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Domestic Relations - Child Support and College Education - Commonwealth v. Howell, 198 Pa. Super, 391, 181 A.2d 903 (1962)

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explored the circumstances of the search and seizure without objection by the State. The defense made no objection, however, to the offer of the articles seized. The Supreme Court of New Jersey held that the rules require that an objection to the admission of evidence be made at the trial, but since the defense could not anticipate the *Mapp* case, the issue would be heard on the basis of the record made below as interpreted by the law as it existed at the time of the appeal.

Taking into its consideration the problem created by the *Mapp* decision, the New York Court of Appeals, in *Friola*, permits review whether or not objection was made to evidence introduced in the trial court. The only reservation is that some inquiry into the circumstances of the search and seizure be present in the record.

DOMESTIC RELATIONS–CHILD SUPPORT AND COLLEGE EDUCATION

Plaintiff, wife, brought a petition for additional support against her husband to send their eighteen-year-old daughter to college. The Domestic Relations division of the County Court of Philadelphia rendered an order directing the husband to pay the daughter's college tuition to the extent of a fund created by a child's educational endowment policy which had been issued to the husband, and which he intended to use to send the daughter to college. The husband appealed stating that the court abused its discretion in making the order because no evidence was admitted as to his financial ability and that the intention to send his daughter to college, coupled with an insurance policy, is not enough to legally oblige him to carry out this purpose. The Superior Court of Pennsylvania affirmed, holding that if there is an express agreement or if the circumstances warrant it, a parent may be held liable for the support of a child attending college. The court further stated that while the endowment policy is not an express agreement, its existence coupled with the father's intention to send the daughter to college are factors which warrant the decree. The court also held that the presence of the insurance policy showed the husband's ability to pay. Consequently, there was no abuse of discretion.[1] *Commonwealth v. Howell*, 198 Pa. Super, 391, 181 A. 2d 903 (1962).

[1] There is a dissent by three judges who rely on 18 P.S. § 4733 which, after making initial provisions for issuance of process and service on a defendant, provides that the court, after a hearing in a summary proceeding, may order a parent to provide a college education, when a complaint has been made and the parent is of sufficient ability to pay such sum as said court shall think reasonable and proper for the comfortable support and maintenance of the said children. The dissent states that the lower court would not allow evidence as to the inability of the husband to pay for support; thus no order should be entered.

The problem of whether a father is required to pay for the college education of his children is an old one and has been the subject of many cases. Blackstone almost two centuries ago stated the legal principle which governs the issue of whether parents are responsible for the college education of their children. He wrote:

> 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. For, as Puffendorf very well observes, it is not easy to imagine or allow, that a parent has conferred any considerable benefit upon his child by bringing him into the world, if he afterwards entirely neglects his culture and education and suffers him to grow up like a beast, to lead a life useless to others, and shameful to himself.[2]

The courts, in deciding on this problem have not been as explicit as Blackstone. There have been many differences in opinion as to whether or not to allow support for college education.[3] The states allowing the support decrees are in a growing minority. These states proceed on general divorce statutes which provide that when a divorce is decreed, the courts may make orders affecting the custody and support of the children as shall be fit, reasonable and just as to the ability of the parent. The statute on which the wife is relying in our principal case is substantially the same.[4] These states interpret that the phrase "support of children" incorporates in its meaning a college education.[5] Other decisions that order college educations proceed on the common law "necessary" theory. The Washington Supreme Court in *Esteb v. Esteb*[6] is representative of this view. In this case a mother petitioned the court for additional support

[2] BLACKSTONE'S COMMENTARIES, Lewis Edition, p. 424.

