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Support And Maintenance Of Minors: A Father's Liability For Extraordinary Expenses - Wagner v. Wagner

Support And Maintenance Of Minors: A Father's Liability For Extraordinary Expenses

Wagner v. Wagner[1]

A mother petitioned for modification of alimony and support provisions of a judgment of separation, which had been entered in 1954 and resettled in 1957. The Special Referee found that " '. . . under the present conditions, high school and college educations have become a necessity rather than a luxury,' "[2] and therefore decided that a twenty year old daughter, who was in college, and an eighteen year old son, who would graduate from high school that year and enter college in the fall, should be maintained in college and private school until each was twenty-one. In addition, he ordered the father to pay for his daughter's orthodontia expenses. The father appealed these findings.

The appellate court, granting the father's motions, found that as a matter of fact and law he was under no obligation to send his children to private boarding schools and college. Relevant factors considered were the mother's job and substantial income, the father's past fulfillment of his support obligations, the attendance of both children at a public high school from 1960–63, and thereafter the son's attendance at a private boarding school with tuition being voluntarily paid by the mother, without consultation of the father. "Decisional law holds that a father is not required to pay for his child's private school tuition where the community makes available to children through the public school system the education which each child is entitled to as a matter of course. . . ."[3] The court found further that a father has no legal duty to provide his children a college education; unless a father expressly agrees to send his children to college, his obligation to do so is a moral one only.[4] In addition, since the extent of the daughter's needed dental care was undetermined, the court, feeling such an order to be speculative, refused to compel the father to pay the dental expenses which his daughter might incur in the future. He was, however, ordered to pay the orthodontia expenses incurred by his daughter prior to the date of decision. The opinion ended with the statement: "In view of the foregoing, no counsel fee is allowed herein."[5] In reaching its decision, the court apparently did not consider a very detailed New York statute under which it might have granted the mother's petition.[6]

Blackstone stated the extent of parental obligations as follows:

> The duty of parents to provide for the *maintenance* of their children is a principle of natural law; (3) an obligation, says

1. 51 Misc. 2d 574, 273 N.Y.S.2d 572 (Sup. Ct. 1966).
2. 273 N.Y.S.2d at 574.
3. *Ibid.*
4. 273 N.Y.S.2d at 574–76.
5. 273 N.Y.S.2d at 577.
6. "Father liable for support of his child or children under twenty-one years of age; . . ." CONS. LAWS OF N.Y. ANN. art. 3–A, § 32(2) (1964). "The court . . . shall have the power to order the respondent to pay sums sufficient to provide necessary food, shelter, clothing, care, medical or hospital expenses, . . . , expenses of education of a child, funeral expenses . . . having due regard to the circumstances of the respective parties." CONS. LAWS OF N.Y. ANN. art. 3–A, § 34(2) (1964).

> Puffendorf, (f) laid on them not only by nature herself, but by their own proper act, in bringing them into the world: . . . . By begetting them, therefore, they have entered into a voluntary obligation to endeavor, as far as in them lies, that the life which they have bestowed shall be supported and preserved. And thus the children will have the perfect *right* of receiving maintenance from their parents. . . . No person is bound to provide a maintenance for his issue, (14) unless where the children are impotent and unable to work, . . . through infancy . . . , and then is only obliged to find them with necessaries, . . .[7]

Necessaries which a father must provide have always included food, clothing and shelter,[8] and, usually, education.[9] In the past, however, a father's duty to provide an education for his child extended no further than the public education provided by the state or city,[10] although occasionally liability for private school expenses has been imposed.[11] Thus, the court in the principal case was following the traditional view. In addition, it did not impose liability on the father for two other expenses, which might be termed extraordinary: college education and legal expenses. There has not been much litigation concerning imposition of liability for unusual expenses on a father; however, concerning college education, legal, medical, and funeral expenses, varying lines of authority have developed.

