, on the parties.

Commissioner v. Lester[55] illustrates the great lengths to which courts have been willing to go to avoid any construction which would indicate the presence of a fixed sum designated as support for the children. In that case, the decree incorporated a written agreement between the parties which provided that the husband would make periodic payments to the wife, such payments to be reduced by one-sixth should any of the parties' three children die, marry, or become emancipated. The Government quite logically contended that this agreement fixed one-half of the periodic payments as a sum payable for the support of the children. The United States Supreme Court rejected this argument and agreed with the taxpayer husband's contention that this was not a fixed sum within the meaning of the Code. In so holding, the Court referred to congressional committee hearings preceding passage of the act, and concluded that the legislature intended that the parties be able to decide between themselves as to who would bear the tax burden.

Having seen that, given knowledge of the judicial trend, reasonable planning can obviate what might otherwise be viewed as undesirable tax consequences in the divorce situation, consideration will now be made of other consequences that can be expected in the area of taxation as a result of the holdings that a college education is a legal necessary.

B. *Short Term Trusts*

Particular attention is given to the tax consequences flowing from the use of trusts for the financing of college education. Whether the law calls a college education a necessary and imposes an obligation upon the parents to provide it or not, many parents have availed themselves of the trust to provide the education.

Much has been written about trusts and taxes, especially short term trusts, but only scant examination has been made of the use of short term trusts for financing a college education and the possible danger of such income being taxed to the parent or other

55. 366 U.S. 299 (1961), 15 VAND. L. REV. 298 (1961).

person who may be obligated to provide that education. This note seeks to conduct such a study because a parent of sufficient means who wishes to send his child to college will, for the reasons listed below, very likely elect the short term trust to accomplish this end. The current increase in college enrollment reflects the greater number of persons involved in providing this education and emphasizes the importance of understanding the consequences of using the short term trust for financing it.

While generally trusts may be, and are, created for a variety of reasons and purposes,[56] tax savings being only one, the familiar short term trust is employed almost exclusively for the saving of taxes. The desired tax consequences of such a trust, which term must be for a minimum of ten years,[57] are to create an additional exemption and shift the incidence of the income tax from the higher tax bracket of the grantor to the comparatively lower bracket of the beneficiary of the trust (a form of income splitting), or in the case of a complex trust in which income may be accumulated,[58] to the trust itself. If successful, then taxes will be saved and at the end of the trust period the ownership of the corpus will revert to the grantor. A primary use of short term trusts is to finance the college education of the grantor's minor children. The hoped for result is to create an additional taxpayer with another exemption, lower rates, and ideally no tax at all. Now although such a result, which is equivalent to allowing a personal income tax deduction for expenses incurred in sending one's child to college,[59] is possible, there is also a hidden danger. If the provision of a college education is found to be a discharge of the parent's legal obligation of support, then the trust income so applied will be includible in the parent's gross income. Since this inclusion would negate the objective sought by establishing the trust[60] it is important to determine if such a legal obligation of support does exist, and, if it does, whether there are methods by which these adverse consequences can be avoided and the college education financed with resultant tax savings. Otherwise the congenial taxpayer-grantor may lose some of his congeniality if he finds that the very purpose

56. Yohlin, *Tax Saving Techniques in Testamentary Trusts*, 3 PRAC. LAW. 21, 22 (April 1957). This article lists various non tax saving motives for the creation of trusts.

57. INT. REV. CODE OF 1954, § 673(a).

58. INT. REV. CODE OF 1954, § 662.

59. While there have been proposals for Congress to amend the Code to allow either a deduction or tax credit for amounts expended by taxpayers toward payment of college education, no approval has yet been given these proposals. One argument against such a deduction or credit is that it tends to discriminate in favor of persons who have the financial resources to provide this education.

60. Another conceivable objective of such a trust would be for the grantor to put these funds beyond the reach of his creditors; however, such a transfer would run the risk of being set aside as a fraudulent conveyance.

for which the trust was established has been thwarted—especially if it can be shown that the same purpose could have been properly served by a more artfully drawn trust instrument.

Section 671 of the Code provides that the income of a trust shall be taxable to the party designated by the Code as the owner of the trust.[61] Section 677 provides that the grantor shall be treated as the owner of any portion of a trust whose income may be distributed to the grantor when such distribution is actually made, or, without the approval or consent of an adverse party, may be made.[62] It is well established by judicial decision that trust income which is applied in satisfaction of a legal obligation of the grantor is, for purposes of section 677, treated as distributed to the grantor and therefore taxable to him.[63] This is true even though the trust instrument creates an independent trustee and effectively divests the grantor of any legal control whatsoever over the trust corpus and income.

