APPENDIX:

STATUTORY AND JUDICIAL EMANCIPATION OF MINORS

IN THE UNITED STATES

ALABAMA

TITLE 26. INFANTS AND INCOMPETENTS

CHAPTER 13. RELIEF OF MINOR CHILDREN FROM DISABILITIES OF NONAGE

SECTION 26

Section 26-13. When authorized; procedure generally.

The several juvenile courts of the state are authorized to relieve minors over 18 years of age from the disabilities of nonage in the following cases and none other:

(1) Whenever the father or the mother of such minor shall file a petition with the court, in writing, requesting that such minor be relieved from the disabilities of nonage, and the court shall be satisfied that it is to the best interest of such minor. The parent filing such petition shall aver whether he is the guardian of such minor.

(2) Whenever any such minor, having no father, mother or guardian, or if a parent is living but is insane or has abandoned such minor for one year, shall file a petition with the court to be relieved of the disabilities of nonage, and the court shall be satisfied that it is to the interest of such minor.

(3) Whenever any such minor, having no father or mother, or if a parent is living but is insane or has abandoned such minor for one year, but having a guardian, shall file a petition with the juvenile court to be relieved from the disabilities and the guardian shall join in such petition and the court shall be satisfied that it is to the interest of such minor.

Section 26-13-2. Filing of petition.

The petition must be filed in the county in which the parent or guardian of such minor resides or in the county in which the guardianship of such minor is pending when the petition is filed by the parent or guardian and in the county where the minor resides when the petition is filed by a minor who has no parents or guardian or whose parents reside beyond the limits of the state and such minor resides in this state. In the event that the parent, guardian or minor filing such petition resides beyond the limits of the State of Alabama, then the petition may be filed in the county in which the guardianship of such minor is pending or in the county where the minor owns any real or personal property.

Section 26-13-3. Notice of filing of petition.

Whenever the petition is filed by the minor and the guardian it shall be the duty of the clerk to give notice of the filing of such petition in some newspaper published in the county or, if no newspaper is published in such county, then in such manner as may be prescribed by the judge. Such notice shall be given once a week for three successive weeks before the time of hearing such petition. Whenever the petition is filed under subdivision (1) of Section 26-13-1, a copy of the petition must be served on the minor by the sheriff if the minor resides in this state or, if a nonresident or absent from the state, by registered or certified mail.

Section 26-13-4. Contests of petition; receipt of evidence as to petition.

Upon the hearing of such petition, any person may contest the granting of same upon giving security for costs of such contest. All evidence touching such petition shall be taken in such manner as may be directed by the court.

Section 26-13-5. Entry of judgment relieving minor from disabilities of nonage and effect thereof generally.

If on the hearing of the evidence adduced and upon such other evidence as may be required by the court, the court shall be satisfied that it will be to the interest of such minor to be relieved from the disabilities of nonage, the court shall thereupon enter judgment accordingly, and such judgment shall have the effect of investing such minor with the right to sue and be sued, to contract, to buy, sell and convey real estate and generally to do and perform all acts which such minor could lawfully do if 19 years of age, except as provided in this chapter.

Section 26-13-6. Restriction of rights of minor by judgment of court.

The court, in its judgment, may, if it deems it advisable, restrict and qualify the rights of a minor relieved from the disabilities of nonage, as to acquittances to and contracts with guardians, executors, administrators, trustees and other persons indebted to such minor, to such an extent as to the court may seem proper in each particular case. Such restrictions shall be fully set forth in the judgment relieving such minor from the disabilities of nonage.

Section 26-13-7. Filing of copy of judgment with probate court; recordation, etc., of judgment by probate judge.

Every minor relieved of the disabilities of nonage under the provisions of this chapter must file a certified copy of the judgment relieving him from such disabilities in the office of the judge of probate in each of the counties in which such minor shall thereafter reside and in the office of the judge of probate of each county in the state where such minor shall do any business or make any contracts. It shall be the duty of the judge of probate to record the judgment and keep the same for the inspection of the public.

Section 26-13-8. Recordation of foreign judgments relieving minors of disabilities of nonage and effect thereof.

A copy of a judgment entered by a court of competent jurisdiction of another state of the United States, duly certified according to the acts of Congress of the United States, relieving a minor nonresident of this state of the disabilities of nonage may be recorded in the probate office of any county in this state where such minor owns property, and when so recorded the said judgment shall have the same force and effect throughout this state as in the state where entered.

ALASKA

TITLE 9. CODE OF CIVIL PROCEDURE

CHAPTER 55. SPECIAL ACTIONS AND PROCEEDINGS

ARTICLE 8. REMOVAL OF DISABILITIES OF A MINOR

SEC. 09.55.590. REMOVAL OF DISABILITIES OF MINORITY

Sec. 09.55.590. Removal of disabilities of minority

(a) A minor who is a resident of this state and is at least 16 years of age, who is living separate and apart from the parents or guardian of the minor, capable of sustained self-support and of managing one's own financial affairs, or the legal custodian of such a minor, may petition the superior court to have the disabilities of minority removed for limited or general purposes.

(b) A minor or the legal custodian of a minor may institute a petition under this section in the name of the minor.

(c) The petition for removal of disabilities of minority must state

(1) the name, age, and residence address of the minor;

(2) the name and address of each living parent;

(3) the name and address of the guardian of the person and the guardian of the estate, if any;

(4) the reasons why removal would be in the best interest of the minor; and

(5) the purposes for which removal is sought.

(d) The person who institutes a petition under this section must obtain the consent of each living parent or guardian having control of the person or property of the minor. If the person who is to consent to the petition is unavailable or the whereabouts of that person are unknown, or if a parent or guardian unreasonably withholds consent, the court, acting in the best interest of the minor, may waive this requirement of consent as to that parent or guardian.

(e) The court may appoint an attorney or a guardian ad litem to represent the interests of the minor at the hearing. Appointment of an attorney or guardian ad litem shall be made in accordance with AS 25.24.310.

(f) If the petition under this section is filed by a minor, the court may remove the disabilities of minority as requested in the petition if the court finds on the record after a hearing that the minor is a resident of the state, at least 16 years of age, living separate and apart from the parent or guardian of the minor, and capable of sustained self-support and managing the minor's own financial affairs. If the petition under this section is filed by the legal custodian of a minor, the court may remove the disabilities of minority as requested in the petition only if the minor consents on the record to the removal of disabilities and the court, in addition to making the other findings required under this subsection for a petition filed by a minor, makes a finding on the record that there is interpersonal conflict involving the legal custodian and the minor that the custodian and the minor have been unable to resolve satisfactorily through other means; the finding must include a description of the efforts that were made by the legal custodian to resolve the interpersonal conflict before the custodian filed the petition under this section. If the court determines that removal of disabilities is in the best interests of the minor, the court may waive the requirement for the minor's consent that is otherwise imposed under this subsection. In making its decision under this subsection, the court may consider whether a noncustodial parent of the minor is able and willing to petition for custody of the minor.

(g) Except for specific constitutional and statutory age requirements for voting and use of alcoholic beverages, a minor whose disabilities are removed for general purposes has the power and capacity of an adult, including but not limited to the right to self-control, the right to be domiciled where one desires, the right to receive and control one's earnings, to sue or to be sued, and the capacity to contract.

ARIZONA

MATHEWS C. TENCZA AND GLADYS BONHARDT TENCZA, HUSBAND AND WIFE, GLADYS BONHARDT TENCZA, MOTHER AND SURVIVING RELATIVE OF THERESA BONHARDT, DECEASED, AND JOHN DOES 1 THROUGH 10, SURVIVING RELATIVES OF THERESA BONHARDT, DECEASED, APPELLANTS V. AETNA CASUALTY AND SURETY COMPANY, A CORPORATION, APPELLEE

No. 11606-PR

Supreme Court of Arizona

111 Ariz. 226; 527 P.2d 97; 1974 Ariz. LEXIS 401

October 15, 1974

OPINION BY HOLOHAN

Aetna Casualty and Surety Company issued to Mathews Tencza an automobile liability policy containing uninsured motorist coverage. It brought this declaratory judgment action to determine whether it was liable under the policy for the death of the insured's stepdaughter, who was killed when she was struck by an uninsured pickup truck. Trial was to the court without a jury, and judgment was rendered for the plaintiff insurance carrier. On appeal, the Court of Appeals reversed the decision of the superior court. *21 Ariz.App. 552, 521 P.2d 1010 (1974).* We accepted the petition for review filed by the insurance carrier. The opinion of the Court of Appeals is vacated.

The policy's uninsured motorist clause provides coverage for any relative of the insured "who is a resident of the same household." The company does not deny that the stepdaughter is a relative; it disputes the allegation that she was, at the time of the accident, a resident of the insured's household, and that is the sole issue in this case.

For some time prior to September, 1971, Theresa Bonhardt had lived with her mother and stepfather, Mathews Tencza. In September, 1971, Theresa, an 18-year-old high school junior, quit school, took her dog, moved out of the house, and went to live with some friends in Brooklyn. After a few weeks there, she moved out and went to live with her aunt in the same city. A few weeks later she flew to Tucson and hitchhiked her way toward Sells, Arizona. Theresa moved into the home of Mr. and Mrs. Jerry Janc who were school-teachers in the Sells area. Theresa earned her room and board by doing the housework.

On December 3, 1971, Theresa was walking along the highway near Sells, Arizona and was struck and killed by an uninsured pickup truck.

At the trial only two witnesses testified -- Mr. Tencza and Mrs. Janc. Mr. Tencza testified that he and his wife planned on moving to Arizona, and that he had told his boss and Theresa about his plans. He testified that there were several reasons why Theresa left home. The immediate cause was friction with her brother which came to a head when the brother got drunk and stabbed her dog with an ice pick. Another reason was that she just "jumped the gun" -- i. e., decided not to wait for her parents to go to Arizona. A third reason, he testified, was that she had for some time wanted to live and work with Indians. Mr. Tencza pointed out that Theresa had kept in touch with her mother by telephone and letters. He also noted that she had not taken all her clothes when she left for Arizona although it was not clear whether the remainder of her clothes were at the farm or at her aunt's home. Mr. Tencza conceded that he didn't think that Theresa had any intention of returning to New York, but he was confident that she intended to live with the family when they moved to Arizona.

Mrs. Janc testified that Theresa, while living with them, tried to find a job but never succeeded. Her mother sent her a $ 200 Social Security check from her deceased natural father's funds, and an additional amount of $ 50 by personal check. Mrs. Janc got Theresa to bank the $ 200 check, but Theresa spent the $ 50 check on clothes.

Having failed to find a job she decided to go to school at Sells. The Jancs rented a house for her in an Indian village within the Sells school district so she could attend school there without paying tuition. They also bought her a bicycle. Her death occurred a day before she was to move into the house.

No formal findings of fact and conclusions of law were requested, and the trial court made none. The ruling of the trial court was that Theresa Bonhardt was not a member of the insured's household and therefore not covered by his policy of insurance. While an appellate court is not bound by the legal conclusion of a trial court it is bound by the facts found by the trial court. Where no findings of fact are made the trial court will be deemed to have made every finding of fact necessary to support its judgment, and such findings, whether specifically made or implied, will not be disturbed if supported by competent evidence. *In re Estate of Harber, 104 Ariz. 79, 449 P.2d 7 (1969).* When there is a conflict in the reasonable inferences that can be drawn from the facts, the findings of the trial court must be upheld. *DeSantis v. Dixon, 72 Ariz. 345, 236 P.2d 38 (1951).*

The trial court in effect concluded that Theresa Bonhardt had become an emancipated child. Although what constitutes emancipation is a question of law, whether there has been an actual emancipation is a question of fact, and the intention of the parents governs. *Wadoz v. United Nat. Indem. Co., 274 Wis. 383, 80 N.W.2d 262 (1957).* Although emancipation generally may not be accomplished by the child alone, it can be done in certain cases, as by marriage, enlistment in the armed services, etc.

Emancipation is never presumed but must be proved, and the burden of proof is on the one asserting it to prove that fact by a preponderance of evidence. 59 Am.Jur.2d, Parent and Child § 98. A child may sometimes be emancipated even though she continues to room and board with her parents. *Martinez v. So. Pac. Co., 45 Cal.2d 244, 288 P.2d 868 (1955).* See also *Carricato v. Carricato (Ky.), 384 S.W.2d 85 (1964).* Intent may be implied from the conduct of the parents and the surrounding circumstances. *Bates v. Bates, 62 Misc.2d 498, 310 N.Y.S.2d 26 (1970);* 59 Am.Jur.2d, Parent and Child § 95.

There was no evidence that Theresa's parents ever demanded or even requested that she return to the family abode. Everything pointed to a parental lack of objection to Theresa's remaining in Arizona, and a tacit approval of her leaving New York. If there was any reluctance beyond the usual reluctance of parents to see their child leave home, there is no evidence of it. Theresa had no intention of returning to New York. Her activities were without parental guidance or supervision. She was in the process, before her death, of moving into her own house. She was endeavoring to support herself. She received her financial support mainly through the Social Security payment payable as a result of her father's death. Her age was such that many young women of similar age are independent and considered by parents as emancipated.

The evidence presented in the case was subject to different interpretations, and reasonable men could reach different conclusions on the facts. Under such circumstances, we believe that the trial court had sufficient basis for concluding that Theresa Bonhardt was emancipated and was not a part of the household of her stepfather and mother; hence she was not covered by the policy of insurance.

The judgment of the superior court is affirmed.

ARKANSAS

TITLE 9. FAMILY LAW

SUBTITLE 3. MINORS

CHAPTER 26. RIGHTS RESPECTING BUSINESS AND PROPERTY

SUBCHAPTER 1. GENERAL PROVISIONS

§ 9-26-104. Removal of disability of a minor.