COLLEGE EDUCATION

> The duty of a parent to provide a college education for a child is not as exacting a requirement as the duty to provide food, clothing and shelter for a child of tender years unable to support himself. It is a natural law that a parent should spare no personal sacrifice to feed and protect his offspring.[12]

Middlebury College v. Chandler,[13] decided in 1844 and recognized as the leading case on the subject, enunciates the view that college

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7. BLACKSTONE, COMMENTARIES 419, 422 (Lewis' ed. 1922).

8. Crafts v. Carr, 24 R.I. 397, 53 Atl. 275, 279 (1902) (dictum). See generally MADDEN, PERSONS AND DOMESTIC RELATIONS §§ 110–11 (1931); SCHOULER, LAW OF THE DOMESTIC RELATIONS §§ 241–42 (5th ed. 1895).

9. "The last duty of parents to their children is that of giving them an education suitable to their station in life: . . ." 1 BLACKSTONE, COMMENTARIES 450 (Lewis' ed. 1922); Esteb v. Esteb, 138 Wash. 174, 244 Pac. 264, 265 (1926), 246 Pac. 27 (1926). Covault v. Nevitt, 157 Wis. 113, 146 N.W. 1115, 1117 (1914), found necessaries to be those things which supply the personal needs of the child.

10. ". . . [A] father is under no legal duty to send his son to a boarding school, no matter what his financial circumstances may be. . . . A father, unless his parental authority has been taken away by the courts, is the one to decide the extent of the education of his child, beyond what is provided by the school system of the state." Ziesel v. Ziesel, 93 N.J. Eq. 153, 115 Atl. 435, 437 (1921).

11. Hilliard v. Hilliard, 197 Ill. 549, 64 N.E. 326 (1902), where daughter had been in private school for two years prior to the parents' divorce; Wells v. Wells, 6 Div. 721, 161 So. 794 (1935), where the decree included a reasonable contribution to the son's expensive private school education.

12. Commonwealth *ex rel.* Ulmer v. Sommerville, 200 Pa. Super. 640, 190 A.2d 182, 184 (1963).

13. 16 Vt. 683 (1844).

education is not a necessary. Although the case is concerned with an infant's contractual liability to pay for his college education, the discussion of necessaries in this context was equally applicable to a consideration of the father's liability:

> . . . [A] good common school education . . . is now fully recognized as one of the necessaries for an infant. . . . But it is obvious that the more extensive attainments in literature and science must be viewed in a light somewhat different. Though they tend greatly to elevate and adorn personal character, are a source of much private enjoyment, and may justly expect to prove of public utility, yet in reference to men in general they are far from being necessary in a legal sense. The mass of our citizens pass through life without them. . . . I speak only of the regular and full course of collegiate study; . . . . Now it does not appear that extraneous circumstances existed in the defendant's case, such as wealth, or station in society, or that he exhibited peculiar indications of genius or talent, which would suggest the fitness and expediency of a college education for him, more than for the generality of youth in the community.[14]

In an 1899 New Jersey decision, a father was not required to finance his son's law school education because "professional training is not a general necessity, but is a special advantage."[15] A New York court imposed no duty on a father to support eighteen year old twin daughters who were in college and working. While the court recognized that under unusual circumstances a father might be required to furnish a college or professional education to his child, it found no such duty when the child was emancipated.[16] More recently, a Pennsylvania court denied that support payments be increased to cover the cost of tuition, because the chosen college was ". . . in the nature of a finishing school."[17]

A few older cases created an exception to the general rule when the college education was desired because the child had some special aptitude and/or desired specific vocational preparation.[18] Some jurisdictions have based their decisions on the presence of statutory authorization.[19] Others, finding that college education is not a necessary,

14. *Id.* at 686.

15. Streitwolf v. Streitwolf, 58 N.J. Eq. 570, 43 Atl. 904, 907 (1899).

16. Halsted v. Halsted, 228 App. Div. 298, 239 N.Y.S. 422 (1930). It should be noted that while the principal case follows the *Halsted* decision, other lower courts in New York have not always done so. *E.g.*, Herbert v. Herbert, 198 Misc. 515, 98 N.Y.S.2d 846 (Dom. Rel. Ct. 1950); Weingast v. Weingast, 44 Misc. 2d 952, 255 N.Y.S.2d 341 (Fam. Ct. 1964), having cited *Halsted*: "However, the Court takes into consideration that that case was decided in 1930 and times have changed drastically since then." *Id.* at 343.