Past decisions even went so far as to hold that if the trust income could be used to discharge the grantor's legal obligation of support or maintenance it would be includible in his gross income whether actually expended toward discharge of the legal obligation or not.[64] This unjust result was quickly corrected by Congress.[65] The correction is presently embodied in section 677(b) of the Code, which provides that income of a trust will be taxed to the grantor, in the case of a trust for the support or maintenance of a beneficiary whom the grantor is under a legal obligation to support, only to the extent such income is actually so expended.[66]

A related provision, section 662 of the Code, provides that there will be included in the income of the beneficiary of a trust certain amounts of the trust income.[67] The key word in this section is beneficiary. The regulations for this section provide that anyone, even a nongrantor, whose legal obligation is discharged by application of the trust income will be treated as the beneficiary thereof, and thus

61. INT. REV. CODE OF 1954, § 671.
62. INT. REV. CODE OF 1954, § 677.
63. Morrill v. United States, 228 F. Supp. 734 (D. Me. 1964), citing Douglas v. Willcuts, 296 U.S. 1 (1935), and other decisions.
64. Helvering v. Stuart, 317 U.S. 154 (1942).
65. 58 Stat. 51 (1944).
66. INT. REV. CODE OF 1954, § 677(b). However, the warning has been sounded that once the trust income is found to have been disbursed in discharge of a legal obligation of the grantor, other disbursed income not used in discharge of a legal obligation of the grantor may nevertheless be charged to the grantor. Samuels, *Beware of Trusts for Dependents*, 37 TAXES 1009 (1959).
Note § 674 of the Code which treats the grantor as owner of any portion of the trusts over which he has a power to control the beneficial enjoyment. Specifically excluded from this section is a § 677(b) power.
67. INT. REV. CODE OF 1954, § 662.

taxable under section 662.[68] The Treasury's position has apparently never been litigated, which at least suggests that the Commissioner has not yet decided to try to reach such nongrantor trusts.[69] Although the validity and constitutionality of these regulations are certainly subject to debate,[70] they cannot be completely ignored.[71] Therefore, these regulations present the question whether the parental obligation of support includes providing a college education?

What does the judicially engrafted term "legal obligation of support of the grantor" encompass for tax law purposes? Both the Treasury Department[72] and the courts[73] seem to agree that the phrase legal obligation refers to the obligation that exists under the law of a particular state. The extensively debated Treasury Regulations interpreting section 662, known as the "Grandfather Trust Regulations,"

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68. Treas. Reg. § 1.662(a)-4 (1956).

69. The almost unanimous opinion of publishing tax authorities seems to be that the regulations do not correctly reflect the status of the law. Goodson, *When is Payment in Discharge of Parent's Legal Obligation,* 99 TRUSTS & ESTATES 17 (1960); Mannheimer, *Sprinkling Trusts,* 95 TRUSTS & ESTATES 919 (1956); Savage, *Comparative Advantages and Disadvantages of Support Trusts and Uniform Gifts to Minors Statute; Gifts, What Constitutes Support for Tax Purposes,* N.Y.U. 17TH INST. ON FED. TAX. 1114 (1959); Tomlinson, *Support Trusts and Gifts to Minors,* 97 TRUSTS & ESTATES 929 (1958). An article dealing predominantly with the 1939 Code is Winton, *Taxation of Nongrantors Under Trusts for Support of their Dependents,* 33 TAXES 804 (1955). However, one writer indicates at least some approval for the regulations, Samuels, *supra* note 66, at 1013.

70. The constitutionality of the regulations has been challenged in Tomlinson, *supra* note 69. It would seem that perhaps the best approach is not to challenge the constitutionality of the Code accurately reflects Congress's intention in enacting § 662.

71. The Treasury has ruled that income from property transferred to a parent's dependent under a gifts to minors statute is considered income to the parent to the extent that it discharges the parent's legal obligation of support. The Code section relied upon is § 61. Rev. Rul. 56-484, 1956-2 CUM. BULL. 23. "Regardless of the relationship of the donor or of the custodian to the donee, income derived from property transferred under the model custodian act adopted by the State of Colorado and a number of other states which is used in the discharge or satisfaction, in whole or in part, of a legal obligation of any person to support or maintain a minor is, to the extent so used, taxable to such person under section 61 of the Internal Revenue Code of 1954. However, the amount of such income includible in the gross income of a person obligated to support or maintain a minor is limited by the extent of his legal obligations under local law."