(a) The circuit courts and the chancery courts of this state or the respective judges thereof in vacation shall have the power to authorize any person who is a resident of the county and who has reached his sixteenth birthday to transact business in general and any particular business specified in like manner and with the same effect as if such act or thing were done by a person who had attained majority. Every act done by a person so authorized shall have the same force and effect in law and equity as if done by a person of full age.

(b) Letters testamentary, of administration, or of guardianship may be granted to any such person, if otherwise entitled by law to have or hold such fiduciary trust, with like effect as if granted to a person over the age of majority.

(c) The order of removal of disabilities may be made by the courts, or the respective judges thereof, in term time or in vacation.

(d) (1) The circuit and chancery courts of any county in which a nonresident minor of the State of Arkansas owns real estate, or any interest in real estate, shall have concurrent jurisdiction to remove the disabilities of minority of such minor where the person has reached sixteen (16) years of age, as to such real estate. This may be done to enable the minor to sell and convey the real estate, or any interest therein, which may be owned by the minor or to mortgage or otherwise dispose of the real estate, as fully and effectually as if the minor was of full age.

(2) The order of removal of disabilities may be made by the courts, or the respective judges thereof in term time or in vacation, and, if made in vacation, shall be entered at large upon the records of the court.

(e) After the filing of a petition to remove the disability of a minor, the court shall fix a time and place for hearing the petition. At least twenty (20) days before the date of the hearing, notice of the filing of the petition and of the time and place of the hearing shall be given by the petitioner to any parent or legal guardian of the minor who has not joined in the petition. The notice shall be given in the same manner as is provided for summons under the Arkansas Rules of Civil Procedure.

CALIFORNIA

FAMILY CODE

DIVISION 11. MINORS

PART 6. EMANCIPATION OF MINORS LAW

CHAPTER 1. General Provisions.

7000. This part may be cited as the Emancipation of Minors Law.

7001. It is the purpose of this part to provide a clear statement defining emancipation and its consequences and to permit an emancipated minor to obtain a court declaration of the minor's status. This part is not intended to affect the status of minors who may become emancipated under the decisional case law that was in effect before the enactment of Chapter 1059 of the Statutes of 1978.

7002. A person under the age of 18 years is an emancipated minor if any of the following conditions is satisfied:

(a) The person has entered into a valid marriage, whether or not the marriage has been dissolved.

(b) The person is on active duty with the armed forces of the United States.

(c) The person has received a declaration of emancipation pursuant to Section 7122.

CHAPTER 2. Effect of Emancipation.

§ 7050. Emancipated minor considered an adult.

An emancipated minor shall be considered as being an adult for the following purposes:

(a) The minor's right to support by the minor's parents.

(b) The right of the minor's parents to the minor's earnings and to control the minor.

(c) The application of Sections 300 and 601 of the Welfare and Institutions Code.

(d) Ending all vicarious or imputed liability of the minor's parents or guardian for the minor's torts. Nothing in this section affects any liability of a parent, guardian, spouse, or employer imposed by the Vehicle Code, or any vicarious liability that arises from an agency relationship.

(e) The minor's capacity to do any of the following:

(1) Consent to medical, dental, or psychiatric care, without parental consent, knowledge, or liability.

(2) Enter into a binding contract or give a delegation of power.

(3) Buy, sell, lease, encumber, exchange, or transfer an interest in real or personal property, including, but not limited to, shares of stock in a domestic or foreign corporation or a membership in a nonprofit corporation.

(4) Sue or be sued in the minor's own name.

(5) Compromise, settle, arbitrate, or otherwise adjust a claim, action, or proceeding by or against the minor.

(6) Make or revoke a will.

(7) Make a gift, outright or in trust.

(8) Convey or release contingent or expectant interests in property, including marital property rights and any right of survivorship incident to joint tenancy, and consent to a transfer, encumbrance, or gift of marital property.

(9) Exercise or release the minor's powers as donee of a power of appointment unless the creating instrument otherwise provides.

(10) Create for the minor's own benefit or for the benefit of others a revocable or irrevocable trust.

(11) Revoke a revocable trust.

(12) Elect to take under or against a will.

(13) Renounce or disclaim any interest acquired by testate or intestate succession or by inter vivos transfer, including exercise of the right to surrender the right to revoke a revocable trust.

(14) Make an election referred to in Section 13502 of, or an election and agreement referred to in Section 13503 of, the Probate Code.

(15) Establish the minor's own residence.

(16) Apply for a work permit pursuant to Section 49110 of the Education Code without the request of the minor's parents.

(17) Enroll in a school or college.

§ 7051. Insurance contracts.

An insurance contract entered into by an emancipated minor has the same effect as if it were entered into by an adult and, with respect to that contract, the minor has the same rights, duties, and liabilities as an adult.

§ 7052. Stock, memberships, and property.

With respect to shares of stock in a domestic or foreign corporation held by an emancipated minor, a membership in a nonprofit corporation held by an emancipated minor, or other property held by an emancipated minor, the minor may do all of the following:

(a) Vote in person, and give proxies to exercise any voting rights, with respect to the shares, membership, or property.

(b) Waive notice of any meeting or give consent to the holding of any meeting.

(c) Authorize, ratify, approve, or confirm any action that could be taken by shareholders, members, or property owners.

CHAPTER 3. Court Declaration of Emancipation.

ARTICLE 1. General Provisions.

§ 7110. Legislative intent.

It is the intent of the Legislature that proceedings under this part be as simple and inexpensive as possible. To that end, the Judicial Council is requested to prepare and distribute to the clerks of the superior courts appropriate forms for the proceedings that are suitable for use by minors acting as their own counsel.

§ 7111. Effect of declaration on benefits.

The issuance of a declaration of emancipation does not entitle the minor to any benefits under Division 9 (commencing with Section 10000) of the Welfare and Institutions Code which would not otherwise accrue to an emancipated minor.

ARTICLE 2. Procedure for Declaration.

§ 7120. Petition.

(a) A minor may petition the superior court of the county in which the minor resides or is temporarily domiciled for a declaration of emancipation.

(b) The petition shall set forth with specificity all of the following facts:

(1) The minor is at least 14 years of age.

(2) The minor willingly lives separate and apart from the minor's parents or guardian with the consent or acquiescence of the minor's parents or guardian.

(3) The minor is managing his or her own financial affairs. As evidence of this, the minor shall complete and attach a declaration of income and expenses as provided in Section 1285.50 of the California Rules of Court.

(4) The source of the minor's income is not derived from any activity declared to be a crime by the laws of this state or the laws of the United States.

§ 7121. Notice.

(a) Before the petition for a declaration of emancipation is heard, notice the court determines is reasonable shall be given to the minor's parents, guardian, or other person entitled to the custody of the minor, or proof shall be made to the court that their addresses are unknown or that for other reasons the notice cannot be given.

(b) The clerk of the court shall also notify the district attorney of the county where the matter is to be heard of the proceeding. If the minor is a ward or dependent child of the court, notice shall be given to the probation department.

(c) The notice shall include a form whereby the minor's parents, guardian, or other person entitled to the custody of the minor may give their written consent to the petitioner's emancipation. The notice shall include a warning that a court may void or rescind the declaration of emancipation and the parents may become liable for support and medical insurance coverage pursuant to Chapter 2 (commencing with Section 4000) of Part 2 of Division 9 of this code and Sections 11350, 11350.1, 11475.1, and 11490 of the Welfare and Institutions Code.

§ 7122. Issuance of declaration of emancipation.

(a) The court shall sustain the petition if it finds that the minor is a person described by Section 7120 and that emancipation would not be contrary to the minor's best interest.

(b) If the petition is sustained, the court shall forthwith issue a declaration of emancipation, which shall be filed by the county clerk.

(c) A declaration is conclusive evidence that the minor is emancipated.

§ 7123. Writ of mandate.

(a) If the petition is denied, the minor has a right to file a petition for a writ of mandate.

(b) If the petition is sustained, the parents or guardian have a right to file a petition for a writ of mandate if they have appeared in the proceeding and opposed the granting of the petition.

ARTICLE 3. Voiding or Rescinding Declaration

§ 7130. Grounds for voiding or rescinding.

(a) A declaration of emancipation obtained by fraud or by the withholding of material information is voidable.

(b) A declaration of emancipation of a minor who is indigent and has no means of support is subject to rescission.

§ 7131. Petition to void declaration.

A petition to void a declaration of emancipation on the ground that the declaration was obtained by fraud or by the withholding of material information may be filed by any person or by any public or private agency. The petition shall be filed in the court that made the declaration.

§ 7132. Petition to rescind declaration.

(a) A petition to rescind a declaration of emancipation on the ground that the minor is indigent and has no means of support may be filed by the minor declared emancipated, by the minor's conservator, or by the district attorney of the county in which the minor resides. The petition shall be filed in the county in which the minor or the conservator resides.

(b) The minor may be considered indigent if the minor's only source of income is from public assistance benefits. The court shall consider the impact of the rescission of the declaration of emancipation on the minor and shall find the rescission of the declaration of emancipation will not be contrary to the best interest of the minor before granting the order to rescind.

§ 7133. Notice.

(a) Before a petition under this article is heard, notice the court determines is reasonable shall be given to the minor's parents or guardian, or proof shall be made to the court that their addresses are unknown or that for other reasons the notice cannot be given.

(b) The notice to parents shall state that if the declaration of emancipation is voided or rescinded, the parents may be liable to provide support and medical insurance coverage for the child pursuant to Chapter 2 (commencing with Section 4000) of Part 2 of Division 9 of this code and Sections 11350, 11350.1, 11475.1, and 11490 of the Welfare and Institutions Code.

(c) No liability accrues to a parent or guardian not given actual notice, as a result of voiding or rescinding the declaration of emancipation, until that parent or guardian is given actual notice.

§ 7134. Court order.

If the petition is sustained, the court shall forthwith issue an order voiding or rescinding the declaration of emancipation, which shall be filed by the county clerk.

§ 7135. Effect of voiding or rescission on contract and property rights.

Voiding or rescission of the declaration of emancipation does not alter any contractual obligation or right or any property right or interest that arose during the period that the declaration was in effect.

ARTICLE 4. Identification Cards and Information.

§ 7140. Department of Motor Vehicles records system and identification cards.

On application of a minor declared emancipated under this chapter, the Department of Motor Vehicles shall enter identifying information in its law enforcement computer network, and the fact of emancipation shall be stated on the department's identification card issued to the emancipated minor.

§ 7141. Good faith reliance on identification card.

A person who, in good faith, has examined a minor's identification card and relies on a minor's representation that the minor is emancipated, has the same rights and obligations as if the minor were in fact emancipated at the time of the representation.

§ 7142. Protection of public entities and public employees..

No public entity or employee is liable for any loss or injury resulting directly or indirectly from false or inaccurate information contained in the Department of Motor Vehicles records system or identification cards as provided in this part.

§ 7143. Notice of Department of Motor Vehicles if declaration voided or rescinded.

If a declaration of emancipation is voided or rescinded, notice shall be sent immediately to the Department of Motor Vehicles which shall remove the information relating to emancipation in its law enforcement computer network. Any identification card issued stating emancipation shall be invalidated.

COLORADO

IN RE THE MARRIAGE OF: ROAL S. ROBINSON, PETITIONER, AND LAVELLE S. ROBINSON, RESPONDENT

No. 79SC297

Supreme Court of Colorado

629 P.2d 1069; 1981 Colo. LEXIS 697

June 8, 1981

OPINION BY LOHR

The Adams County District Court ruled that a 19-year-old boy who obtained full-time employment away from home during the summer before his entry into college was emancipated for that time and consequently his non-custodial father was not obligated to pay child support for the boy during that summer. On appeal, the Court of Appeals concluded that there had been no emancipation and reversed the trial court's ruling. *In re the Marriage of Robinson, 43 Colo. App. 171, 601 P.2d 358 (1979).* We granted certiorari and now affirm the decision of the Court of Appeals.

The marriage of the parties was dissolved in 1975. The decree of dissolution of marriage incorporated the parties' Separation, Property Settlement and Child Custody Agreement, n1 which provided that LaVelle S. Robinson (wife) would have custody of the three minor children and that Roal S. Robinson, Jr. (husband), would pay child support in accordance with the following agreement:

"The [husband] shall pay to the [wife] for support, maintenance care and education of the children in her custody, the sum of TWO HUNDRED TWENTY-FIVE AND NO/100 Dollars ($ 225.00) per month, for each child, beginning the 1st day of the month subsequent to the signing and execution of this agreement. The obligation of the [husband] to pay support for the children shall continue for each of the children until each such child may reach the age of 21 years or complete his or her college education, whichever is later in time, unless such child shall sooner become emancipated, then and in that event, the support obligation shall cease upon emancipation."

The sole question here is whether the husband must pay child support for the youngest child, Eric, during the summer before he entered college.

> n1 Only those portions of the record directly relevant to the child support arrearage issue are before us. We rely on undisputed statements in the briefs to supply background information such as the fact that the agreement was incorporated into the decree.

Eric graduated from high school in Colorado in August of 1977. In September he went to Virginia to spend some time with his father and returned to Colorado on February 6, 1978. From February until early May, Eric lived in Colorado with his mother and was employed five days a week at an hourly rate of $ 3.50. During this time he applied for admission to Arapahoe Community College. With his mother's encouragement, Eric obtained employment as a roughneck on an oil drilling crew in Wyoming for wages of approximately $ 300 per week in order to earn more money for college. His application for college was accepted within a week or two after his departure for Wyoming. He left home about May 15 to begin his new employment and lived in Wyoming until September of 1978, when he returned to his mother's home and began attending Arapahoe Community College. During his stay in Wyoming, Eric paid his own living expenses. n2 After his return from Wyoming, Eric's mother did not charge him for housing or food.

> n2 Eric's mother loaned him $ 450 while he was living in Wyoming.