17. Commonwealth v. Wingert, 173 Pa. Super. 613, 98 A.2d 203, 205 (1953).

18. Refer v. Refer, 102 Mont. 121, 56 P.2d 750 (1936), where son wanted to study electrical engineering; Esteb v. Esteb, 138 Wash. 174, 244 Pac. 264 (1926), 246 Pac. 27 (1926), where daughter had high academic aptitude and wanted to become an English teacher; Feek v. Feek, 187 Wash. 573, 60 P.2d 686 (1936), where son wanted to study forestry.

19. *E.g.*, Rawley v. Rawley, 94 Cal. App. 2d 562, 210 P.2d 891 (1949); Pass v. Pass, 238 Miss. 449, 118 So. 2d 769 (1960). See 21 MD. L. REV. 84 (1961).

have been unable to construe their support statutes to include it.[20] Pennsylvania, in the past, found a duty only if the father expressly or impliedly agreed to provide his child a college education.[21]

The modern trend, based on a public policy argument,[22] is to find that college education is a necessary which the father should be required to provide. The particular facts of each case are nevertheless determinative. Controlling factors may be the educational background of the parents,[23] ". . . the financial condition of the parent, the ability of the minor for college work, the age of the minor, whether the child is self-sustaining or not, the father's willingness to provide an education and other factors."[24] With regard to the child's ability, grades are not the only evidence to consider; ". . . attitude, character, desire for learning, and well-directed ambition are important."[25] The father's financial circumstances, however, probably have the most bearing on the court's decision. Even though college education is considered to be a necessary, a father will generally not be required to finance it if he cannot afford it, or he may be required to provide only partial payment.[26]

In most cases the procedure used to compel payment of college expenses is modification of a child support order. The result is that weekly or monthly support payments are increased by an amount considered reasonable, in light of the father's financial circumstances, to cover the increased expenses of the child. It should be noted that these support payments will terminate when the child reaches statutory

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20. *E.g.*, Haag v. Haag, 240 Ind. 291, 163 N.E.2d 243 (1959): "The Legislature has met and adjourned six times since the decision in the Hachat case, and it has done nothing to change the rule as announced in the Morris case and followed in the Hachat case." 163 N.E.2d at 248; Hachat v. Hachat, 117 Ind. App. 294, 71 N.E.2d 927 (1947); Morris v. Morris, 92 Ind. App. 65, 171 N.E. 386 (1930); Mitchell v. Mitchell, 81 Ohio Abs. 88, 158 N.E.2d 546 (1959).

21. Express agreement: Commonwealth v. Martin, 196 Pa. Super. 355, 175 A.2d 138 (1961); Commonwealth *ex rel.* Stomel v. Stomel, 180 Pa. Super. 573, 119 A.2d 597 (1956). Implied agreement: Commonwealth v. Camp, 201 Pa. Super. 484, 193 A.2d 685 (1963); Commonwealth *ex rel.* Howell v. Howell, 198 Pa. Super. 396, 181 A.2d 903 (1962); Commonwealth *ex rel.* Grossman v. Grossman, 188 Pa. Super. 236, 146 A.2d 315 (1958). For a discussion of the Pennsylvania decisions, see Note, 67 DICK. L. REV. 200 (1963).

22. Aside from this personal reason for encouraging higher learning for our youth there is today's imperative reason of public welfare. . . . A changing world has shattered the old concept that a higher education is a luxury to be enjoyed only by the rich. Preparing our youth for possible service in the ranks of the creators and developers of civilization has become an imperative necessity. . . . What was once the "exception" has become commonplace. . . . We hold that considering the progress of society and our nation's need for citizens educated in the humanities and the sciences, a college education is a necessary where the minor's ability and prospects justify it.

Calogeras v. Calogeras, 82 Ohio Abs. 438, 163 N.E.2d 713, 719–20 (1959), which contains a good analysis of prior case law. See 35 NOTRE DAME LAW. 573 (1960).