72. Treas. Reg. § 1.662(a)-4 (1956). See also INT. REV. CODE OF 1954, § 662; Rev. Rul. 56-484, 1956-2 CUM. BULL. 23.

73. It has been suggested that under the authority of Yarborough v. Yarborough, 290 U.S. 202 (1933), the law of the state of the father's domicile would govern. Woods, *Taxability of the Income from a Trust Used to Pay the Cost of a College Education,* 42 TAXES 700 (1964). For an objection to use of the law of the domicile of the father, see Ehrenzweig, *Interstate Recognition of Support Duties,* 42 CALIF. L. REV. 382, 385 (1954). Certainly, the domiciliary state of the child has a substantial interest in seeing that the child receives the most and best possible education.

The application of state law to determine the extent of this legal obligation has been severely criticized. Pedrick, *Familial Obligations and Federal Taxation,* 51 NW. U.L. REV. 53, 62 (1956).

provide that any money paid from a will or trust which discharges a person's legal obligation will be taxed to such person as if he were a direct beneficiary of the will or trust. The regulations also state that the term legal obligation includes the legal obligation to support another only if, under state law, that person's property could not first be used as payment for such support.[74] Following this reasoning, a father would have a legal obligation to support his son only if the son's property could not be reached, under state law, as payment for such support before the father's funds were exhausted. These regulations also recognize that a legal obligation may depend upon the existence of attendant circumstances. The established common law rule is precisely to this effect—that a parent may not first use the funds of his child for the support of such child, and this is the present general rule among the states.[75] It is probable that the same limitations placed upon, and the scope given, to the meaning of the term obligation under the section 662 regulations are applicable to the term as used by the courts in reference to section 677.[76]

Oddly enough there has been no judicial decision under Code section 662 as to what constitutes a legal obligation. However, numerous decisions have been reported concerning section 677 trusts, and these decisions help form a picture of what the term legal obligation entails. It includes the legal obligation of support as well as obligations incurred by personal action, such as contract obligations. Presumably, this would mean that if the parent grantor had a duty to provide a college education as part of his support duty, *i.e.*, it was a necessary—then he would have a legal obligation within the meaning of section 677.

The issue of whether trust income has been used to discharge a legal obligation of support of the grantor is typified by a case involving a support trust created pursuant to a separation agreement.[77] The wife was awarded a divorce, and the decree incorporated a separation agreement previously entered into between the parties which in turn provided that the father would establish a support trust for the maintenance and education of the parties' minor child. While the separation agreement stated that the trust was to be established for the support, education, and maintenance of the child, the trust indenture itself did not so specify the use of the trust income. The Government contended that the trustee was compelled to use all the income provided in the separation agreement, and this income

74. Treas. Reg. § 1.662(a)-4 (1956).
75. Stevens, *Pitfalls in Inter Vivos Trusts*, 37 TAXES 1088, 1089 (1959).
76. But at least one writer disagrees, and feels that the regulations interpreting § 662 are limited thereto. Samuels, *supra* note 66, at 1013.
77. Hamiels' Estate v. Commissioner, 253 F.2d 787 (6th Cir. 1958).

was therefore taxable to the grantor whether actually so applied or not. But the court rejected the Government's contention and said that only amounts actually expended for the maintenance and education of the child were in discharge of the father's legal obligation of support, and therefore income to the father.

In another case the grantor father created a trust and, acting as trustee and pursuant to the terms of the trust, expended part of the trust income for the college education of his children.[78] The court held the amount to be taxable income to the grantor, but the basis for its holding was unclear. Presumably, the court felt that the state law imposed upon the grantor a legal obligation to provide the college education.

The regulations' theory that anyone whose legal obligation is discharged by application of the trust income is a beneficiary and thus taxable on such income is objectionable for several reasons. First, in such case it is quite possible that the father had no control over the income at any time. Secondly, while the regulations seem clearly to consider such benefit to be income to the one whose legal obligation is discharged, this represents a departure from the Code's general approach to income. Economic benefit cannot be, and has not been, the only criterion for determining income. One may directly or indirectly gain great economic benefit from a gift, but gifts are clearly not income within the general meaning of the Code.[79] In the case of contributions to the capital of a corporation, the Code expressly provides that the corporate taxpayer receives no income.[80] Although the legal and perhaps incidental effect of some transaction is to discharge one's legal obligations, this situation is certainly not the same as an intentional discharge by one of his own legal obligations. Thus, it is at best doubtful whether the Code was meant to tax such nongrantors. Even if the regulations are assumed correctly to represent Congress's approach, the provision might be subject to constitutional challenges.[81] One could argue that such incidental benefit to a nongrantor is not income within the meaning of the sixteenth amendment.[82] If this be true, then the tax becomes an unapportioned direct tax on property and is violative of the prohibitions of the federal constitution.[83] Thus, while the courts have been correct in holding that the grantor has received the benefit of

78. Mairs v. Reynolds, 120 F.2d 857 (8th Cir. 1941).

79. Admittedly, the Code does provide that the income from property may not be the subject of a nontaxable gift. INT. REV. CODE OF 1954, § 102.