The parties had agreed informally that the husband need not pay support for Eric during the months of October 1977 through January of 1978, when the young man had been visiting the husband. The husband did not resume payments, however, when Eric returned to the wife's home, and in May 1978 the wife filed a motion in the trial court to reduce to judgment the arrearages for February, March and April. In August of 1978 the husband countered

with a motion alleging that Eric had become emancipated in September of 1977 and asking the court for an order verifying such emancipation.

An evidentiary hearing was held on October 6, 1978, and the court decided to consider the child support payment status for Eric as of the hearing date. The husband conceded that he was obligated for the months of February, March and April of 1978 and for September when Eric began college; only the obligation for the summer months remained in contention. The only evidence presented at the hearing was the wife's testimony. The trial court made the following relevant written findings after the hearing:

"The Court further finds that beginning in May, 1978, Eric H. Robinson, with the assistance of [wife], found summer employment in the State of Wyoming and temporarily moved his residence to the State of Wyoming from May, 1978, through August, 1978.

"The Court further finds that during the month of May, 1978, when Eric H. Robinson went to work, he was emancipated and further finds that he was not dependent on anyone from May, 1978, through August, 1978, since he was earning about $ 300.00 per week.

*** "The Court further finds that beginning in September, 1978, and so long as Eric is attending college and [husband] is liable for his .... support, the child support will be .... $ 225.00 per month [for Eric] during said periods of time."

The court entered judgment for child support arrearages for February, March, April and September, 1978, and denied both child support for the summer months and the wife's claim for attorneys' fees. In a minute order denying the wife's motion for a new trial, the trial court elaborated on its earlier written ruling and concluded that the ruling reflected a proper construction of the parties' original agreement for child support.

The Court of Appeals determined that the record did not support the trial court's conclusion that Eric was emancipated during the months of May through August of 1978, reversed the denial of child support for those months and affirmed the trial court's judgment in all other respects. In this certiorari review, the only issue is the correctness of the Court of Appeals' decision that the husband should pay child support for Eric for the summer months of 1978.

The husband's duty to pay child support for his child Eric is governed by the terms of the written agreement which were incorporated in the decree of dissolution of marriage. It provides that emancipation of a child will terminate the husband's obligation to make support payments for that child. *See also section 14-10-122(3), C.R.S.* 1973, which prescribes that same result in the absence of a different provision in a written agreement or a decree of dissolution of marriage. The question then is whether Eric was emancipated during the summer of 1978 when he worked in Wyoming. n3

> n3 No issue is made of the trial court's conclusion, to which the parties agreed, that a child may return to an unemancipated state after a period of emancipation. *See In re Marriage of Fetters, 41 Colo.App. 281, 584 P.2d 104 (1978); Vaupel v. Bellach, 261 Iowa 376, 154 N.W.2d 149 (1967).*

Emancipation relates to termination of those rights and duties which otherwise exist between parent and child during the child's minority. *See* 59 *Am. Jur. 2d Parent and Child* § 93 (1971); 67A *C.J.S. Parent and Child* § 5 (1978). It is concerned more with the extinguishment of parental rights and duties than with removal of the disabilities of infancy. *See Van Orman v. Van Orman, 30 Colo. App. 177, 492 P.2d 81 (1971);* 59 *Am. Jur. 2d Parent and Child* § 93 (1971); Annot., *165 A.L.R. 723 (1946).* The question of emancipation may arise in a variety of contexts, *e.g.,* the right of a parent to wages earned by his child, the duty of a parent to pay for necessary goods or services furnished to his child by a third party, and the duty of a parent to support his child. *See H. Clark, The Law of Domestic Relations in the United States*, § 8.3 (1968). A minor may be emancipated for some purposes but not for others. *See id.; H. Clark, Cases and Problems in Domestic Relations* 517 (2d ed. 1974); 59 *Am. Jur. 2d Parent and Child* § 93 (1971); 67A *C.J.S. Parent and Child* § 5 (1978); *28 Minn. L. Rev. 275 (1944).* Here, we consider the question of emancipation as it relates to the termination of the parental duty of support.

What constitutes emancipation is a question of law. *Tencza v. Aetna Casualty & Surety Co., 111 Ariz. 226, 527 P.2d 97 (1974); Wood v. Wood, 135 Conn. 280, 63 A.2d 586 (1948); Stitle v. Stitle, 245 Ind. 168, 197 N.E.2d 174 (1964).* n4 The elements of emancipation may vary with the context. While in cases such as those addressing the right of a parent to his child's income it is said that the power to emancipate is with the parent, *see Bonner v. Surman, 215 Ark. 301, 220 S.W.2d 431 (1949); see also* 67A *C.J.S. Parent and Child* § 7 (1978), yet some other cases involving a parent's duty of support hold that a child can effect emancipation in certain circumstances by his own voluntary acts.

See cases cited in Annot., *32 A.L.R.3d 1055 (1970); see generally 28 Minn. L. Rev. 275 (1944).* n5 Professor Clark suggests that "[a] particular disability [or parental obligation] should no longer exist whenever the child's circumstances have so changed that the reason for creating the disability [or obligation] no longer exists." *H. Clark, The Law of Domestic Relations in the United States* § 8.3 (1968).

n4 We do not interpret *Van Orman v. Van Orman, supra,* to the contrary. We construe the Court of Appeals' statement in that case that the question of emancipation is essentially one of fact, to mean no more than that the facts and circumstances of each case must be considered in determining whether the legal standards for emancipation have been established. *See Tencza v. Aetna Casualty & Surety Co., supra.*

n5 Professor Clark states "Emancipation as a legal term is useful, but only as a means of describing a result already reached, not as an analytical tool." *H. Clark, The Law of Domestic Relations in the United States* § 8.3 (1968).

In the context of this case, and without attempting to state a test adequate for all situations, we hold that when, by express or implied agreement between a child and a parent, a child who is capable of providing for his own care and support undertakes to leave his parents' home, earn his own living and do as he wishes with his earnings, emancipation occurs. *See Spurgeon v. Mission State Bank, 151 F.2d 702 (8th Cir. 1945);* 59 *Am. Jur. 2d Parent and Child,* § § 94-95 (1971). The burden of proving emancipation is on the one asserting it. *Spurgeon v. Mission State Bank, supra; Tencza v. Aetna Casualty & Surety Co., supra; see* 67A *C.J.S. Parent and Child* § 9 (1978). n6 Whether emancipation has been established must be determined in light of all the relevant facts and circumstances of the case. *In re the Marriage of Weisbart, 39 Colo.App. 115, 564 P.2d 961 (1977); Van Orman v. Van Orman, supra; Wood v. Wood, supra.*

n6 We need not decide here whether that burden requires clear and convincing evidence, *e.g., Holmes v. Raffo, 60 Wash. 2d 421, 374 P.2d 536 (1962),* or only a preponderance of the evidence, *e.g., Tencza v. Aetna Casualty & Surety Co., supra.*

The uncontroverted evidence was that Eric left home to take the job in Wyoming with his mother's assistance and encouragement in order to increase his earnings in anticipation of the need to pay the expenses of attending college in the fall. n7 Although he had not been accepted into college when he began the new employment, his application had been filed, he planned to go to college, and his application was accepted shortly after he commenced employment. The trial court's conclusion that Eric was emancipated while he was earning approximately $ 300 per week working in Wyoming was based entirely on the conclusion that such an income was fully adequate for the boy's support. n8 The Court of Appeals took the longer view, recognizing that ".... where, as here, a child is employed during the summer in preparation for the educational year, despite the apparent independence of the child for a short period, the intended result is not .... 'emancipation.' The custodial parent's financial responsibilities continue during the child's temporary absence." Financial independence and the establishment of a residence away from the parental home are of significance in determining emancipation. *In re the Marriage of Weisbart, supra.* Here, however, the evidence was that the summer employment did not free Eric from financial dependence on his parents during the school year and his departure from his mother's home was temporary, and was intended to be so, while he was earning money to help pay his educational expenses.

n7 Although the trial court made no findings with respect to Eric's educational plans, the Court of Appeals properly relied on uncontroverted testimony of the wife for that purpose. *See Weed v. Monfort Feed Lots, Inc., 156 Colo. 577, 402 P.2d 177 (1965); Cordillera Corp. v. Heard, 41 Colo. App. 537, 592 P.2d 12 (1978).*

n8 During the course of examination of the wife, the trial judge said: "Maybe I can shorten this line of questioning by telling you this. I don't care whether he was accepted for college or not. If this boy was in Wyoming earning $ 7.50 an hour, then I believe that he was emancipated during that time, whether he'd been accepted to go to college or not." Later, during inquiry by counsel into the circumstances of his mother's $ 450 loan to Eric, the trial judge said: "If she wants to send money to a boy that's earning $ 300 a week then that's a gift, as far as I'm concerned."

The child support agreement lends additional support to our conclusion. It makes specific provision for continuation of support payments for a child until that child completes his college education. It also provides for cessation of the child support obligation on emancipation. The parties made no provision for abatement of child support during the regular school vacation periods. The absence of such a provision is indicative that "emancipation" as used in the agreement was meant to refer to permanent and not temporary emancipation. Even if temporary emancipation would

otherwise result from Eric's short-term, well-paying employment, here the parties implicitly provided by written agreement incorporated in the decree of dissolution of marriage that such would not be the result. That agreement and decree control. *Section 14-10-122(3), C.R.S.* 1973.

We agree with the Court of Appeals that the evidence in this case is insufficient to support the trial court's conclusion that Eric was temporarily emancipated.

The husband also cites *Brown v. Brown, 183 Colo. 356, 516 P.2d 1129 (1974),* as authority that the wife is not entitled to receive child support payments for the summer of 1978 because Eric was not "actually with her and supported by her." *Id. at 360, 516 P.2d at 1131.* Eric's situation is different from that of the children in *Brown.* His support needs related to educational plans the costs of which could be expected to be incurred during the academic year. Thus, the fact that a child support payment in a summer month is not offset by equivalent expenses on the child's behalf in that month is not dispositive. There was no showing that the scheduled child support payments in total were unnecessary for Eric's total support needs during the year. Under these circumstances, Eric's absence from his mother's home during the summer did not preclude her from collecting child support payments for that period.

We affirm the decision of the Court of Appeals.

JUSTICE ROVIRA, dissenting.

I respectfully dissent.

I agree with and support the view expressed by Van Cise, J., in his dissent *In re the Marriage of Robinson, 43 Colo. App. 171, 601 P.2d 358 (1979).*

In my view, a 19-year-old man who lives apart from his parents, earns $ 300 per week, and is entirely self-supporting is, as a matter of law, emancipated.

The findings of the trial court were well supported by the evidence. I would reverse the decision of the Court of Appeals.

CONNECTICUT

TITLE 46B. FAMILY LAW

CHAPTER 815t. JUVENILE MATTERS

PART I. GENERAL PROVISIONS

§ 46b-150. Emancipation of minor. Procedure.

Any minor who has reached his sixteenth birthday and is residing in this state, or any parent or guardian of such minor, may petition the superior court for juvenile matters or the probate court for the district in which either the minor or his parents or guardian resides for a determination that the minor named in the petition be emancipated. The petition shall be verified and shall state plainly: (1) The facts which bring the minor within the jurisdiction of the court, (2) the name, date of birth, sex and residence of the minor, (3) the name and residence of his parent, parents or guardian, and (4) the name of the petitioner and his relationship to the minor. Upon the filing of the petition in the Superior Court, the court shall cause a summons to be issued to the minor and his parent, parents or guardian, in the manner provided in section 46b-128. Upon the filing of the petition in the Probate Court, the court shall assign a time, not later than thirty days thereafter, and a place for hearing such petition. The court shall cause a citation and notice to be served on the minor and his parent, if the parent is not the petitioner, at least seven days prior to the hearing date, by a state marshal, constable or indifferent person. The court shall direct notice by certified mail to the parent, if the parent is the petitioner. The court shall order such notice as it directs to the Commissioner of Children and Families, and other persons having an interest in the minor.

Section 46b-150 of the general statutes is repealed and the following is substituted in lieu thereof:

Any minor who has reached his [A> OR HER <A] sixteenth birthday and is residing in this state, or any parent or guardian of such minor, may petition the superior court for juvenile matters or the probate court for the district in which either the minor or [D> his <D] [A> SUCH MINOR'S <A] parents or guardian resides for a determination that the minor named in the petition be emancipated. The petition shall be verified and shall state plainly: (1) The facts which bring the minor within the jurisdiction of the court, (2) the name, date of birth, sex and residence of the minor, (3) the name and residence of [D> his <D] [A> SUCH MINOR'S <A] parent, parents or guardian, and (4) the name of the petitioner and [D> his <D] [A> THE PETITIONER'S <A] relationship to the minor. Upon the filing of the petition in the Superior Court, the court shall cause a summons to be issued to the minor and [D> his <D] [A> SUCH MINOR'S <A] parent, parents or guardian, in the manner provided in section 46b-128. Upon the filing of the petition in the Probate Court, the court shall assign a time, not later than thirty days thereafter, and a place for hearing such petition. The court shall cause a citation and notice to be served on the minor and [D> his <D] [A> THE MINOR'S <A] parent, if the parent is not the petitioner, at least seven days prior to the hearing date, by a state marshal, constable or indifferent person. The court shall direct notice by certified mail to the parent, if the parent is the petitioner. The court shall order such notice as it directs to the Commissioner of Children and Families, and other persons having an interest in the minor.

§ 46b-150a. Investigation of petition for emancipation. Report. Appointment of counsel. Probate Court may order examination.

(a) With respect to a petition filed in Superior Court pursuant to section 46b-150, the Superior Court may, if it deems it appropriate, (1) require a probation officer, the Commissioner of Children and Families or any other person to investigate the allegations in the petition and file a report of that investigation with the court, (2) appoint counsel for the minor who may serve as guardian ad litem for the minor, (3) appoint counsel for the minor's parents or guardian, or (4) make any other orders regarding the matter which the court deems appropriate.