23. Decker v. Decker, 204 Pa. Super. 156, 203 A.2d 343, 345 (1964).

24. Gerk v. Gerk, 144 N.W.2d 104, 109 (Iowa 1966). *E.g.*, Hoffman v. Hoffman, 210 A.2d 549 (D.C. App. 1965).

25. Jackman v. Short, 165 Ore. 626, 109 P.2d 860, 872 (1941), which contains a good analysis of prior case law.

26. *E.g.*, Brown v. Weidner, 208 Pa. Super. 114, 220 A.2d 382 (1966); Rice v. Rice, 206 Pa. Super. 393, 213 A.2d 179 (1965); Ulmer v. Sommerville, 200 Pa. Super. 640, 190 A.2d 182 (1963), where the court also considered the fact that an uncle had provided each child with a substantial educational trust fund; Jackman v. Short, 165 Ore. 626, 109 P.2d 860 (1941).

majority, and therefore, the father will not be required to pay all of the child's college expenses. A few courts, however, have reached other solutions: one ordered that the increased support payments continue ". . . until each son has attended college four years, unless they both sooner discontinue school or college . . .";[27] another ordered payment of $2,500 per college year for the college expenses of a minor daugther;[28] while still another ordered payment of $25 a month up to $1,500 into a fund since "as the boy reaches the age of eighteen years, he may desire a vocational, technical, or professional education . . . ," and creation of a fund ensured that money would be available if desired and needed.[29]

One Maryland case has required a father to pay for support of his minor son in college. *Smith v. Smith*[30] involved an appeal from an order of permanent alimony, which provided, in part, that the father pay $12.50 a week for his nineteen year old son, who was in Morgan State College, and who the father alleged was of employable age and able to support himself. In affirming the order, the court stated:

> [T]he financial circumstances of the parties, their station in life, and the expense of educating the children are among the factors to be considered. The record before us shows that a college education for the children has been afforded as an incident of the station in life of this family, and the father is financially able to pay the modest allowance made for the minor son while attending college, until he attains his majority, when the obligation will cease.[31]

The award, like most, was in the nature of support and, therefore, means, as noted above, that the father was not required to pay expenses incident to the child's entire college education.

FUNERAL EXPENSES

Funeral expenses are generally considered to be a necessary for which a father is liable. This conclusion has been reached in many cases in which the parent sues a third party for the wrongful death of his child. Although such damages are not recoverable under wrongful death statutes,[32] courts have held that since a father has a duty to pay the funeral expenses of a minor child who lives with him and since he is therefore liable to third persons furnishing the funeral services, he may recover in a separate action against a tortfeasor or insurer.[33]

27. Hart v. Hart, 239 Iowa 142, 30 N.W.2d 748, 751 (1948).

28. Matthews v. Matthews, 30 Misc. 2d 681, 222 N.Y.S.2d 31 (Sup. Ct. 1961). This award was not appealed, but the court mentions it as part of the support order.

29. Underwood v. Underwood, 162 Wash. 204, 298 Pac. 318, 320 (1931).

30. 227 Md. 355, 176 A.2d 862 (1962).

31. *Id.* at 361, 176 A.2d at 866.

32. See, *e.g.*, MD. CODE ANN. art. 67, §§ 1, 4 (1966). Graul v. Adrian, 49 Ill. App. 2d 101, 199 N.E.2d 631 (1964).

33. Graul v. Adrian, 32 Ill. 2d 345, 205 N.E.2d 444 (1965) (overruling Wright v. Royse, 43 Ill. App. 2d 267, 193 N.E.2d 340 (1963)); Venable v. Liberty Mut. Ins. Co., 142 So. 2d 639 (La. App. 1962); Munsert v. Farmers Mut. Auto. Ins. Co., 229 Wis. 581, 281 N.W. 671 (1938) (recovery denied, however, because of exclusionary clause in policy).