80. INT. REV. CODE OF 1954, § 218.

81. U.S. CONST. art. I, § 9.

82. Eisner v. Macomber, 252 U.S. 189 (1920).

83. U.S. CONST. art. I, § 9. See Pollock v. Farmers' Loan & Trust Co., 158 U.S. 601 (1895).

the trust income and must include it in his gross income when such trust income is used to discharge a debt of the grantor,[84] it is submitted that a distinction should be made in the case of section 662 trusts.

From this it follows that if trust income is used for the support, maintenance, and education of children for whom the grantor has a duty to so provide, then the grantor has in fact realized taxable income.[85] If this grantor trust income is used to pay for the college education of a minor child, it is clear that the grantor parent should, and will, be taxed on the income to the extent that it is found that he was under a legal duty under applicable state law to provide such education, *i.e.*, college education which is found to be necessary.[86] While the general situation under which this obligation would be found to arise would be a divorce decree ordering the parent to provide the college education—an obligation imposed by law—a recent case points out that this certainly is not the only possible vehicle for imposing the obligation. In the case of *Morrill v. United States*,[87] a federal district court found that the father, who was grantor of the trust, was under a contractual obligation to the school to pay for the expenses of his child's college education. The court then held that the father was under a legal obligation to provide the college education, and therefore, amounts paid out of the trust income for such education were in discharge of this obligation and taxable to the father. The opinion stated that "the income is taxable to the grantor when used to discharge his individual obligation, whether imposed by law or by contract,"[88] and whether the contract is express or implied. This decision seems quite reasonable. Also, if the father should contract with the mother to provide the child with a college education, this wonld seem to be such a legal obligation, even if the child were beyond the age of twenty-one.[89] In other words, if the father is bound by contract to provide the education it should not matter to whom he is bound. But this leaves unanswered the question of whether in the case of a united family, and absent any contractual provisions, a father would for purposes of grantor trust taxation have a legal obligation to provide a college education. This question, in turn, depends upon state law which would include a college education as a part of the father's legally enforceable duty of support only if it were a necessary. Whether it would satisfy the Code requirement if it were found that the college education was a necessary

84. Helvering v. Blumenthal, 296 U.S. 552 (1935).
85. Helvering v. Stokes, 296 U.S. 551 (1935).
86. Mair v. Reynolds, 120 F.2d 857 (8th Cir. 1941).
87. 228 F. Supp. 734 (D. Me. 1964).
88. *Id.* at 736.
89. See Bonime v. Cummings, 5 App. Div. 2d 976, 172 N.Y.S.2d 594 (1958).

for purposes of minors' contracts is unknown. It is submitted that the proper criterion as to whether the parent has a legal obligation should be whether the minor child has a legally enforceable right to the college education under state law.

One further provision of the Code which bears mention is section 678. This section, known as the substantial owner provision, treats a nongrantor as the owner of any portion of a trust over which he has a power exercisable by himself to vest the corpus or income in himself. An exception is made, however, in the case of support trusts. In this situation, the nongrantor will be taxable only to the extent that he actually expends the trust income in discharge of his legal obligation.[90] This means that a parent who is made trustee of a support trust for his children will be taxed on the income distributed for their support. This creates a certain amount of overlap with the "Grandfather Trust Regulations" which would also treat this parent trustee as a beneficiary. The threat of section 678 inclusion can be removed by the parent's refusal to become a trustee. If he is made a trustee without his knowledge, he will have the opportunity to renounce or disclaim such power within a reasonable time after learning of its existence.[91] For purposes of section 678, it is assumed that the term legal obligation would have the same meaning that it does under section 677.

Despite the final outcome of the legal obligation problem, its very uncertainty is cause for an awareness of the danger that income paid from a short term support trust toward the college education of a minor may be treated as taxable income to the father, either as grantor of the trust, as substantial owner of the trust, or merely as a constructive beneficiary of the trust income. Meanwhile, the need and demand for the support trust or some similar tax saving device increases with the growing unportance of college education. Therefore, some consideration of the possible paths open to the taxpayer father may be useful. There is no reason why, with thoughtful planning, the short term support trust cannot be successfully utilized.