(b) With respect to a petition filed in Probate Court pursuant to section 46b-150, the Probate Court shall request an investigation by the Commissioner of Children and Families, unless this requirement is waived by 2the court for cause shown. The court shall appoint counsel to represent the minor. The costs of such counsel shall be

paid by the minor, except that if such minor is unable to pay for such counsel and files an affidavit with the court demonstrating inability of the minor to pay, the reasonable compensation shall be established by, and paid from funds appropriated to, the Judicial Department. If funds have not been included in the budget of the Judicial Department for such purposes, such compensation shall be established by the Probate Court Administrator and paid from the Probate Court Administration Fund.

(c) Upon finding at the hearing or any time during the pendency of the proceeding in the Probate Court, that reasonable cause exists to warrant an examination, the court on its own motion or on motion of any party, may order the minor to be examined at a suitable place by a physician, psychiatrist or licensed psychologist appointed by the court. The court may also order examination of a parent whose competency or ability to care for a minor before the court is at issue. The expenses of any examination if ordered by the court on its own motion shall be paid for by the petitioner or if ordered on motion by a party, shall be paid for by the party moving for such an examination, unless such party or petitioner is unable to pay such expenses in which case they shall be paid for by funds appropriated to the Judicial Department. However, in the case of a probate matter, if funds have not been included in the budget of the Judicial Department for such purposes, such expenses shall be established by the Probate Court Administrator and paid from the Probate Court Administration Fund. The court may consider the results of the examinations in ruling on the merits of the petition.

§ 46b-150b. Order of emancipation.

If the Superior Court or the Probate Court, after hearing, finds that: (1) The minor has entered into a valid marriage, whether or not that marriage has been terminated by dissolution; or (2) the minor is on active duty with any of the armed forces of the United States of America; or (3) the minor willingly lives separate and apart from his parents or guardian, with or without the consent of the parents or guardian, and that the minor is managing his own financial affairs, regardless of the source of any lawful income; or (4) for good cause shown, it is in the best interest of the minor, any child of the minor or the parents or guardian of the minor, the court may enter an order declaring that the minor is emancipated.

§ 46b-150c. Appeal.

Any person named in a petition filed pursuant to section 46b-150a who is aggrieved by the order of the Probate Court may appeal to the Superior Court as provided in section 45a-186. Any person named in a petition filed pursuant to section 46b-150a who is aggrieved by order of the Superior Court may appeal to the Appellate Court in the manner provided in subsection (b) of section 46b-142.

§ 46b-150d. Effect of emancipation.

An order that a minor is emancipated shall have the following effects: (a) The minor may consent to medical, dental or psychiatric care, without parental consent, knowledge or liability; (b) the minor may enter into a binding contract; (c) the minor may sue and be sued in his own name; (d) the minor shall be entitled to his own earnings and shall be free of control by his parents or guardian; (e) the minor may establish his own residence; (f) the minor may buy and sell real and personal property; (g) the minor may not thereafter be the subject of a petition under section 46b-120 as an abused, dependent, neglected or uncared for child or youth; (h) the minor may enroll in any school or college, without parental consent; (i) the minor shall be deemed to be over eighteen years of age for purposes of securing an operator's license under section 14-36 and a marriage license under subsection (b) of section 46b-30 without parental consent; (j) the minor shall be deemed to be over eighteen years of age for purposes of registering a motor vehicle under section 14-12; (k) the parents of the minor shall no longer be the guardians of the minor under section 45a-606; (l) the parents of a minor shall be relieved of any obligations respecting his school attendance under section 10-184; (m) the parents shall be relieved of all obligation to support the minor; (n) the minor shall be emancipated for the purposes of parental liability for his acts under section 52-572; (o) the minor may execute releases in his own name under section 14-118; and (p) the minor may enlist in the armed forces of the United States without parental consent.

§ 46b-150e. Emancipation under common law.

Nothing in sections 46b-150 to 46b-150e, inclusive, shall affect the status of minors who are or may become emancipated under the common law of this state.

DELAWARE

IN THE MATTER OF S. L., (date of birth 5/82), A MINOR CHILD V. A. AND SH. L.

File No. CN89-11574

Family Court of Delaware, New Castle

735 A.2d 433; 1999 Del. Fam. Ct. LEXIS 85

February 5, 1999, Date Submitted

March 12, 1999, Date Decided

OPINION BY KUHN

INTRODUCTION

This matter is before the Court on a Petition for Emancipation filed on behalf of S. L. (hereinafter "Petitioner"), by and through her Guardian Ad Litem, Daniel J. Munley, Esquire. n1 Petitioner is seeking emancipation from her parents, Sh. And A. L. (hereinafter "Respondents") so that Petitioner may legally contract for housing "as well as other necessities for her health and well being." n2 The petition is a direct petition for emancipation, in which Petitioner is seeking a partial emancipation for the limited purpose of contracting for housing. n3 At the initial hearing on December 10, 1998, the Court heard testimony regarding the Petition and reviewed allegations of abuse and neglect set forth in the Petition.n4 The Court recessed the hearing due to the need to answer the preliminary issue before the Court: Does the Family Court of the State of Delaware, a Court of limited statutory jurisdiction, have subject matter jurisdiction to address a Petition for Emancipation.

> n1 Petitioner, a minor, lacks capacity to institute a civil proceeding in her own name. The standing defect was cured by the appointment of the Guardian Ad Litem, Mr. Munley. See *In re Samantha Nicole Frazer, Del. Supr., 721 A.2d 920, 921-22 (1998).*
>
> n2 Petitioner's original request for relief was more broad. In her initial filing with the Court, Petitioner requested a grant of emancipation "so that she may legally contract for an apartment and file a complaint, as well as necessities for health and well being." Petitioner's counsel clarified the type of emancipation sought at the hearing on January 29, 1999.
>
> n3 The distinctions between partial emancipation and complete or total emancipation are discussed more fully herein.
>
> n4 Petitioner alleges, inter alia, that she has been physically abused by her father, that she has been sexually assaulted by her brother, and that the Respondents have failed to support her financially for at least two years.

Based upon the testimony presented at the December 10, 1998 hearing, the Court requested that counsel for Petitioner make a Hotline referral to the Division of Family Services (hereinafter "DFS") of the Department of Services for Children, Youth, and their Families (hereinafter "Department") for investigation of Petitioner's allegations of abuse and neglect. n5 Thereafter, counsel for Petitioner contacted DFS.

> n5 Section 901 of Title 10 of the Delaware Code defines a dependent child as:
>
> a child whose physical, mental or emotional health and well-being is threatened or impaired because of inadequate care and protection by the child's custodian, who is unable to provide adequate care for the child, whether or not caused by the child's behavior; provided, however, that for the purposes of this chapter, dependent child may include a child who has been placed in a nonrelated home on a permanent basis without the consent and approval of the Division of Child Protective Services or any agency licensed thereby to place

> children in a nonrelated home; or who has been placed with a licensed agency which certifies it cannot complete a suitable adoption plan.
>
> 10 Del. C. § 901(8).
>
> A neglected child is defined as:
>
> a child whose physical, mental or emotional health and well-being is threatened or impaired because of inadequate care and protection by the child's custodian, who has the ability and financial means to provide for the care but does not or will not provide adequate care; or a child who has been abused or neglected as defined by § 902 of Title 16. No child who in good faith is under treatment solely by spiritual means through prayer in accordance with the tenets and practices of a recognized church or religious denomination by a duly accredited practitioner thereof shall for that reason alone be considered a neglected child for purposes of this chapter.
>
> 10 Del. C. § 901(11).

On January 28, 1999, Tania M. Culley, Deputy Attorney General for DFS, advised the Court by correspondence that DFS had investigated the referral and had "approved the non-relative caretaker with whom [Petitioner] is now living. The home is safe and appropriate. [Petitioner] has also been set up with Medicaid and General Assistance." n6

> n6 The correspondence from Counsel further advised that DFS policy dictates that "where the child's family, the child and the non-relative caretaker agree with the current arrangement and do not wish further DFS intervention, and where DFS determines the home to be safe and appropriate for the child, DFS will close their case. DFS has represented that all parties are in agreement with this current arrangement. Therefore, DFS will not be petitioning for custody of [Petitioner] and will be closing the case."

At the close of the December 10, 1998 hearing, the Court requested Petitioner's counsel to provide the Court with a legal memorandum addressing the issue of whether the Family Court of the State of Delaware has subject matter jurisdiction over a Petition for Emancipation. Petitioner's counsel filed a legal memorandum on December 18, 1998.

On December 23, 1998 the Court appointed Karen Valihura, Esquire, of Skadden, Arps, Slate, Meagher and Flom, LLP, as counsel for Respondents. On January 12, 1999, Respondents, by and through counsel, filed a Response to Petitioner's legal memorandum and a Motion to Dismiss for failure to state a claim upon which relief can be granted pursuant to Family Court Civil Procedure Rule 12(b)(6). n7 Oral argument on the Motion to Dismiss and the question of Family Court's jurisdiction was held on January 29, 1999. Counsel for Petitioner and Respondents filed supplemental briefings on February 5, 1999. This is the Court's decision on Respondent's Motion to Dismiss.

> n7 Although filed as a Motion to Dismiss under Family Court Civil Procedure Rule 12(b)(6), the Court finds the more appropriate rule to be Family Court Civil Procedure Rule 12(b)(1), lack of subject matter jurisdiction. Moreover, the Court shall also review the Motion pursuant to Family Court Civil Procedure Rule 12(3). Family Court Civil Procedure Rule 12(3) provides that "whenever it appears by suggestion of the parties or otherwise that the Court lacks jurisdiction of the subject matter, the Court shall dismiss the action."

STANDARD ON A MOTION TO DISMISS

The issue underlying the Motion to Dismiss is whether Family Court has subject matter jurisdiction over this cause of action. The plaintiff bears the burden of establishing that this Court has subject matter jurisdiction. See *Wilmington Fraternal Order of Police Lodge # 1 v. Bostrom, 1999 Del. Ch. LEXIS 3,* Del. Ch., C.A. No. 16348, Jacobs, V.C. (Jan. 22, 1999). n8 The Court makes the determination of subject matter jurisdiction on the face of the complaint at the time of filing and assumes that all material factual allegations are true. See *id. n9* The Court may, however, look beyond the face of the complaint and examine "the true nature of the relief sought." Wilmington Fraternal (citation omitted). This Court must view the pleadings in the light most favorable to the Petitioner. See, e.g., In re Santa Fe Pacific *Corp. Shareholder Litigation, Del. Supr., 669 A.2d 59, 62 (Nov. 1995).*

> n8 Wilmington Fraternal is available as a slip copy on an electronic database service: *1999 Del. Ch. LEXIS 3, 1999 WL 39546.*

Although the standards for review of subject matter jurisdiction were set forth by the Court of Chancery, both the Court of Chancery and Family Court have identical versions of Rule 12(b)(1) and 12(3).

n9 See also, e.g., *Union Texas Petroleum Holdings, Inc. v. Travelers Indemnity Company, 1998 Del. Ch. LEXIS 27,* *2, Del. Ch., C.A. No. 15448, Chandler, C. (Feb. 1998) ("For the purposes of a motion to dismiss, all well-pleaded allegations of the Complaint are accepted as true"). The standard is essentially the same when the assertion is failure to state a claim: "It is well settled under Delaware law that a complaint will not be dismissed for failure to state a claim unless it appears reasonably certain 'that a plaintiff would not be entitled to the relief sought under any set of facts which could be proven to support the action.' In considering the sufficiency of the complaint, all well-pleaded allegations are accepted as true, and all reasonable inferences are construed in favor of the plaintiff." Union Texas (citations omitted). Union Texas is available in an electronic database: *1998 Del. Ch. LEXIS 27,* *10, *1998 WL 83068.*

FACTS

Petitioner is a sixteen-year-old minor who seeks an Order of Emancipation from her parents. Petitioner claims that she has lived separate and apart from her parents since approximately May 1996. n10 Petitioner alleges that, while living with Respondents, she was physically and sexually abused. She contends that she had to be self sufficient and could not rely on Respondents for her needs. She presents herself as an "extremely mature sixteen year old" female who intends to obtain her GED in May 1999. Petitioner claims that she is self sufficient, paying for her own monthly rent and personal needs from her earnings; her earnings from her two jobs total approximately $ 1,000.00 per month. Petitioner states that, at present, she has little contact and no relationship with her parents.

n10 The facts in this section are derived from the Petition and, as noted supra, are viewed for purposes of the Motion to Dismiss in the light most favorable to Petitioner.

Petitioner was injured in an automobile accident in February of 1997. One of the stated reasons for the filing of the Petition for Emancipation was that the statute of limitations period on her personal injury action would end in February 1999. Petitioner alleged that emancipation was necessary in order to preserve her legal claim. Petitioner has since withdrawn this claim as a basis for relief; she has been able to preserve her cause of action as a result of the appointment of a Guardian Ad Litem in the Superior Court action. n11 Petitioner claims she has incurred several thousand dollars in medical expenses and that she has had to discontinue medical treatment due to her inability to afford her medical bills. She further claims that Respondents have not assisted her in the payment of her medical bills.

n11 On January 20, 1999 the Honorable William T. Quillen signed an order appointing Daniel J. Munley, Esquire, the Guardian Ad Litem of Petitioner S. L. for the sole purpose of her personal injury claims in Superior Court. S. L. v. Sh. L. and A. L., Del. Super., C.A. No. 99M-01-059, Quillen, J. (Jan. 18, 1999). The parties to this case stipulated that such appointment was not to be construed as an admission or introduced into evidence in the underlying proceeding.

Based upon these claims, Petitioner asks this Court to grant her a partial emancipation from her parents.