Other cases have imposed direct liability to third persons on a father since ". . . the funeral expense incident to the burying of a minor child is to be classed as a necessity. . . ."[34] One court found that a father's liability is removed by a third person's express contract to pay for the child's funeral expenses.[35]

In Maryland, a father may presumably be required to reimburse the mother of his deceased minor child for funeral expenses incurred for the child's burial. *Kriedo v. Kriedo*[36] concerned a mother's petition in equity for payment to her of medical and funeral expenses incurred for the child. Having stated that a father's liability for medical expenses was to the person rendering the service, the court found no distinction between that claim and the mother's for ". . . funeral services rendered the deceased child at the mother's request, and which have been paid by her."[37] The court held, however, that such recovery could not be had in equity but was properly the subject of an action at law.

MEDICAL EXPENSES

Although the particular facts in each case are determinative, medical care has almost universally been classified as a necessary which a father is obligated to provide, and a third person supplying medical and dental care to a minor child can properly recover its value from a father in a civil action.[38] The theory underlying such action was stated in *Porter v. Powell*:[39]

> It is the legal as well as moral duty of parents to furnish necessary support to their children during minority; . . . a parent cannot be charged for necessaries furnished by a stranger for his minor child, except on an express or implied promise to pay for the same; . . . such a promise may be inferred on the grounds of the legal duty imposed.[40]

If a child is in his father's custody and control, or if the father exercises general care and protection for the child, he must pay for medical expenses incurred,[41] and the child's estate cannot be bound.[42]

The basis of recovery is sometimes otherwise stated as an implied authority of agency, that is, an agency of necessity which arises upon a father's refusal to provide the care needed.[43] This theory is usually not interpreted as strictly as in *Thompson v. Perr*,[44] where a dentist sued

34. Rose Funeral Home, Inc. v. Julian, 176 Tenn. 534, 144 S.W.2d 755, 757 (1940). *E.g.*, Rowe v. Raper, 23 Ind. App. 27, 54 N.E. 770 (1899); Colovos' Adm'r v. Gouvas, 269 Ky. 752, 108 S.W.2d 820 (1937); Hunycutt & Co. v. Thompson, 159 N.C. 29, 74 S.E. 628 (1912).
35. Barry Funeral Home v. Norris, 216 Miss. 457, 62 So. 2d 768 (1953).
36. 159 Md. 229, 150 Atl. 720 (1930).
37. *Id.* at 233, 150 Atl. at 722.
38. See, *e.g.*, Osborn v. Weatherford, 27 Ala. App. 258, 170 So. 95 (1936).
39. 79 Iowa 151, 44 N.W. 295 (1890), where the duty was imposed even though daughter was seventeen and lived and worked away from home.
40. *Id.* at 296.
41. *E.g.*, Osborn v. Weatherford, 27 Ala. App. 258, 170 So. 95 (1936).
42. Foster v. Adcock, 161 Tenn. 217, 30 S.W.2d 239 (1930).
43. Owen v. Watson, 157 Tenn. 352, 8 S.W.2d 484 (1928).
44. 238 S.W.2d 22 (Mo. App. 1951).

a father for payment for thirteen fillings and treatment of an abscessed tooth. The services were requested by the child's mother, who had not consulted the father, and although the court found the treatment to be a necessary, it stated:

> Except for an emergency which renders a third person's immediate interference both reasonable and proper, an implied promise to pay for necessaries must depend upon the father's failure or refusal to supply them; and where he is ready and willing to make suitable provision for his child, there can be no recovery by a third person who has furnished the necessaries without his express authority . . . the basis of the father's liability is his omission to fulfill his obligation of supporting his child. . . .[45]

The question of a father's responsibility for medical expenses often arises, as in college education cases, upon application by a mother for modification of a support order. Unlike the principal case, many courts have modified support orders to include provisions for medical expenses *in futuro*.[46] Other cases follow the line of decisions concerning funeral expenses and allow recovery for out-of-pocket payment from a tortfeasor or insurer on the grounds that medical expenses are a necessary for which a father is legally liable.[47] A father has been allowed recovery against a tavern owner, under a Dram Shop Act,[48] for medical expenses incurred by his child because of the parent's statutorily imposed liability for the medical expenses.[49]