[3] Middlebury College v. Chandler, 16 Vt. 683 (1844), held that a college graduate is the exception and not the common person, in refusing to allow allotment for the child for college education. Other cases that have refused to allow college educations as an element in divorce decrees are: Commonwealth v. Wingart, 173 Pa. Super. 613, 98 A. 2d 203 (1953); Golay v. Golay, 35 Wash. 2d 122, 210 P. 2d 1022 (1949); Strauer v. Strauer, 26 N.J. Misc. 218, 59 A. 2d 39 (1948); Hachet v. Hachet, 177 Ind. App. 294, 71 N.E. 2d 927 (1947); Binney v. Binney, 146 Pa. Super. 374, 22 A. 2d 598 (1941); Morris v. Morris, 92 Ind. App. 65, 171 N.E. 386 (1930). Those allowing for college educations in divorce decrees are: Commonwealth v. Martin, 196 Pa. Super. 355, 175 A.2d 138 (1961); Pass v. Pass, 238 Miss. 449, 118 So. 2d 769 (1960); Maitzen v. Maitzen, 24 Ill. App. 2d 32, 163 N.E. 2d 840 (1959); Strom v. Strom, 13 Ill. App. 2d 354, 142 N.E. 2d 172 (1957); Cohen v. Cohen, 193 Misc. 106, 82 N.Y.S. 2d 513 (Sup. Ct. 1948); Jackman v. Short, 165 Ore. 626, 109 P. 2d 860 (1941); Refer v. Refer, 102 Mont. 121, 56 P.2d 750 (1936); Esteb v. Esteb, 138 Wash. 174, 244 Pac. 264 (1926); Hilliard v. Hilliard, 197 Ill. 549, 64 N.E. 326 (1902).

[4] 18 P.S. § 4733.

[5] ILL. REV. STAT. ch. 40 § 19 (1959), Maitzen v. Maitzen, 24 Ill. App. 2d 32, 163 N.E. 2d 840 (1959); MISS. CODE ANN. § 399 (1956), Pass v. Pass, 238 Miss. 449, 118 So. 2d 769 (1960).

[6] 138 Wash. 174, 244 Pac. 264 (1926).

from the father for sending the daughter to college. The court, in granting an award of $60 a month, said that times have changed, where a century ago college education was the exception, today it is the rule. The Supreme Court held that a college education is a "necessary" in the full meaning.[7] In the Mississippi case of *Pass v. Pass*[8] the Supreme Court raised a support order from $50 to $90 in order to allow the defendant's nineteen-year-old daughter to attend college. The court held that the parents, to the extent of their financial ability, have a duty to provide an education to better equip the child for adult life, and this duty will extend to a college education. The common-law doctrine has also been used to compel a divorced father to provide funds for the college education of his disabled adult child.[9] Courts, in describing what are necessaries, include in the meaning not only food and clothing but other things which children of his or her age have and enjoy, among these would be a college education.[10] In deciding whether a college education is a "necessary," the courts will look at the financial ability of the parent and the practicability of the courses pursued and the ability of the child.[11]

Other states, such as Pennsylvania, allow a support order for college education if there is an express agreement to do so or if the circumstances warrant it.[12] The reasoning in the *Howell* case where the Superior Court held that the intention of the father to send the daughter to college together with the presence of the endowment policy for that purpose, point to the circumstances warranting a decree of additional support for a college education. The court also relied on the common law "necessary" doctrine by showing: 1) the ability of the father to pay because of the insurance policy; 2) the practicalities of the secretarial course pursued by the daughter; and 3) that the daughter, by graduating from high school and being admitted into college, has sufficient ability to continue with her education.

[7] Also see Jackman v. Short, 165 Ore. 626, 109 P. 2d 860 (1941), affirming an order for $50 a month for the support of an eighteen year old daughter who was attending the University of Oregon, the Supreme Court said that reason as well as the public policy of the state dictates that a college education is a "necessary."

[8] 238 Miss. 449, 118 So. 2d 769 (1960).

[9] Strom v. Strom, 13 Ill. App. 2d 354, 142 N.E. 2d 172 (1957).

[10] Jackman v. Short, 165 Ore. 626, 109 P. 2d 860 (1941).

[11] See cases in note 7 and 8 and also Maitzen v. Maitzen, 24 Ill. App. 2d 32, 163 N.E. 2d 840 (1959).

[12] Commonwealth v. Martin, 196 Pa. Super. 355, 175 A. 2d 138 (1961). In this case the father's prior promise to the divorce, agreeing to pay for his now nineteen-year-old daughter's education beyond secondary school, and also to set up an insurance trust evinced an express agreement which the court enforced by ordering payment of $100 per month for the college education for the daughter. The court also stated that an express agreement would not be needed; all that is required is that the circumstances warrant a duty to pay.