DISCUSSION

The issue presented by the Motion to Dismiss is whether Family Court has the authority and the jurisdiction to rule on a Petition for Emancipation. The legal definition of emancipation is "the act by which one who was unfree, or under the power and control of another, is rendered free, or set at liberty and made his own master." Black's Law Dictionary 468 (5th ed. 1979). An emancipated minor is defined as a "person under 18 years of age who is totally self-supporting." Black's Law Dictionary 468 (5th ed. 1979).

In Delaware, unlike a growing number of other states, n12 the general legal definition is the only definition available. n13 The Delaware Code does not provide a definition, nor a procedure, for emancipation. In determining whether Family Court has the authority to consider the emancipation petition of a minor, the first question is whether there is any statutory authority, given the lack of specific statutory provisions, under which the Court may review this cause of action.

n12 Approximately twenty-three states have emancipation statutes. See, e.g., Gregory A. Loken, "Thrownaway" Children and Thrownaway Parenthood, *68 Temple L. Rev. 1715, 1728 & n.73 (1995)* (citations omitted) (noting that two states (South Dakota and Washington) added emancipation statutes in the 1990s, joining 21 others (the 20 listed infra in this footnote plus Alabama, Mississippi, New Hampshire (recognizing out-of-state emancipation decrees), and Wyoming) that already had some type of statute concerning emancipation); Bruce C. Hafen & Jonathan O. Hafen, Abandoning Children to Their Autonomy: The United Nations Convention on the Rights of the Child, *37 Harv. Int'l L.J. 449, 479-80 & n. 164 (1996)*

(noting the "proliferation of emancipation statutes in the United States over the last thirty years" (p. 479) and noting that approximately 20 states have emancipation statutes (citing Dana F. Castle, Early Emancipation Statutes: Should They Protect Parents as Well as Children?, *20 Fam. L.Q. 343, 358 (1986));* Carol Sanger & Eleanor Willemsen, Minor Changes: Emancipating Children in Modern Times, 25 U. Mich. J.L. Reform 239, 245 & n.25 (1992) (noting that 16 states (Alaska, Connecticut, Indiana, Kansas, Louisiana, Maine, Michigan, Montana, Nevada, New Mexico, North Carolina, Oklahoma, Oregon, Texas, Virginia, and West Virginia) (citations omitted) have an emancipation statute similar to California's and three others have statutes codifiying common-law judicial emancipations (Arkansas, Illinois, and Tennessee) (citations omitted)).

n13 In the United States, emancipation as a doctrine has been recognized since the turn of the century. Emancipation law has developed along two lines: statutory emancipation and judicial emancipation. See William E. Dean, Casenote and Comment. Ireland v. Ireland: Judicial Emancipation of Minors in Idaho: Protecting the Best Interests of the Child or Conferring a Windfall Upon the Parent?, *31 Idaho L. Rev. 205, 215 (1994)* (citations omitted). Judicial emancipation is generally seen as a theory available only to a parent while statutory emancipation is often viewed as being available only to a minor. See id. (citations omitted).

STATUTORY AUTHORITY

Family Court is "created by and derives its authority solely from statute." *Villarroel vs. Villarroel, Del. Supr., 562 A.2d 1180, 1182 n.4,* (1989). n14 The Delaware courts, including our Delaware Supreme Court, have repeatedly held, in cases involving issues ranging from divorce to child support, that the jurisdiction of Family Court is limited to the authority granted by statute. See *Villarroel, 562 A.2d at 1183.* Therefore, in order for this Court to find jurisdiction over a Petition for Emancipation, the Delaware Code must provide the Court with a statutory basis for the proceeding.

n14 In Villarroel, the Delaware Supreme concluded that "Family Court is a statutory court of limited jurisdiction." *Villarroel, 562 A.2d at 1182* (citing *M.T.L. v. T.P.L., Del. Supr., 414 A.2d 510, 511 (1980)).* In M.T.L., the Supreme Court noted the limitations of Family Court's jurisdiction with regard to divorce and annulment actions, noting that such jurisdiction "depends solely upon the statute conferring such jurisdiction." *M.T.L., 414 A.2d at 511* (citation omitted). Likewise, the Supreme Court of Delaware has explicitly and repeatedly stated that the "jurisdiction of the Family Court is defined by statute." *Sanders v. Sanders, Del. Supr., 570 A.2d 1189, 1191 (1990).*

The purpose of the Family Court of the State of Delaware is set forth by statute, 10 Del.C. § 902(a). n15 This section provides the general purpose and construction of the statutory scheme for the Family Court. It expressly states that the Family Court will have "original statewide civil and criminal jurisdiction over family and child matters and offenses as set forth herein." 10 Del. C. § 902(a). Section 902(b) of Title 10 of the Delaware Code requires that the provisions of 10 Del.C. § 902(a) be liberally construed in order that the purposes of Chapter 9 may be realized. n16

n15 Section 902(a) of Title 10 of the Delaware Code, entitled "Purpose; construction," provides as follows:

In the firm belief that compliance with the law by the individual and preservation of the family as a unit are fundamental to the maintenance of a stable, democratic society, the General Assembly intends by enactment of this chapter that 1 court shall have original statewide civil and criminal jurisdiction over family and child matters and offenses as set forth herein. The court shall endeavor to provide for each person coming under its jurisdiction such control, care, and treatment as will best serve the interests of the public, the family, and the offender, to the end that the home will, if possible, remain unbroken and the family members will recognize and discharge their legal and moral responsibilities to the public and to one another.

n16 Section 902(b) of Chapter 10 provides as follows: "This chapter shall be liberally construed that these purposes may be realized." See also *Wife, S. v. Husband, S., Del. Ch., 295 A.2d 768, 771 (1972)* (noting liberal construction of Family Court Act).

Petitioner relies upon 10 Del. C. § 902 and 10 Del.C. § 921(3) to establish the statutory basis for this Court to find jurisdiction over the subject matter at issue, the Petition for Emancipation. Under 10 Del.C. § 921(3), the legislature has vested in the Family Court the exclusive jurisdiction to deal with any petitions or actions for, among other things, the control of children. n17 Petitioner argues that the Court must liberally construe section 921(3) in accordance with section 902(b) and conclude that the Family Court has exclusive jurisdiction to deal with the Petition for Emancipation of a minor, which deals with the ultimate control of the child.

n17 Section 921(3) of 10 Delaware Code, entitled "Exclusive original civil jurisdiction," provides as follows:

The Court shall have exclusive original civil jurisdiction in all proceedings in this State concerning:

(3) Enforcement of any law of this State or any subdivision or any regulation promulgated by a governmental agency, or any petitions or actions, for the education, protection, control, visitation, possession, custody, care, or support of children.

Section 921(3) was enacted in 1971 when the civil jurisdiction of Family Court was expanded and redefined by the General Assembly. See *Husband, P. v. Wife, P., Del.Supr., 348 A.2d 327, 329 (1975).* The General Assembly's intention in 1971 was to provide litigants with one source of relief that is well versed and knowledgeable in the area of family matters and in the special issues relating to children. See *Wife, P. v. Husband, P., Del. Ch., 287 A.2d 409, 413 (1972);* see also *Scribner v. Chonofsky, Del. Supr., 310 A.2d 924, 927 (1973).* n18 While § 921(3) does vest jurisdiction over certain enumerated actions in Family Court, this statutory provision does not create or provide independent statutory rights to individuals. n19 The provision does confer exclusive jurisdiction upon this Court over rights and actions that are otherwise created by statute. See, e.g., *Sanders v. Sanders, Del. Supr., 570 A.2d 1189 (1990); Wife, S. v. Husband, S., Del. Ch., 295 A.2d 768 (1972); Wife, P. v. Husband, P., Del. Ch., 287 A.2d 409, 413 (1972).*

n18 In Scribner, the Court noted the "clear intention expressed by the General Assembly by 10 Del. C. s 902 to place all original civil jurisdiction 'over family and child matters' in the Family Court." *Scribner, 310 A.2d at 927.*

n19 Section 921(3) provides jurisdiction over causes of action that are more fully defined elsewhere, including, inter alia, custody and visitation (Chapter 7, Title 13) and support (Chapter 5, Title 13).

Finally, Petitioner contends that this Court has jurisdiction over emancipation as a form of relief in a Dependency/Neglect action through the Court's equitable powers under 10 Del. C. § 925(15). n20 Petitioner contends that, because the Court has ruled that it has jurisdiction to hear issues relating to dependency/neglect regarding Petitioner, the Court also has the power under the principles of equity to order emancipation as relief.

n20 Under 10 Del. C. § 925(15), Family Court, and each Judge, has the authority in "any civil action where jurisdiction is otherwise conferred upon the Family Court ... to enter such orders against any party to the action as the principles of equity appear to require."

IS THE FAMILY COURT OF DELAWARE STATUTORILY AUTHORIZED TO ADDRESS EMANCIPATION?

This petition, and the issue of emancipation, presents the Court with a question of statutory interpretation: whether Family Court's existing statutory authority encompasses emancipation, without a direct reference to the same. The Superior Court of Delaware stated in Mount Pleasant School District v. Warder that "it is clear from this enumeration of powers that the Family Court has been vested with extensive powers to deal with problems of minors. These powers include the broad powers inherent in a Court of equity to deal with those problems of minors." *375 A.2d 478, 482 (1977).* n21 Family Court, however, may only exercise this power to aid or to implement its existing statutory authority. *Villarroel v. Villarroel, Del. Supr., 562 A.2d 1180, 1183 (1989)* (citations omitted). The courts have repeatedly held that Family Court may exercise principles of equity only where jurisdiction has been specifically conferred by statute. *Wife, S. v Husband, S., 295 A.2d at 770.* n22

n21 Mount Pleasant involved issues related directly to the education of minors, a cause of action that is enumerated within the Delaware Code. See *Mount Pleasant, 375 A.2d 478 (1977).*

n22 "Family Court's jurisdiction to apply the principles of equity is specifically limited by the statute to any civil action 'where jurisdiction is otherwise conferred upon it.' And that jurisdiction is, of course, found only in specific statutes dealing with family and related domestic relations matters." *295 A.2d at 770.*

Family Court is therefore guided by the principles of broad exercise of its enumerated powers. It is also, however, guided by the requirement to limit its broad exercise to the powers enumerated by statute. For example, in Sanders v. Sanders, the Supreme Court of Delaware held that Family Court had no statutory jurisdiction, under the circumstances of that case, to rule on petitions to rescind contractual agreements when such petitions were not within divorce or annulment proceedings. *570 A.2d 1189, 1191.* In addition, in Angelli v. Sherway, the Supreme Court of Delaware concluded that the Family Court has the equitable authority to allocate marital property incident to a divorce but, where the divorce proceeding itself abates, "the Family Court lacks a statutory predicate upon which to fashion further relief." *Angelli v. Sherway, Del. Supr., 560 A.2d 1028, 1037 (1989).*

Taken in conjunction with the decisions that limit Family Court's jurisdiction to that provided by statute, and the statutory authority, this Court concludes that Family Court is authorized to broadly exercise only those powers that are statutorily provided.

The Family Court does regularly and appropriately rely upon the broad exercise of its statutory authorization. Specifically, the Court routinely rules upon Petitions for Imperiling the Family Relationship and Petitions for Guardianship despite the lack of extensive statutory guidance. Imperiling the Family Relationship and Guardianship are, in fact, undefined except for their enumeration as causes of action in Chapter 10 of the Delaware Code. n23

n23 With regard to Imperiling the Family Relationship, 10 Del. C. § 921(6) provides as follows:

The Court shall have exclusive original civil jurisdiction in all proceedings in this State concerning:

(6) Actions and proceedings wherein:

a. A member of a family alleges that some other member of the family is by their conduct imperiling any family relationship and petitions the Court for appropriate relief.

b. The Division of Child Protective Services or a licensed youth service agency alleges that the conduct of a child, or of the parents or custodians, or members of a family, imperials [sic] any family relationship or imperils the morals, health, maintenance or care of a child and petitions the Court for appropriate relief; provided, however, that where a parent, to ensure the safety or welfare of his child, fails to cause the child to attend school, such parent has not imperiled the family relationship, nor has imperiled the morals, health, maintenance or care of the child.

c. In such actions and proceedings the Court may make such adjudications and dispositions as appear appropriate.

10 Del. C. § 9211(6).

With regard to Guardianship, 10 Del. C. § 925(16) provides that "The Court and each Judge shall have authority to:

(16) To appoint guardians of the person over minors under 18 years of age."

Petitioner relies upon the fact that section 921(3) grants exclusive jurisdiction to the Family Court to deal with actions concerning the "control" of children. By its definition, emancipation does concern the control of children, as well as their custody, education, family, and support. However, even giving section 921(3) a liberal construction, it cannot be read to provide a cause of action for emancipation. To do so would necessitate a finding that any issue involving control of children would automatically fall within the jurisdiction of Family Court, a result that does not appear to have been contemplated by the legislature. It is also clear that emancipation, in any form, directly impacts the parent-child relationship.

Additionally, the Court does not find statutory authority by which Family Court can consider emancipation as a form of relief in a Dependency/Neglect action through the equitable powers conferred by 10 Del. C. § 925(15). To do so would extend the grant of equitable powers to Family Court further than contemplated by the statutory framework that currently exists.

Moreover, the Court cannot find any cause of action in Family Court that is not somewhere delineated or enumerated by statute as a specific cause of action. After careful examination of its statutory authority, this Court cannot find a statutory basis by which jurisdiction of an emancipation petition is conferred upon the Family Court.

Despite the lack of clear statutory authority, emancipation is frequently presented to and addressed by the courts of Delaware and, in particular, Family Court. Therefore, the Court must examine the line of judicial decisions addressing emancipation to see whether the cases provide authority or guidance to Family Court in addressing a petition for emancipation.