In Maryland, *Kriedo v. Kriedo*[50] indicated that a father is liable for medical expenses incurred on behalf of his minor child. His responsibility for medical bills which have not been paid is to the doctor who rendered the medical service, and his liability for bills already paid by the mother is to her:

> Our conclusion, therefore, is that the father is primarily liable for the extraordinary necessary expenses shown to have been incurred for the benefit of his deceased minor child, which liability is to the persons rendering the service in cases where those rendering service have not been paid, and that the mother is entitled to reimbursement from the father in those cases in which payment has been made by her, but that upon the refusal of the father

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45. *Id.* at 25.

46. *E.g.*, Kuespert v. Roland, 222 Ark. 153, 257 S.W.2d 562 (1953); Mitchell v. Mitchell, 81 Ohio Abs. 88, 158 N.E.2d 546 (1959); Commonwealth v. Warner, 198 Pa. Super. 124, 181 A.2d 888 (1962).

47. Graul v. Adrian, 32 Ill. 2d 345, 205 N.E.2d 444 (1965). See, *e.g.*, Hickey v. Insurance Co. of North America, 239 F. Supp. 109 (E.D. Tenn. 1965); Doss v. Sewell, 257 N.C. 404, 125 S.E.2d 899 (1962).

48. The sections of the Illinois liquor control statute applicable to this case prohibit the sale of alcoholic liquor to a minor and give a right of action by the parent injured "in person or property" by an intoxicated person against the person who by selling the liquor caused or contributed to the intoxication. ILL. REV. STAT. ch. 43, §§ 131, 135 (1953).

49. Shepherd v. Marsaglia, 31 Ill. App. 2d 379, 176 N.E.2d 473 (1961). Money used by the parents to pay expenses was found to be property within the meaning of the Dram Shop Act, which allowed recovery for damages to property.

50. 159 Md. 229, 150 Atl. 720 (1930).

> to pay, the remedy is by a suit at law wherein he is entitled to have a jury pass upon questions of fact, including the inquiry as to whether the services were rendered, whether they were necessary, and whether the charge was a reasonable . . . one.[51]

It should be noted that the *Kriedo* case imposes primary liability on a father, notwithstanding a Maryland statute which imposes equal liability on both parents.[52]

A more recent Maryland case, *Hull v. Hull*,[53] citing the language from *Kriedo* that proper recovery for such expenses was in an action at law, refused to order medical support *in futuro* and deleted a provision for payment of all unusual medical and dental expenses of the children from the support order.

LEGAL EXPENSES

Although it is within the court's discretion to require a father to pay attorney's fees in custody suits or support proceedings,[54] liability for such fees and other legal expenses incurred is almost always imposed. Payment is often ordered made to the mother, whether she is petitioner,[55] or respondent,[56] on the theory that the suit involved necessaries for the minor children, and therefore the legal expenses incurred were themselves necessaries:

> All of these [legal and accounting expenses] constitute necessaries for the said infants which the plaintiff, as guardian ad litem, supplied. The defendant is under the natural obligation to furnish these necessaries for his infant children. . . . It is well settled that necessaries are not limited to food, clothing, habitation, and education but also include, among other things, the right of counsel. There can be no doubt, as a matter of law, that legal service rendered to an infant to enforce his right is a necessary for which his father is liable.[57]

An attorney may maintain a separate action against a father since he represented the children, the real parties to the action.[58]

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51. *Id.* at 233, 150 Atl. at 722. Duty of father to provide depends also on his financial circumstances and the parties' station in life.

52. "The father and mother are the joint natural guardians of their minor child and are jointly and severally charged with its support, care, nurture, welfare and education." MD. CODE ANN. art. 72A, § 1 (1957). "While this statute does not mention 'medical care' in specific terms, we have no hesitancy in holding that it is embraced within the scope of the broad language used." Craig v. State, 220 Md. 590, 596, 155 A.2d 684, 688 (1959). It should be noted that although the statute imposes a joint duty, the primary duty for support rests on the father. Boyd v. Boyd, 177 Md. 687, 688, 11 A.2d 461, 465 (1940). This statute is identical to that construed to include college education in Pass v. Pass, 238 Miss. 449, 118 So. 2d 769 (1960); however, the Court of Appeals did not expressly mention it in reaching its decision in Smith v. Smith, 227 Md. 355, 176 A.2d 862 (1962).