The majority of jurisdictions still refuse to give support orders including allowances for college education. The courts have reasoned that a college education is not important enough to be considered a "necessary,"[13] that only rich people should be compelled to provide a college education for their children;[14] and that there must be an express agreement between the parties to provide for a college education before the court will allow a decree with support for college education.[15]

Illinois, as early as 1902, in taking a stand with the minority, allowed support orders which required a father to pay for his child's education up to majority if he has the financial ability to do so.[16] Illinois has also regarded a college education as a necessity. The Appellate court in *Maitzen v. Maitzen*,[17] when faced with the problem of whether the court should modify the decree by increasing the support from $50 to $150 for the college education of the defendant's seventeen year old daughter, discussed the public policy of the state and the statute relating to divorce, custody and support of children.[18] The court stated that such a decree was not contrary to but in agreement with the public policy. This is indicated by the numerous institutions of higher learning built by the state. The court added that "the word 'children' in the statute is not qualified by any word or phrase limiting its application to minor children;[19] hence, the decree was not contrary to the statute relating to divorce, custody and support of children. In *Strom v. Strom*[20] the Illinois Appellate Court ordered a father to provide a college education for his physically handicapped daughter even past her majority in order to equip her for adult life. The court investigated the financial ability of the father, and the evidence proved that he was able to provide a higher education which was considered to be a "necessary." These cases establish that Illinois courts will order a father to provide a college education for his children.[21]

The more recent cases indicate a trend toward ordering divorced par-

[13] Hachat v. Hachat, 117 Ind. App. 294, 71 N.E. 2d 927 (1947).

[14] Golay v. Golay, 35 Wash. 2d 122, 210 P. 2d 1022 (1949).

[15] Commonwealth v. Stomel, 180 Pa. Super. 573, 119 A. 2d 597 (1956).

[16] Hilliard v. Hilliard, 197 Ill. 549, 64 N.E. 326 (1902). Although this case did not go into college education, it is a case used for a foundation of allowing college education as an element of support orders.

[17] 24 Ill. App. 2d 32, 163 N.E. 2d 840 (1959).

[18] ILL. REV. STAT. ch. 40 § 19 (1959). "The court may on application, from time to time, make such alterations in the allowance of alimony and maintenance and the care custody and support of the children as shall appear reasonably proper."

[19] Maitzen v. Maitzen, 24 Ill. App. 2d 32, 37, 163 N.E. 2d 840, 843 (1959).

[20] 13 Ill. App. 2d 354, 142 N.E. 2d 172 (1957).

[21] See also Friedman and Weinber, *Matrimonial Law in Illinois in the '50's*, 10 DE PAUL L. REV. 448 (1961).

ents to furnish a college education for their children. This trend seems to be growing because of the need for educated citizens in our society, our families and our government. If the children of today, the leaders and citizens of tomorrow, are to take over our society and government and meet the responsibility of their calling, they must be prepared. The financially able should provide the training and educational support that their children need to meet this responsibility.

INSURANCE–FALSE SWEARING BY INSURED AS A DEFENSE TO INSURER

Marianne Vernon, a resident of Texas, brought suit against the Aetna Insurance Company, in the United States District Court,[1] for recovery of the value of certain insured jewelry. In her complaint she stated that the jewelry was taken from her home under circumstances constituting burglary or theft. After the filing of her complaint, but prior to the insurance company's answer thereto, she swore in an affidavit, confessing that the alleged burglary or theft was a hoax, scheme and conspiracy entered into between her father, mother and herself, devised to defraud the insurance company. The insurance company then filed a motion for summary judgment, attaching thereto a copy of the said affidavit. Prior to the hearing of this motion plaintiff filed a second affidavit, stating that everything in the first affidavit was untrue and completely false. The insurance company then filed another motion for summary judgment, this time relying on the forfeiture clause in its policy which provided for the voiding of the policy if the insured was guilty of making any fraudulant or false swearings in regard to the policy.[2] The insurance company contended that the two affidavits, as a matter of law, constituted fraud, attempted fraud, false swearing, concealment and misrepresentation within the meaning of its forfeiture clause. The United States District Court granted the motion for summary judgment[3] and the plaintiff appealed.

[1] Aetna Insurance Company is a resident of Connecticut, within the meaning of 28 U.S.C. § 1332 (1958). Thus, Federal jurisdiction was obtained under this statute which states: "The District Courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and as between citizens of different states, . . . (c) for the purposes of this section . . . a corporation shall be deemed a citizen of any state by which it has been incorporated and of the state where it has its principal place of business."

[2] The clause was worded as follows: "This policy shall be void if the assured has concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof or in case of any fraud, attempted fraud or false swearing by the assured touching any matter relating to this insurance or the subject thereof, whether before or after a loss."

[3] Vernon v. Aetna Insurance Company, 189 F. Supp. 233 (S.D. Texas, 1960).