EMANCIPATION CASE LAW IN DELAWARE

The Delaware courts have confronted emancipation in many different ways and in many different contexts. The courts have most often addressed the issue of partial emancipation. n24 A partial emancipation "frees a child for only a part of the period of minority, or from only a part of the parent's rights, or for some purposes, and not for others." Black's Law Dictionary 468 (5th ed. 1979). n25 While in some cases a minor has petitioned the courts for an emancipation, in the majority of reported cases, emancipation has been presented to the courts as a "subissue"

within other proceedings, such as child support. See, e.g., Chance v. Chance, Del. Fam., File No. CN95-06143, Tumas, J. (April 1, 1998); DCSE/Ellen S.P. v. Terrance D.S., 1996 Del. Fam. Ct. LEXIS 75, Del. Fam., No. CK95-3937, Nicholas, J. (Sept. 5, 1996); *Kathleen L.H. v. Wayne E.H., Del. Fam., 523 A.2d 977 (1987).*

n24 See, e.g., *Kathleen L.H. v. Wayne E.H., Del. Fam., 523 A.2d 977(1987);* State ex rel Cindy L.S. v. Patricia T., Del. Fam., File No. B-5498, Wakefield, J. (July 19, 1977).

n25 A total or complete emancipation is "entire surrender of care, custody, and earnings of child, as well as renunciation of parental duties." Black's Law Dictionary 468 (5th ed. 1979). The issue of total emancipation has been less often addressed by the courts. For a more complete discussion of emancipation, see as examples Gregory A. Loken, "Thrownaway" Children and Thrownaway Parenthood, *68 Temple L. Rev. 1715 (1995);* Bruce C. Hafen & Jonathan O. Hafen, Abandoning Children to Their Autonomy: The United Nations Convention on the Rights of the Child, *37 Harv. Int'l L.J. 449 (1996);* Carol Sanger & Eleanor Willemsen, Minor Changes: Emancipating Children in Modern Times, 25 U. Mich. J.L. Reform 239 (1992); Sanford N. Katz, William A. Schroeder, & Lawrence R. Sidman, Emancipating Our Children--Coming of Legal Age in America, *7 Fam. L. Q. 211 (1973).*

There is legal precedent for the Delaware courts, including the Family Court, to consider emancipation both as a defense and as a unique cause of action. Emancipation has been recognized by Delaware Courts since the later 1800s. See *Farrell v. Farrell, Del. Super., 8 Del. 633, 3 Houst. 633 (1868); Wilkins v. Wilson, Del. Super., 15 Del. 404, 41 A. 76 (1895); Bowring v. Wilmington Malleable Iron Co., Del. Super., 22 Del. 332, 67 A. 160 (1907).*

In actions for the recovery of monetary damages under contract or personal injury actions, the Superior Court of Delaware has concluded that a parent may "voluntarily and expressly emancipate" their minor child. *Bowring, 67 A. at 162; Wilkins, 41 A. at 77; Farrell, 3 Houst. at 640.* An emancipation by a parent "may be implied by law from circumstances or inferred from the conduct of the parent." *Bowring, 67 A. at 162* (relying on *Farrell v. Farrell, 8 Del. 633, 3 Houst. 633);* see *Farrell, 3 Houst. at 640.* The Court recognized that emancipation did occur. See *Bowring, 67 A. at 164; Farrell, 3 Houst. at 641.*

Emancipation also arises in other contexts in Family Court, often in child support cases where Family Court must determine what, if any, support is due to a minor. See, e.g., DCSE/Ellen S.P. v. Terrance D.S., 1996 Del. Fam. Ct. LEXIS 75, Del. Fam., No. CK95-3937, Nicholas, J. (Sept. 5, 1996); *Kathleen L.H. v. Wayne E.H., Del. Fam., 523 A.2d 977 (1987).* n26 While, in many of these cases, emancipation refers to an attainment of the age of majority n27, in others the reference is to emancipation prior to reaching the age of majority. n28 In fact, the guidelines for child support in Delaware refer to "emancipated children." n29

n26 Issues related to emancipation in the child support context have also arisen in the Court of Chancery. Jurisdiction over child support actions, however, lies exclusively with Family Court. See, e.g., *Connecticut General Life Insurance v. Wannberg, 1996 Del. Super. LEXIS 424,* *6, Del. Super., No. 95C-11-184-WTQ (August 1996) ("Family Court has exclusive jurisdiction over any disputes involving support as to children or spousal agreements"); *Wife, P. v. Husband, P, Del. Ch., 287 A.2d 409, 413 (1972)* (stating that there was an adequate remedy at law in Family Court "sufficient to divest the Court of Chancery of jurisdiction in child support cases").

n27 See, e.g., *Cooper v. Cooper, Del. Supr., 1986 Del. LEXIS 1068 (Table), 1986 WL 16467,* at *1 (February 1986) (Wife appealed Family Court order on grounds including the fact that original order did not provide for reduction in alimony "due upon emancipation of the child"); Chance v. Chance, Del. Fam., File No. CN95-06143, Tumas, J. (April 1, 1998) ("should Wife's alimony end prior to the parties' son's emancipation").

n28 See, e.g., Chilton v. Cobb, Del. Fam., File No. E-1933, Horgan, J. (Jan. 26, 1983) (applying standards from *Bates v. Bates, 62 Misc. 2d 498, 310 N.Y.S.2d 26 (1970),* and concluding that "minor child was not emancipated for support purposes even though the child was employed because he still lived at home with his mother and, significantly, she maintained that he was not emancipated." (Cited in *Kathleen L.H. v. Wayne E.H., Del. Fam., 523 A.2d 977, 979* Keil, J. (1987)).

High school graduation seems to be also frequently referenced in ancillary and support opinions as a point of emancipation. See, e.g., Webb-Hessell v. Webb, Del. Fam., No CN96-9727, Buckworth, J. (June 1998) (child, born 10/8/79, "expected to be emancipated in June of 1998" and issues included whether child's

emancipation affected Husband's support or alimony obligations. As is discussed more fully infra, high school graduation has been one, but not the sole, criteria considered in determining emancipation.

n29 The Family Court of the State of Delaware: Delaware Child Support Formula Evaluation and Update (October 1, 1998) (Report of the Family Court Judiciary; The Honorable Vincent J. Poppiti, Chief Judge). Section D, on page 8, is entitled "Emancipated Children."

In Kathleen L.H., the Family Court echoed the conclusions of the Superior Court in finding that emancipation could be express but also may be "implied from the conduct of the parties and surrounding circumstances, especially from the conduct of the parties inconsistent with the continuation of parental and filial legal rights and obligations. A minor may be emancipated for some purposes, but not for others, and the parent may be freed from some of his obligations, yet not be divested of others." *Kathleen L.H., 523 A.2d at 978-79* (citations omitted). n30 In Kathleen L.H., Family Court did not specifically reach a conclusion as to whether it had jurisdiction to declare the minor to be emancipated. *523 A.2d at 979.* n31

n30 In Kathleen L.H., a support arrears case, the issue presented to the Court was whether Father had shown just cause for suspending his support payments. *523 A.2d at 978.* The Court proceeded, however, to conduct a detailed analysis of the law concerning the emancipation of minors, both in Delaware and elsewhere. See *Kathleen L.H., 523 A.2d at 978-980.* The Court noted that there was precedent for concluding that a minor's financial independence will in and of itself "support a finding of emancipation, but the better and more equitable rule requires more." *Id. at 979.*

n31 "In the instant case, if indeed this Court had jurisdiction to declare [her] to be an emancipated minor, it would not so rule based on the evidence produced." *Kathleen L.H., 523 A.2d at 979* (emphasis added). The Court concluded that Father had not shown just cause for reducing his support payments. *Id. at 979.* The Court did note that the language of section 506 of Title 13, concerning child support, was "conceivably. . . broad enough to permit termination of a support obligation in circumstances where a child becomes emancipated." *Id. at 978.*

In Kathleen L.H., the Court referred to a previous Family Court case, discussed more fully herein, whereby Family Court drew a conclusion about its authority to emancipate a minor and to relieve a parent of a support obligation. *Kathleen L.H., 523 A.2d at 978* (citing State ex rel. C.L.S. v. P.T., Del. Fam., File No. B-5498, Wakefield, J. (July 19, 1977)). The Court in Kathleen specifically declined to address whether the minor was emancipated: "the precise issue in the instant case is not whether [she] became emancipated upon her graduation and employment but whether Father had shown just cause for suspending his support payments." *Kathleen L.H., 523 A.2d at 978.*

The issue of whether Family Court had jurisdiction to declare the minor to be emancipated was, likewise, not addressed by the Court in DCSE/Ellen S.P. v. Terrance D.S. n32 The Court concluded that emancipation of a child would be just cause for concluding that there was no longer a duty of support but concluded that "the evidence failed to establish that the child was emancipated." DCSE/Ellen S.P. n33

n32 DCSE/Ellen S.P. v. Terrance D.S., 1996 Del. Fam. Ct. LEXIS 75, Del. Fam., No. CK95-3937, Nicholas, J. (Sept. 5, 1996). In this case, the respondent argued that the minor child, who was 17 years, 4 months of age at the time of the hearing, had by his own actions become emancipated and, therefore, respondent did not have a duty to support him. DCSE/Ellen S.P. DCSE/Ellen S.P. is available on an electronic database: 1996 *Del. Fam. Ct. LEXIS 75, 1996 WL 798783.*

n33 The Court concluded that the minor was not capable of supporting himself and that respondent still had a duty to support the child. DCSE/Ellen S.P. The Court stated that there was not enough evidence "to establish that the child was self-supporting and, therefore, emancipated." Id.

In addition to cases in Family Court where emancipation arises as a subissue, direct petitions by a minor for emancipation have been presented to Family Court and emancipations in fact have been granted by Family Court. See Brenda E. v. Margaret C., 1987 Del. Fam. Ct. LEXIS 168, Del. Fam., File No. CN87-0364/F-2607, Keil, J. (August 24, 1987); State ex rel. Cindy L.S., Del. Fam., File No. # E-5498, Wakefield, J. (July 19, 1977). The Court in Brenda E., in granting emancipation, noted that there was a presumption against emancipation but that the petitioner had met her burden of proof. n34

n34 The minor in Brenda E. had married out of state and was pregnant. Brenda E. The Court in Brenda E. considered the following factors in making its ruling: the age of majority in Delaware; 13 Del. C. § 123

(noting that age is not a "disability" to obtaining a marriage certificate if the party is a prospective parent); 10 Del. C. § 921(5)(allowing the Court to terminate compulsory school attendance); the case of Kathleen L.H. v. Wayne E.H. (noting that, in Kathleen, the Court found that emancipation could be implied from the conduct of the parties or the surrounding circumstances); the emotional and physical health of the minor and her unborn children; 13 Del. C. § 708 (allowing a child to consent to certain diagnostic or therapeutic procedures under certain circumstances); and 12 Del. C. § 3902 (allowing a minor to choose a guardian under certain circumstances). Brenda E. Brenda E. is available on an electronic database: 1987 Del. Fam. Ct. LEXIS 168, *2.

In State ex rel Cindy L.S., Family Court granted the emancipation, while acknowledging the lack of statutory guidance. The Court stated that "there is no specific provision in the Delaware Code conferring upon this Court the authority to emancipate a minor." Cindy L.S. The Court also set forth the limits of its grant of emancipation, stating that it did not have the authority "to relieve a parent of all legal obligations of every kind" and did not have the authority to "emancipate permanently." Id. The Court found that it had "authority to grant partial emancipation only and that such partial emancipation is subject to revocation." Id. Thus, the mother of the child was relieved of obligations to control, supervise, and support the child, "subject to revocation upon a proper showing." Id.

In both Brenda E. and Cindy L.S., the Court grappled with facts, not unlike those in the instant case, where minors experienced irreconcilable differences with their parents and were no longer living in the family home. See Brenda E; Cindy L.S. The Court acknowledged that it was "not in a position to turn the clock backward but must accept the reality of what exists today." Brenda E. These cases highlight the very real and difficult challenges presented by adolescents whose needs are not sufficiently addressed by existing legal options; these are issues that continue to exist and are again at issue for the Court. These cases also highlight the multiple factors that the Court must consider with regard to an emancipation petition, inter alia: whether presumptions exist in favor of either party; the interrelationship with other statutory requirements; the interests of the minor; the effect on the parent-child relationship; the permanency of an emancipation; and the extent of the emancipation. n35 As noted by the Court in Cindy L.S., it could not assure the mother that she was "relieved of all responsibilities of every kind." Cindy L.S. Then, as is still true today, the specific rights and obligations of parents of emancipated children remained undefined.

n35 Other courts, as well as commentators, have also confronted the numerous issues in need of consideration. See also William E. Dean, Casenote and Comment. Ireland v. Ireland: Judicial Emancipation of Minors in Idaho: Protecting the Best Interests of the Child or Conferring a Windfall Upon the Parent?, *31 Idaho L. Rev. 205, 216-17 (1994)* (citations omitted) ("A finding that a minor is judicially emancipated has the effect of altering the minor's legal status and the parent-child relationship and its attendant rights and duties. This change in status may also, but will not usually, affect the minor's legal rights and duties as to third parties").

Emancipation has a long history in Delaware. It arises in a variety of different contexts and various courts have considered numerous factors in making determinations concerning emancipation. n36 This Court believes that the issues considered in prior decisions with regard to emancipation were appropriately considered and form a solid basis for further development of the law concerning emancipation. Because the Petition for Emancipation in this case does not arise as a defense or in the context of a child support petition, this Court does not reach the issue as to whether Family Court has the ability to make an actual finding that a child is "emancipated" for purposes of cases that are primarily cases of dependency/neglect, child support, custody, or termination of parental rights. It is clear, however, that issues concerning emancipation have, and will, continue to arise in such matters.

n36 See, e.g., DCSE/Ellen v. Terrance D.S., 1996 Del. Fam. Ct. LEXIS 75, Del. Fam., File No. CK95-3937, Nicholas, J. (September 5, 1996) (examining whether minor capable of supporting himself).