53. 201 Md. 225, 93 A.2d 536 (1953).

54. McDonald v. McDonald, 124 Mont. 26, 218 P.2d 929 (1950).

55. *E.g.*, Simonds v. Simonds, 154 F.2d 326 (D.C. Cir. 1946); Brown v. Brown, 233 Ark. 422, 345 S.W.2d 27 (1961); Matthews v. Matthews, 30 Misc. 2d 681, 222 N.Y.S.2d 31 (Sup. Ct. 1961).

56. Cone v. Cone, 68 So. 2d 886 (Fla. 1953).

57. Matthews v. Matthews, 30 Misc. 2d 681, 222 N.Y.S.2d 31, 36 (Sup. Ct. 1961).

58. *E.g.*, Friou v. Gentes, 11 App. Div. 2d 124, 204 N.Y.S.2d 836 (1960); see Schwartz v. Jacob, 394 S.W.2d 15 (Tex. Civ. App. 1965).

Financial ability to pay may be a factor considered. Although ordinarily the father has to pay attorney's fees even if the mother is the losing party, ". . . the court must take into consideration the financial condition of the wife and the ability of the husband to pay; if the parties are about equally able to pay their expense of litigation . . . ," then it is within the court's discretion to refuse imposition of liability on a father.[59]

In *Carter v. Carter,*[60] the Maryland Court of Appeals exercised its discretion not to require a father to pay fees of the attorney hired by the mother. Custody of the minor child was divided between the parties, and the father was successful in petitioning for modification of the order to give him sole custody. The court stated that the scope of necessaries might extend to ". . . the services of an attorney if reasonable and necessary for the protection or enforcement of property rights of the minor or his protection, liberty, or relief."[61] However, the court found that the mother's resistance of the father's petition was not in the child's best interest but rather was in her own behalf, and that therefore she could not recover money paid for the attorney's services.

The lower court in *Price v. Price,*[62] a suit to enforce a support order after much litigation concerning the psychiatric care of the parties' minor son, awarded the mother $1,850 for attorney's fees. The Court of Appeals stated that while it is sensible for equity to pass on the necessity for services provided to an infant and to direct a father to pay them, the action to enforce the liability must be at law.[63] Subsequently, in *Price v. Perkins,*[64] the court, requiring the father to pay $1,770 in fees to the attorney, quoted the lower court's findings: " ' . . . the Court finds that the services rendered by Mr. Perkins . . . were necessaries furnished to the child. Certainly, the mental health of Richard was of paramount importance.' "[65]

There are very few cases concerned with legal expenses incurred for the defense of a minor child in his or her criminal prosecution. It might, therefore, be supposed that most fathers voluntarily undertake this duty. In *Hill v. Childress,*[66] the court found that a father was not required to pay an attorney whom he did not hire to defend his son in a murder prosecution since ". . . he [was] by law only responsible for necessaries furnished [his son], among which the services of an attorney [could not] be ranked. . . ."[67] A New York court, however, stated that legal services requested by a minor for defense in a criminal prosecution were necessaries for which the father could be held responsible,[68] and an Indiana court, in a petition by a minor for provision under statutory authority of a criminal trial transcript for use

59. Shepard v. Shepard, 194 S.W.2d 329, 330 (Mo. App. 1946).
60. 156 Md. 500, 144 Atl. 490 (1929).
61. *Id.* at 509, 144 Atl. at 494.
62. 232 Md. 379, 194 A.2d 99 (1963).
63. *Id.* at 385, 194 A.2d at 102–03.
64. 242 Md. 501, 219 A.2d 557 (1966).
65. *Id.* at 503, 219 A.2d at 558.
66. 10 Yerg. (18 Tenn.) 514 (1837).
67. *Id.* at 515.
68. Griston v. Stousland, 186 Misc. 201, 60 N.Y.S.2d 118, 119 (Sup. Ct. 1946).

in his appeal, said that such legal expense was a necessary which a parent was obligated to provide if he was able to do so.[69]

MISCELLANEOUS

There is a paucity of decisions concerning liability of a father for extraordinary necessaries, other than those in the areas of college education, funeral, medical, and legal expenses. The reason for this may be that most persons of ordinary means would not consider other extraordinary items to be necessaries, whereas persons whose social station and financial resources are such that they recognize such items to be necessaries normally would agree to their provision.