The logical starting point is to examine the state law and determine, as closely as is possible, just what the father's legal obligation is. Since state law may change, and the Code provisions may be amended or further interpreted by judicial decision, the determination should be accepted with caution. One might so word the trust indenture as not to say specifically that the income is to be expended for the college education. But broad trust language such as "income to be used for the child's support and maintenance" may create construc-

90. INT. REV CODE OF 1954, § 678.
91. INT. REV. CODE OF 1954, § 678(d).

tion problems, resulting in expensive and time-consuming litigation to determine the settlor's intent or at least creating doubt in the mind of the trustee as to what the settlor intended.[92] Remembering that once the trust is established the grantor cannot retain any power to control the beneficial enjoyment for there to be an effective short term trust,[93] the father, to insure that the money is used as he intends, might want to expressly provide in the trust instrument that the money should be used for the child's education. Thus, a specifically worded trust instrument may be the most desirable method, and the risk in its use may be relatively small. The father definitely should avoid entering into any contract, express or implied, for providing the child's college education. In the absence of such contract, it is doubtful, at present, that he would be found to have a legal obligation under any state law, unless he and the mother are separated or divorced. If the father is not taxed upon this trust income, it may, with intelligent planning, avoid taxation altogether. One suggested way to avoid taxation completely is for the father grantor to transfer to the trust sufficient income producing securities to yield dividend income of 1,000 dollars annually. The child beneficiary will be entitled to a personal exemption of 600 dollars and this added to the dividend exclusion of 100 dollars and the minimum standard deduction of 300 dollars produces 1,000 dollars of non-taxable income per year.[94]

C. *Estate Tax Consequences*

With much emphasis now being placed upon good estate planning it is important to note the estate tax consequences if there exists an established duty to provide one's children with a college education, and what estate tax pitfalls, if any, exist in planning for such education. While the estate tax would not be a major consideration in planning for college education, it is nevertheless worthwhile to understand the possible consequences.

In this respect, section 2041 of the Code,[95] dealing with powers of appointment, deserves some attention for two reasons.

First, consider the possibility of a parent giving his child a general power of appointment over some property to use in financing his education. Section 2041 includes within the value of the gross estate all property over which the decedent exercised a general power of appointment created before October 21, 1942, and exercised or

92. The problems of interpreting the terms of a trust instrument are illustrated by Hamiels' Estate v. Commissioner, *supra* note 77.

93. There are some exceptions to this limitation on the grantor's power to control beneficial enjoyment. INT. REV. CODE OF 1954, § 674.

94. 45 P-H, 1964 FED. REP. BULL. ¶ 32340 (1964).

95. INT. REV. CODE OF 1954, § 2041.

held at death a general power of appointment created on or after October 21, 1942. This section goes on to provide that the term "general power of appointment" does not include "a power to consume, invade, or appropriate property for the benefit of the decedent which is limited by an ascertainable standard relating to the health, education, support or maintenance of the decedent . . . ." If a parent wishes to give his son a power of appointment over property which power is limited by an ascertainable education or support standard then such power will not be includible in the son's gross estate under section 2041. Now suppose that the father sets up a trust which provides that the son may invade corpus for the purpose of financing his college education. Would the college education be included within the language of the statutory exception so as to prevent the son from having a general power of appointment over the corpus?

This question is clearly put to rest by the Treasury Regulations. They provide that "powers exercisable for the holder's . . . 'education, including college and professional education . . . ' are limited by the requisite standard not to be treated as general powers of appointment, and hence will not be includible in the holder's gross estate."[96]

The regulations further point out that the synonymous words support and maintenance are not to be limited to the bare necessities of life. While the taxpayer would appear to have his permissible conduct clearly set out, a note of caution is in order. While the Treasury has seen fit to give broad scope to the definitive limitation on general powers of appointment in permitting many powers to be termed special, such interpretation is subject to change at the discretion of the Treasury, so some care is in order. In drafting a trust instrument which gives one's son a power of appointment, the language should preclude any conclusion that it delegates a general power of appointment in case the Treasury were to revoke the present regulations.

While the present regulations are subject to change, their approach is commendable and hopefully represents an established attitude. Section 2041 certainly means to exclude from one's gross estate any property over which he holds a power merely to apply such property toward payment for his life necessaries. It would be quite unreasonable and unfair to treat such necessaries as being only the bare necessities of life. Instead, it seems eminently correct to say that necessities here has a broad scope and includes such things as a college or professional education, for the statute expressly refers to education. This does no more than keep the estate tax abreast of the actualities of modern life.