Having examined the history of emancipation within Delaware's courts, this Court is unable to find authority granting Family Court jurisdiction over a cause of action that is not enumerated within the Delaware Code. The relevant statutes do not provide any additional grant of jurisdiction that would permit a direct petition for emancipation to be addressed by Family Court. Without any statutory reference to emancipation, the Court also cannot conclude that a direct petition for emancipation by a minor can be considered as an available remedy within the dependency/neglect context.

Although the common law history, the mandate to have one court address issues related to families and children, and public policy all seem to favor allowing the issue of emancipation to be addressed by the same court that is

mandated to address the control, education, and support of children, the lack of legislation at this time does not allow the Family Court to address a direct petition for emancipation by a minor. Regardless of the temptation to act, finding jurisdiction over this petition would be inappropriate.

THE CUSTODIAL STATUS OF PETITIONER

In the absence of legislation, this Court has concluded that jurisdiction does not lie within Family Court on a direct petition for emancipation by a minor. The impact of this decision leaves this Court, the child welfare agencies, and adolescents themselves in a difficult position. It is an unfortunate reality that there are adolescents who have homes to which they cannot return and parents who do not or cannot provide for them in any meaningful way. These adolescents, therefore, become entangled in a void in a system that is not adequately equipped to serve them. n37 In some cases, a Petition for Termination of Parental Rights may be filed by the Department, or by an agency, even when a child is sixteen or seventeen years of age. n38 The prospects for adoption of a teenager, however, are remote. The adolescent can remain in foster care, under the legal protection of the Division, until they have attained majority. Other teenagers may enter marriage as a way to attempt to gain independence.

n37 This opinion is not discussing juveniles who have delinquency charges pending or who have, by their own behavior, prevented a return to their homes.

n38 Under 13 Del. C. § 1104, a minor cannot file a Petition for Termination of Parental Rights.

The Court in this case is confronted with an adolescent who, based upon the facts alleged by the Petitioner, falls into neither group. n39 There are no pending custody, child support, or TPR petitions. n40 She is not emancipated. She is still, at sixteen years of age, legally a child who must be in the custody and care of someone. The Court, under its statutory mandate, must consider Petitioner's custodial status and welfare. In its consideration of Petitioner's legal status and welfare, the Court has evaluated the evidence presented, both in the limited testimony on December 10, 1998 and in the parties' submissions.

n39 The Court, having found that it has no jurisdiction, in no way draws any conclusions concerning the merits of the Petition. The Court must, however, examine the impact of its decision on Petitioner and her situation in order to ensure her safe and appropriate care. The Court must, therefore, evaluate the limited evidence presented with regard to Petitioner's situation and assume, solely for purposes of determining the appropriate judicial action, that the evidence presented by Petitioner concerning her situation is accurate.

n40 Petitioner is neither married nor pregnant and is not enrolled in the armed services. She has obtained employment.

Petitioner is not currently residing with her parents or receiving support from them. There have been serious allegations concerning the level of care and safety in their home and the DFS file concerning this family is voluminous. n41 Until additional information is obtained, it would be unconscionable for the Court to conclude that Petitioner should return to her parents' home. Petitioner is living with a non-relative caretaker whom DFS has indicated that they have approved. n42 Petitioner's custodial status, therefore, remains in limbo.

n41 The DFS file concerning this family is comprised of at least 500 pages, compiled by DFS over the ten-year period of their involvement with this family.

n42 It is not known whether this is actually an approved foster home. There is also no evidence that this caretaker is Plaintiff's legal guardian. At this time, neither Petitioner, Respondent, nor DFS has volunteered the identity or the address of the caretaker.

While Petitioner's parents apparently have retained legal custody, she has no ongoing relationship with them. Her caretaker has no legal custodial rights. The guardian ad litem for the civil suit is not a custodial caretaker. Petitioner cannot take the legal steps necessary to protect herself or to care for herself. There has to be someone with responsibility for Petitioner. This Court cannot ignore this responsibility.

The Court is aware, and appreciative, of the DFS investigation that concluded that Petitioner is currently in a safe environment. The Court is also very aware that DFS has an overwhelming demand placed upon it and far, far too many cases in which children are at risk and in need of foster placement and other agency services. The Court further acknowledges and appreciates that Petitioner has indicated that she is willing to accept responsibility for herself and appears to be appropriately attempting to do so. While the Court agrees that alternatives other than custodial arrangements with relative or nonrelative adults or with DFS may, in fact, be appropriate for Petitioner, these options are not available to this Court.

At this time, Petitioner cannot act for herself and there seems to be no responsible party in place with the custodial authority to act in her best interests. Petitioner, therefore, remains at risk. By means of a separate Order, this Court will, regardless of further arguments on the jurisdictional question of emancipation, order a hearing at which Petitioner; her counsel; her parents; her current caretaker; and DFS shall appear in order to make appropriate arrangements for the safety and welfare of this adolescent.

FAMILY COURT'S UNIQUE ROLE IN CAUSES OF ACTION AFFECTING CHILDREN, ADOLESCENTS, AND THEIR FAMILIES

Family Court continues, under its statutory mandate, to play a unique role in actions that directly affect children, adolescents, and their families. By reaching the conclusion that Family Court does not have jurisdiction over a direct petition by a minor for emancipation, the Court is in no way expressing a belief that such a cause of action should not be recognized and, if recognized, should not lie in Family Court. Family Court is uniquely suited to address the issues surrounding emancipation, issues that directly affect adolescents, their parents, and the family unit. This Court agrees with Judge Keil in believing that both the General Assembly and the courts must "deal with realities existing today." Brenda E. v. Margaret C, 1987 Del. Fam. Ct. LEXIS 1687, Del. Fam., File NO. CN87-0364/F-2607, Keil, J. (Aug. 24, 1987).

This Court, on a daily basis, confronts realities, including those presented by this case, that suggest that at times adolescents will live separate and apart from their families, either as a result of the parents' conduct or that of the adolescent. For these adolescents, who may be sufficiently mature to support themselves, alternative custodial arrangements with agencies, dependency/neglect proceedings, or termination of parental rights are not necessarily appropriate. These adolescents, at present, fall into a gap where their needs are not well represented.

A Petition for Emancipation raises complex substantive and procedural issues that are appropriate for consideration by the General Assembly. The first steps toward legislative consideration of emancipation have in fact occurred in Delaware. In the fall of 1998, the Delaware Legislative Council's office drafted proposed emancipation legislation. The Court is unaware whether the proposed legislation was submitted to the General Assembly. This legislation, however, does present many of the procedural issues that the Court would need to appropriately address such a petition. Without such a framework, many outstanding issues would remain unclear: the elements a petitioner must satisfy to be emancipated; the standard to be applied; the burden of proof; any applicable presumptions; the limits of an emancipation; the nature of the parental responsibility, if any, after an emancipation; and whether an emancipation is revocable. n43 Such issues are beyond the authority of this Court to resolve. The Court does take this opportunity to bring the issue of emancipation to attention and to suggest that legislation, such as the proposed legislation, be considered.

> n43 These are merely illustrative examples that arose during this Court's consideration of the issue and by no means represent an exhaustive list. Delaware is not alone in facing the issue of direct emancipation. A number of other states have also confronted the issue of emancipation. See supra notes 12, 13, and 25.

CONCLUSION

Emancipation is not an enumerated cause of action within the Delaware Code. The Family Court of the State of Delaware, which must broadly exercise the authority granted to it by Delaware statutes, does not have jurisdiction to address a direct petition by a minor for a partial emancipation. Therefore, the Petition for Emancipation is dismissed for lack of jurisdiction over the subject matter.

IT IS SO ORDERED.

Chandlee Johnson Kuhn

Judge

DIST. OF COLUMBIA

FRANCES B. KUPER, APPELLANT V. ROBERT U. WOODWARD, APPELLEE

No. 95-FM-775

District of Columbia Court of Appeals

684 A.2d 783; 1996 D.C. App. LEXIS 235

September 25, 1996, Argued

November 7, 1996, Decided

JUDGES: Before Wagner, Chief Judge, Steadman, Associate Judge, and Pryor, Senior Judge.

OPINION PER CURIAM

This case began when appellant, Frances B. Kuper, attached funds in the bank account of appellee, Robert Woodward, claiming that he had not made child support payments that she was entitled to under their child support agreement which had been incorporated into their divorce judgment. The trial judge held that appellant was not entitled to these funds, and she appealed. We reverse.

I.

Based on the pleadings and representations of the parties, the following facts seem undisputed. Appellant and appellee were married on November 29, 1974, in the District of Columbia. They had one child, Taliesin Woodward, who was born on November 10, 1976. On September 10, 1979, the Superior Court entered its Findings of Fact, Conclusions of Law and Judgment of Absolute Divorce. This judgment incorporated two agreements, one of which dealt with the division of property, alimony, and child support issues ("child support agreement") and the other of which involved custody and visitation issues ("custody agreement"). The custody agreement set up a joint custody arrangement in which the child had her primary residence with appellant and visitation with appellee, including but not limited to, at least alternating weekends, one overnight visit each week, one month each summer, and a period of time during major holidays and school vacations. Appellee was also to pay child support as set forth in paragraph sixteen of the child support agreement which provides:

The Husband [appellee] shall pay to the Wife [appellant], for the Child's support, the sum of Three Thousand Dollars ($ 3,000) per month commencing on September 1, 1979 for a period of Forty Eight (48) months and thereafter the Husband shall pay One Thousand Five Hundred Dollars ($ 1,500) per month until the Child reaches the age of Eighteen (18) or is emancipated.

The payments were to be made on or before the first day of each month, and appellee was to arrange with the bank an automatic transfer of the money from his account to appellant's account.

In the spring of 1994, appellant became engaged and planned to move to Texas. Appellant asked the child, who was then seventeen years old, to move to Texas with her, but the child chose to remain in the District of Columbia for the summer before her first year of college. On May 7, 1994, appellant got married and set up her residence in Texas. It appears that there was a period of time here in which the child spent some time living with appellee, some time in appellant's house in the District of Columbia, and some time on vacation with friends. She officially moved in with her father on June 21, 1994, when her mother closed her house in the District of Columbia. She remained there until August 12, 1994, when she went away to college in California, although there was a two week period during which she went on vacation in Nantucket with her mother. The child never went to live in Texas. From August 12, 1994, until November 10, 1994, when she turned eighteen, the child lived at college. Pursuant to a separate provision of the agreement, appellee paid for all of the child's college expenses.

Appellee did not make child support payments for the months of July, August, October, and November 1994. n1 On December 7, 1994, appellant served an amended writ of attachment on appellee's bank for the amount of unpaid child support and costs, for a total of $ 6,020. The bank attached this amount from credits of appellee, and appellee filed an Answer Defending Against Attachment Pursuant to *D.C. Code § 16-520*. Various subsequent pleadings were filed, including appellant's Motion for Execution on Attached Funds and appellee's Request for Dismissal of Attachment. The trial judge heard argument on appellant's motion for a continuance on May 8, 1995, at which time he determined that the underlying facts were not in dispute, and therefore he did not need to hold a factual hearing. The next day the trial judge held a hearing in which no live witnesses were called and the parties were given the opportunity to make legal arguments.

> n1 It appears that there was some discussion below of the fact that the bank "accidentally" paid appellant child support for the month of September. That issue has not been raised in this appeal, and therefore we will not consider it.

The trial judge made oral conclusions of law, and began by stating:

I think that what controls this case and the issue in this case is paragraph 16 found on page 5 of the 1979 agreement, and specifically what controls are the words "[shall pay] $ 1500 per month until the child reaches the age of 18 or is emancipated." I conclude that while I have to try to figure out what the intent of the parties were in using the word "emancipated," that it is reasonable to conclude that they meant the legal definition of emancipated, whatever that definition might be in the District of Columbia.

The trial judge went on to say that "the words 'emancipation' have to take on, it seems to this Court, the meaning of residence more than any other factor that one might determine or analyze in determining whether or not the child is emancipated." He then stated his findings of fact, and concluded that the child was emancipated at least as of May 7th, when appellant married. The trial judge denied the motion to execute on the attachment and granted the motion to dismiss the attachment. A written order was entered to this effect on May 19, 1995. Appellant filed a timely appeal.

II.

According to Black's Law Dictionary, the term "emancipation" is "principally used with reference to the emancipation of a minor child by its parents, which involves an entire surrender of the right to the care, custody, and earnings of such child as well as a renunciation of parental duties." Black's Law Dictionary 521 (6th ed. 1990). While this jurisdiction has not dealt extensively with the concept of emancipation, a United States Court of Appeals for the District of Columbia Circuit case noted that: "It has been held that the marriage of a minor daughter, creating relationships inconsistent with parental control, emancipates her from the custody, care and control of her parents." *Davis v. Davis, 96 F.2d 512, 514, 68 U.S. App. D.C. 240, 242, rev'd on other grounds*, *305 U.S. 32, 59 S. Ct. 3, 83 L. Ed. 26, 118 A.L.R. 1518 (1938).* In affirming the trial court's denial of a request for annulment by an eighteen-year-old husband, who was under the age of legal consent at the time of the marriage, our predecessor court cited with approval the trial court's determination that the plaintiff had evidenced his emancipation by demonstrating "his ability to protect and support himself." *Duley v. Duley, 151 A.2d 255, 258 (Mun. App. D.C. 1959).* Specifically, the plaintiff husband had left his parents' home to live with an uncle, stopped attending school, supported himself and his wife. *Id.* These cases reflect that the child's economic self-sufficiency is a significant factor in determining emancipation.