A New York court has found items purchased by a mother for babysitters to be necessaries, as a form of compensation, and imposed liability for their cost on the father.[70]

Pincus v. Pincus[71] was an appeal from a contempt order in which, under a support order which required payment of all costs incident to the necessary and reasonable education of the minor children, the father was ordered to pay the expenses incident to his son's bar mitzvah.[72] The court held that since the original order did not expressly cover bar mitzvah expenses such a finding was not properly made in a contempt hearing and remanded the case for further findings of fact. However, the court indicated that the expenses of religious instruction might properly be included within the language of the original order and that while the reception expense probably could not be classified as an educational expense the father might still be liable for them depending upon his financial resources, the parties' position in the community, and the custom of having such a reception.[73]

That the father's financial circumstances and the station in life of the parties are controlling is clearly shown in *Hecht v. Hecht*:[74]

> The court below held . . . that summer camps are a "luxury," and that expenses of this nature may not be included in a support order. In the case of most parents this would be true, but "necessaries" and "luxuries" are relative matters. . . . Children of wealthy parents are entitled to the educational advantages of travel, private lessons in music, drama, swimming, horseback riding, and other activities in which they show interest and ability. They are entitled to the best medical care, good clothes and familiarity with good restaurants, good hotels, good shows and good camps. . . . A wealthy father has a legal duty to give his children the "advantages" which his financial status indicates to be reasonable.[75]

69. State *ex rel.* Butler v. Allen Circuit Court, 241 Ind. 627, 170 N.E.2d 663, 664 (1960).
70. Federated Dept. Stores, Inc. v. Seizer, 49 Misc. 2d 429, 267 N.Y.S.2d 774, 777–78 (Civ. Ct. 1965).
71. 197 A.2d 854 (D.C. App. 1964).
72. Religious instruction, $127.50; Printing, $22.87; Wine, $19.92; Flowers, $62.78; Religious school expenses, dues and books, $273.75; Reception, $1,045.88. *Id.* at 856 n.1.
73. *Id.* at 856.
74. 189 Pa. Super. 276, 150 A.2d 139 (1959).
75. *Id.* at 143.

CONCLUSION

It appears that the current trend is for courts to declare expenses incurred for the college education, funeral, legal assistance, and medical care of minor children, which expenses were once considered extraordinary, to be necessaries for which the minor's father is liable. This is almost universally true concerning funeral and medical expenses and, to a degree, legal expenses, although the latter still retains a more discretionary status. College education, too, has come to be considered a necessary in most circumstances.

A father's liability for expenses in all of these categories, however, as well as for the basic common law necessaries, is qualified primarily by his financial circumstances. In the case of college education, the additional factors of station in life of the parties and the minor's aptitude for higher education are considered. Some courts have imposed this liability on a father by simply extending the common law concept of necessaries, while others have justified the extension under a child support statute.[76] The court in the principal case was apparently unable to do either: it followed the *Halsted*[77] precedent, even though that decision was explicitly limited to its particular facts;[78] and it apparently ignored a statute which should have permitted it to follow the modern trend of authority.

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76. The applicable Maryland statute is MD. CODE ANN. art. 72A, § 1 (1957). See discussion note 52 *supra*.

77. Halsted v. Halsted, 228 App. Div. 298, 239 N.Y.S. 422 (1930).

78. "It may be that unusual circumstances might make the furnishing of a professional or classical education to an infant a necessary, enforceable at law against a parent, but that question is not here . . ." *Id.* at 424.