96. Treas. Reg. § 20.2041-1(c) (1958), as amended, T.D. 6526, 1961-1 CUM. BULL. 402.

A second aspect of section 2041 deals more directly with the question itself of whether a parent owes his children a college education and presents a more serious danger to the father holding a power of appointment. It is provided in section 2041 that a general power is one exercisable in favor of the decedent or his creditors. Assume that the decedent possessed at his death a power to provide for a dependent's college education, or to discharge some other legal obligation. An obvious way in which this could arise would be for a grandfather to establish a support trust for his minor grandchild, and appoint his son as trustee. If there is a legal obligation to provide a college education the question is whether the decedent's power to discharge it represents a power exercisable in favor of the decedent. The regulations provide that "[a] power of appointment exercisable for the purpose of discharging a legal obligation of the decedent or for his pecuniary benefit is considered a power of appointment exercisable in favor of the decedent or his creditors."[97]

Thus, assuming the position of the Code and regulations to be accurate, consider the instance where a father sets up a trust and retains a power to distribute amounts to be used for his son's college education. That the term legal obligation is meant to include the legal obligation of support cannot be open to serious doubt.[98] If a college education is found to be a legal obligation of support of the father, then that power will be a general power of appointment includible in the father's gross estate. Essentially the same tax situation would be presented if the grandfather were the grantor and made the father trustee under the trust with support payments to be made to the child. Just what amount or valuation will be placed on this power? Without engaging in a detailed analysis of what valuation procedure would be used it may be generally noted that the gross estate includes all property over which the decedent held a general power of appointment, whether exercised or not with respect to a post-1942 power.

Of course, an always present estate tax provision to be kept in mind is the so-called retained life estate provision. This provides that there shall be included in the gross estate of the decedent the value of any property transferred by the decedent if he has retained the use, possession, right to income or other enjoyment of the transferred property for a period which does not end before his death.[99]

If the decedent has set up an irrevocable trust under which an inde-

97. *Ibid.* This raises a most interesting jurisprudential question. Holmes' scientific pragmatic approach has been that where no legal remedy exists there can be no legal right. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 458 (1897). For exploration of alternate views, see FULLER, THE PROBLEMS OF JURISPRUDENCE, 627-38 (1949).

98. Stevens, *Pitfalls in Inter Vivos Trusts*, 37 TAXES 1088, 1090-91 (1959).

99. INT. REV. CODE OF 1954, § 2036.

pendent trustee is directed to apply the trust income for the support and maintenance of the children what will be the estate tax consequences to the decedent settlor? The regulations clearly provide that if the trust income must be applied toward the discharge of a legal obligation of the decedent, including the legal obligation of support, then the decedent will be considered to have retained or reserved a life estate.[100] Therefore, this would mean that if the trust indenture required that the income be applied toward the child's college education,[101] and the settlor had a legal obligation to provide such education, then the corpus of the trust from which this income be derived will be included in the decedent's gross estate.[102]

Another area of tax consequence, beyond the scope of this note, is the federal gift tax. While many intriguing gift tax problems may exist, all that can be done at this time is to mention the possibility of their existence. It is obvious that the creation of a trust may very well constitute at some point in time a completed gift to the beneficiary of the trust. All that can be done in this note is to point out to planners the existence of potential gift tax consequences.[103]

V. ENFORCEMENT

Assuming that a father has a legal obligation to provide a college education for his children, the question arises as to what remedies exist if he breaches this duty, and who may initiate legal action to enforce these remedies.

Two possible types of legal proceedings for enforcement of the obligation must be considered, civil actions and criminal proceedings. Looking at the latter first, in all American jurisdictions a parent may be criminally liable if his failure to properly support his child is sufficient to constitute a willful injury to the child or amounts to criminal negligence.[104] It seems quite unlikely that a mere refusal or failure to provide a college education for one's child would rise to the level of

100. Treas. Reg. § 20.2036-2 (1958).

101. For a holding that the regulations would not include a trust which provided merely that the trustee could so apply the income, but was not expressly compelled to do so, see Commissioner v. Douglass' Estate, 143 F.2d 961 (3rd Cir. 1944).

102. While § 2038 includes within the settlor's estate property over which he has retained a power to effect the beneficial enjoyment, this section would include the power because it was a retained power and not because it was to be used in discharge of the settlor's legal obligation.

103. See, *e.g.*, Curtis, *Gift Tax Pitfalls in Establishing Trusts*, N.Y.U. 17th INST. ON FED. TAX 1217 (1959).

104. *E.g.*, ALA. CODE tit. 34, § 90 (1958) (misdemeanor); OHIO REV. CODE ANN. § 3113.99 (Baldwin 1964). Almost all states distinguish two separate offenses, nonsupport and desertion, the gist of each being the parent's failure to provide proper support for his children. 4 VERNIER, AMERICAN FAMILY LAWS § 234.

criminal neglect within the meaning of any present statutes, and no reported cases so holding have been found.

On the other hand, certain civil actions definitely will lie for the failure of a parent properly to support his children. These actions are generally based upon the parent's refusal to provide necessaries for his children; thus, the extent to which an action lies to enforce provision for a college education will be determined by whether the college education is a necessary. Keeping in mind the prior discussions of this note and thereby assuming that a college education is, at least on some occasions, a necessary which a parent has a legal obligation to provide, examination will be made of the possible civil actions available.

The old common law rule, which is today the decisional law in several states, was that in the absence of statutory authorization a child could not maintain an action to enforce the performance of his parent's support obligations.[105] The courts of several states, however, have held that a child may maintain a support action against his parent independent of authorizing statutes.[106] In addition, some statutory provisions have been made for such actions.[107]

The division of the courts over this issue is based upon the judicial position as to the proper line to be drawn between judicial and parental authority. Those decisions denying such actions by the child have emphasized the strong public policy involved in preserving family harmony and parental discipline.[108]

A closer examination of some of these decisions will illustrate that family harmony and parental discipline are not adequate reasons. One court chose as its basis for denying a cause of action to a child in the custody of the divorced mother that the father had only a moral duty to provide the support, but then clearly showed that this was not the real reason for denying the action when it stated that the refusal to allow such suit "is founded upon public policy, and is designed to preserve the peace and harmony of the home

105. Sikes v. Sikes, 158 Ga. 406, 123 S.E. 694 (1924); Rawlings v. Rawlings, 121 Miss. 140, 83 So. 146 (1919); Huke v. Huke, 44 Mo. App. 308 (1891); Alling v. Alling, 52 N.J. Eq. 92, 27 Atl. 655 (1893); Baker v. Baker, 169 Tenn. 589, 89 S.W.2d 763 (1935); Yost v. Yost, 172 Md. 128, 190 Atl. 753 (1937); Price v. Price, 197 S.W.2d 200 (Tex. Civ. App. 1946).

106. Schneider v. Schneider, 141 F.2d 542 (D.C. Cir. 1944); Upchurch v. Upchurch, 196 Ark. 324, 117 S.W.2d 339 (1938); Paxton v. Paxton, 150 Cal. 667, 89 Pac. 1083 (1907); McQuade v. McQuade, 145 Colo. 218, 358 P.2d 470 (1960); Cohen v. Markel, 111 A.2d 702 (Del. Ch. 1955); Parker v. Parker, 335 Ill. App. 293, 81 N.E.2d 755 (1948); Doughty v. Engler, 112 Kan. 583, 211 Pac. 619 (1923); Green v. Green, 210 N.C. 147, 185 S.E. 651 (1938); Campbell v. Gampbell, 200 S.C. 67, 20 S.E.2d 237 (1942); McClaugherty v. McClaugherty, 180 Va. 51, 21 S.E.2d 761 (1942).

107. Fagan v. Fagan, 43 Cal. App. 2d 189, 110 P.2d 520 (1941).

108. See authorities cited note 105 *supra.*

. . . ."[109] Another court expressly recognized the deserting father's legal obligation, but nevertheless said that the children were remediless.[110] The court reasoned that parental authority should not be displaced by judicial fiat, and further cautioned against the possible danger of suits by unruly or disobedient children. The court failed, or at least refused, to recognize that when the family is separated and the mother has custody of the child, the father's authority has already been replaced by judicial intervention, and in such instances there can hardly be any family harmony left to be interrupted. The dissent in the case pointed out that where, as the majority in this case expressly recognized, a legal duty exists a court should be compelled to enforce that duty.[111] The Tennessee Supreme Court's answer to the need for a remedy when a legal liability exists was simply that the child need be given no cause of action since an action could be brought by those furnishing necessaries to the child. In the case of *Baker v. Baker*,[112] a child sued the divorced father for support and maintenance. The court expressly recognized the father's legal liability for support, but said the child was not the proper party to maintain the action. Such a result gives too little attention to the strong interests of the child to enforce the obligation. It would seem that if the father has a duty to support the child, then the duty is owed to the child[113] (and perhaps to society as well) who is therefore entitled to the support and who undoubtedly suffers the legal wrong when the duty is breached, and certainly the person wronged and to whom the duty is owed should be allowed to maintain an action to enforce it. On the other hand, it is impractical to give the enforcement of the duty solely to third persons furnishing necessaries to the child, for such persons may not provide the necessaries in the first instance unless assured of payment without resort to court action. In the case of an action for a college education, the child would probably be old enough to bring the action to insure the father's compliance, or the child could sue by next friend.

Much sounder are the judicial decisions allowing actions by the wronged children.[114] One such decision is *Green v. Green*,[115] where the court allowed an illegitimate child, whose parents were divorced, to maintain an action for support and maintenance against his father. The court correctly noted that the primary objection to such actions

109. Yost v. Yost, 172 Md. 128, 134, 190 Atl. 753, 756 (1937).
110. Rawlings v. Rawlings, *supra* note 105.
111. *Ibid.*
112. 169 Tenn. 589, 89 S.W.2d 763 (1935).
113. That it is the child to whom the duty is owed was recognized in McQuade v. McQuade, *supra* note 106.
114. See authorities cited note 106 *supra*.
115. 210 N.C. 147, 185 S.E. 651 (1936), 15 N.C. L. REV. 67 (1936).

was that they would tend to disrupt the family relationship, but that when the family relationship has already been disrupted, then the reason for the rule has been erased. Thus, it can be implied from the opinion that if the allowance of such action would actually tend to disrupt the harmony of the home, then it might not be allowed. In all of the reported decisions allowing the child to maintain the action there had already been some disruption of the family relationship such as divorce or separation. It appears to be an open question whether in the united family situation an action by the child could be maintained. It may not be a matter of much practical significance, however, as it seems highly probable that in most instances the father would be providing all of the family necessaries which were within his capabilities. In the united family situation the factors of family peace and harmony, and preservation of the parents' discretion in the operation of the family unit tend to be of paramount importance. Another consideration is that in united family situations there may well be no legally enforceable duty, for as it has been cogently put, "the duty to support the integrated family is a curious sort of unliquidated obligation which in its nature and extent is more societal and moral than legally enforceable."[116]

In addition to the child other parties may maintain actions to compel the father to perform his obligation. As previously mentioned a third party who has supplied necessaries to the minor may be able to recover the reasonable value thereof from the father. In addition, statutes may authorize actions by proper welfare authorities and other interested parties to compel the father to perform his obligation or to obtain reimbursement for expenses incurred by others in carrying out the father's duties.

It may be concluded that reason and necessity demand that the child be allowed to sue his father for support when such action will not tend to disrupt the harmony of the family unit. In many instances, the statutes or decisional law of the state will authorize such action and it is hoped that the dissenting states will soon discard their outmoded views and adopt this approach. It would seem advisable that the matter be covered by statutory enactment.[117] Certainly, in those situations where the obligation exists, there should be adequate means for its enforcement.

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116. Pedrick, *supra* note 73, at 64.

117. The present statutory provisions are quite varied, but an examination of a few jurisdictions indicates three types of partics which may maintain actions to enforce the support obligations: (1) the child himself, (2) relatives of the child, (3) local government officials. See ALA. CODE tit. 34, §§ 93, 113 (1958). But not all statutes declare who has standing to maintain the action and in such jurisdictions it is suggested that one would have to proceed under the prevailing rules of common law.

VI. CONCLUSION

The general status of a college education as a legal necessary may be summed up as follows. If the parents of a minor are divorced or separated, then the college education will be a necessary if the circumstances indicate the father is financially able to provide the education and the child is mentally capable of attaining it. But if the parents are living together, there is general agreement that the college education is not a necessary which the father is under a legal obligation to provide. In those instances in which a minor has himself contracted for a college education, the courts have been reluctant to declare it to be a contract for a necessary for which the minor will be bound. Even so, there seems to be no sound reason why the college education should not be a necessary when contracted for by the minor, yet when the parents are separated be held to be a necessary which the father must provide. Modern social and economic conditions compel recognition that a college education is a legal necessary, although when the parents are living together, the social policy of preserving family harmony may preclude the exertion of any legal compulsion upon the father to provide a college education.

It is important to determine whether a college education is a legal necessary which a father is under a legal obligation to provide his children for a number of tax reasons. Generally speaking, if a college education is a necessary, then trust income expended toward payment of it will be included in the gross income of the father who may either be grantor of the trust, trustee of the trust, or may simply be an implied beneficiary of the trust. For estate tax purposes a power to apply property toward payment of the college education of one to whom the holder of the power is under a legal obligation to provide may result in inclusion of the power in the holder's gross estate.

If the law finds that a college education is a necessary, then the law must provide means by which the resultant obligation to provide the necessary may be enforced. Recent cases support the view that, at least when the family unit has been disrupted, such enforcement action may be maintained in the form of a civil action by the child entitled to the education.

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