In addition, "emancipation has been defined as the renunciation of legal duties by a parent and the surrender of parental obligations to the child." *Gittleman v. Gittleman, 81 A.D.2d 632, 438 N.Y.S.2d 130, 132 (App. Div. 1981).* In *Gittleman,* the court recognized that emancipation may occur by operation of law where the parent's actions are inconsistent with the parental obligation, *e.g.,* where the parent abandons the child. *Id.* The *Gittleman* court rejected specifically the notion that a change in residence alone constitutes an adequate basis for finding emancipation. *Id.* The court recognized the non-custodial mother's continuing parental rights, even though primary responsibility for the child's care was changed from the mother to the father. *Id.* Also, absent was any showing of an intent to abandon the child. *Id.* Similarly, we are not persuaded that a change of residence from one parent to another is a sufficient ground for finding that a minor child is emancipated. Here, the trial court failed to consider other significant factors bearing upon the issue as outlined above. Therefore, we reverse and remand this case for further proceedings in accordance with this opinion.

Reversed and remanded.

FLORIDA

TITLE XLIII. DOMESTIC RELATIONS

CHAPTER 743. DISABILITY OF NONAGE OF MINORS REMOVED

743.01. Removal of disabilities of married minors.

The disability of nonage of a minor who is married or has been married or subsequently becomes married, including one whose marriage is dissolved, or who is widowed, or widowered, is removed. The minor may assume the management of his or her estate, contract and be contracted with, sue and be sued, and perform all acts that he or she could do if not a minor.

743.015. Disabilities of nonage; removal.

(1) A circuit court has jurisdiction to remove the disabilities of nonage of a minor age 16 or older residing in this state upon a petition filed by the minor's natural or legal guardian or, if there is none, by a guardian ad litem.

(2) The petition shall contain the following information:

(a) The name, address, residence, and date of birth of the minor.

(b) The name, address, and current location of each of the minor's parents, if known.

(c) The name, date of birth, custody, and location of any children born to the minor.

(d) A statement of the minor's character, habits, education, income, and mental capacity for business, and an explanation of how the needs of the minor with respect to food, shelter, clothing, medical care, and other necessities will be met.

(e) Whether the minor is a party to or the subject of a pending judicial proceeding in this state or any other jurisdiction, or the subject of a judicial order of any description issued in connection with such pending judicial proceeding.

(f) A statement of the reason why the court should remove the disabilities of nonage.

(3) If the petition is filed by the natural or legal guardian, the court must appoint an attorney ad litem for the minor child, and the minor child shall be brought before the court to determine if the interest of the minor will be fully protected by the removal of disabilities of nonage. The attorney ad litem shall represent the child in all related proceedings.

(4) If the petition is filed by the guardian ad litem or next friend, service of process must be perfected on the natural parents.

(5) If both parents are not jointly petitioning the court for the removal of the disabilities of nonage of the minor, service of process must be made upon the nonpetitioning parent. Constructive service of process may be used, provided the petitioning parent makes an actual, diligent search to discover the location of, and provide notice to, the nonpetitioning parent.

(6) The court shall consider the petition and receive such evidence as it deems necessary to rule on the petition. If the court determines that removal of the disabilities of nonage is in the minor's best interest, it shall enter an order to that effect. An order removing the disabilities of nonage shall have the effect of giving the minor the status of an adult for purposes of all criminal and civil laws of the state, and shall authorize the minor thereafter to exercise all of the rights and responsibilities of persons who are 18 years of age or older.

(7) The court shall consider the petition and, if satisfied that the removal of the disabilities is in the minor's best interest, shall remove the disabilities of nonage; and shall authorize the minor to perform all acts that the minor could do if he or she were 18 years of age.

(8) The judgment shall be recorded in the county in which the minor resides, and a certified copy shall be received as evidence of the removal of disabilities of nonage for all matters in all courts.

743.05. Removal of disabilities of minors; borrowing money for educational purposes.

For the purpose of borrowing money for their own higher educational expenses, the disability of nonage of minors is removed for all persons who have reached 16 years of age. Such minors are authorized to make and execute promissory notes, contracts, or other instruments necessary for the borrowing of money for this purpose. The promissory notes, contracts, or other instruments so made shall have the same effect as though they were the obligations of persons who were not minors. No such obligation shall be valid if the interest rate on it exceeds the prevailing interest rate for the federal Guaranteed Student Loan Program.

743.06. Removal of disabilities of minors; donation of blood without parental consent.

Any minor who has reached the age of 17 years may give consent to the donation, without compensation therefor, of her or his blood and to the penetration of tissue which is necessary to accomplish such donation. Such consent shall not be subject to disaffirmance because of minority, unless the parent or parents of such minor specifically object, in writing, to the donation or penetration of the skin.

743.066. Removal of disability of minors adjudicated as adults.

The disability of nonage of a minor adjudicated as an adult and in the custody or under the supervision of the Department of Corrections is removed, as such disability relates to health care services, except in regard to medical services relating to abortion and sterilization.

743.07. Rights, privileges, and obligations of persons 18 years of age or older.

(1) The disability of nonage is hereby removed for all persons in this state who are 18 years of age or older, and they shall enjoy and suffer the rights, privileges, and obligations of all persons 21 years of age or older except as otherwise excluded by the State Constitution immediately preceding the effective date of this section and except as otherwise provided in the Beverage Law.

(2) This section shall not prohibit any court of competent jurisdiction from requiring support for a dependent person beyond the age of 18 years when such dependency is because of a mental or physical incapacity which began prior to such person reaching majority or if the person is dependent in fact, is between the ages of 18 and 19, and is still in high school, performing in good faith with a reasonable expectation of graduation before the age of 19.

(3) This section shall operate prospectively and not retrospectively, and shall not affect the rights and obligations existing prior to July 1, 1973.

743.08. Removal of disabilities of minors; artistic or creative services; professional sports contracts; judicial approval.

(1) A contract made by a minor or made by a parent or guardian of a minor, or a contract proposed to be so made, may be approved by the probate division of the circuit court or any other division of the circuit court that has guardianship jurisdiction, where the minor is a resident of this state or the services of the minor are to be performed or rendered in this state, where the contract sought to be approved is one under which:

(a) The minor is to perform or render artistic or creative services, including, but not limited to, services as an actor, actress, dancer, musician, vocalist, model, stunt person, conductor, or other performing artist.

(b) The minor is to render services as a participant or player in professional athletics or semiprofessional athletics, including, but not limited to, track and field, surfing, sailing, diving, boxing, gymnastics, ice skating, wrestling, bicycling, soccer, horse racing, motocross, softball, baseball, football, hockey, basketball, tennis, golf, and jai alai.

(c) The minor will endorse a product or service, or in any other way receive compensation for the use of right of publicity of the minor as that right is defined by s. 540.08.

(d) The minor agrees to purchase, sell, lease, license, transfer, or otherwise exploit literary, musical, or dramatic properties, whether tangible or intangible, or any rights therein for use in motion pictures, television, the production of phonorecords, the legitimate or living stage, or otherwise in the entertainment field.

(e) A person is employed to receive compensation from the minor for services to the minor in connection with such performing or athletic services of the minor such as a coach, manager, agent, trainer, or otherwise to represent or advise the minor in connection with contracts therefor.

(2) Approval under this section may be sought for a contract or agreement that is already in existence and under which the parties are currently performing.

(3) (a) If a contract described by subsection (1) is so approved by the circuit court pursuant to the requirements of this section and the requirements of ss. 743.09, 743.095, and chapter 744, the minor may not, either during his or her minority or upon reaching his or her majority, disaffirm the contract on the ground of minority or assert that the parent or guardian lacked authority to make the contract. A contract modified, amended, or assigned after its approval under this section shall be deemed a new contract.

(b) If a contract described by subsection (1) is so approved, all earnings, royalties, or other compensation earned or received by the minor pursuant to said approved contract shall become the property of the minor, subject to the provisions of ss. 743.09, 743.095, and chapter 744.

(4) (a) Approval of the contract pursuant to this section shall not exempt any person from any other law with respect to licenses, consents, or authorizations required for any conduct, employment, use, or exhibition of the minor in this state, nor limit in any manner the discretion of the licensing authority or other persons charged with the administration of such requirements, nor dispense with any other requirement of law relating to the minor.

(b) Approval of a contract pursuant to this section does not remove the disability of nonage for any other contract with the same minor which is not approved by the court pursuant to this section, nor is the disability of nonage of the minor removed generally for the minor, nor is the minor emancipated for any other purpose or contract other than the performance of contracts approved pursuant to this section.

(c) No contract shall be approved which provides for an employment, use, or exhibition of the minor, within or without the state, which is prohibited by law and in particular by any federal or state child labor law, and could not be licensed to take place in this state.

(d) No contract shall be approved by the court:

1. Unless a written acquiescence to such contract by the parent or parents having custody, or other person having custody of the minor, is filed in the proceeding;

2. Unless written approval is given by the guardian ad litem appointed by the court in this proceeding; or

3. If the court shall find that the minor is emancipated.

(e) No contract shall be approved, if the term during which the minor is to perform or render services or during which a person is employed to render services to a minor, including any extensions thereof by option or otherwise, extends for a period of more than 3 years from the date of approval of the contract. If the contract contains any other covenant or condition which extends beyond such 3 years, the same may be approved if found to be reasonable and for such period as the court may determine.

(f) If the court which has approved a contract pursuant to this section shall find that the physical or mental well-being of the minor is being impaired by the performance thereof or in violation of any child labor law, it may, at any time during the term of the contract during which services are to be performed by the minor or rendered by or to the minor or during the term of any other covenant or condition of the contract, either revoke its approval of the contract or declare such approval revoked unless a modification of the contract which the court finds to be appropriate in the circumstances is agreed upon by the parties and the contract as modified is approved by order of the court. Application for an order pursuant to this subsection may be made by the minor, or his or her parent or parents or guardian, or by the person having the care and custody of the minor, or by a guardian ad litem appointed for the purpose by the court on its own motion. The order granting or denying the application shall be made after hearing, upon notice to the parties to the proceeding

in which the contract was approved, given in such manner as the court shall direct. Revocation of the approval of the contract shall not affect any right of action existing at the date of the revocation, except that the court may determine that a refusal to perform on the ground of impairment of the well-being of the minor was justified.

743.09. Removal of disabilities of minors; artistic or creative services; professional sports contracts; procedure for court approval; appointment of a guardian ad litem.

(1) (a) A proceeding for the approval of a contract described by s. 743.08 shall be commenced by verified petition by:

1. Either natural parent of the minor, or other person having custody of the minor;
2. A guardian of person or property of the minor;
3. The minor;
4. Any party to the contract sought to be approved; or
5. Any other interested person.

(b) If a guardian of the person or property of the minor has been appointed or qualified in this state, the petition shall be made to the court by which he or she was appointed or in which he or she qualified. If there is no such guardian, the petition shall be made in the circuit court, probate division, or other circuit division having guardianship jurisdiction, in the circuit where the minor resides, or if he or she is not a resident of the state, in any county in which the minor is to be employed under the contract.

(c) The following persons, other than one who is the petitioner or who joins in the petition, shall be served with the petition by formal notice as provided by the Florida Probate Rules:

1. The minor, if over the age of 14 years.
2. His or her guardian or guardians, if any, whether or not appointed or qualified in this state.
3. Each party to the contract.
4. The parent or parents of the minor.
5. Any person having the care and custody of the minor.
6. The person with whom the minor resides, if other than a parent or guardian.

(d) Formal notice shall be made at least 30 days before the time at which the petition is set to be heard, unless the court shall fix a shorter time upon cause shown.

(2) The petition shall have annexed a complete copy of the contract or proposed contract and shall set forth:

(a) The full name, residence, and date of birth of the minor.

(b) The name and residence of any living parent of the minor, the name and residence of the person who has care and custody of the minor, and the name and residence of the person with whom the minor resides.

(c) Whether the minor is a resident of the state or, if he or she is not a resident, that the petition is for approval of a contract for performance or rendering of services by the minor and the place in the state where the services are to be performed or rendered.

(d) A brief statement as to the minor's employment and compensation under the contract or proposed contract.

(e) A statement that the term of the contract during which the minor is to perform or render services or during which a person is employed to render services to the minor can in no event extend for a period of more than 3 years from the date of approval of the contract.

(f) An enumeration of any other covenants or conditions contained in the contract which extend beyond such 3 years or a statement that the contract contains no such other covenants or conditions.

(g) A schedule showing the minor's estimated gross earnings, estimated outlays, and estimated net earnings as defined in s. 743.095.

(h) The interest of the petitioner in the contract or proposed contract or in the minor's performance under it.

(i) Such other facts known by the petitioner regarding the minor and his or her family and property as show that the contract is reasonable and provident and for the best interests of the minor, including whether the minor has had at any time a guardian appointed by a court of any jurisdiction, and the facts with respect to any previous application for the relief sought or whether similar relief has been sought with respect to the minor.

(3) At any time after the filing of the petition, the court, if it deems it advisable, may appoint a guardian ad litem, pursuant to s. 744.301, to represent the interests of the minor. The court shall appoint a guardian ad litem as to any contract where the parent or guardian will receive remuneration or financial gain from the performance of the contract or has any other conflict of interest with the minor as defined by s. 744.446. The court, in determining whether a guardian ad litem should be appointed, may consider the following criteria:

(a) The length of time the exclusive services of the minor are required.

(b) Whether the gross earnings of the minor under the contract are either contingent or unknown.

(c) Whether the gross earnings of the minor under the contract are in excess of $15,000.

(4) The guardian ad litem shall be entitled to reasonable compensation. The court shall have the power to determine the amount of the reasonable compensation paid to the guardian ad litem and may determine which party shall be responsible for the fee, whether the fee shall be paid from the earnings of the minor pursuant to the contract sought to be approved, or may apportion the fee between the parties to the proceedings.

(5) (a) The minor, unless excused by the court for good cause shown, shall attend personally before the court upon the hearing of the petition.

(b) The court may, by order:

1. Determine any issue arising from the pleadings or proof and required to be determined for final disposition of the matter, including issues with respect to the age or emancipation of the minor.

2. Approve or disapprove the contract or proposed contract.

3. Approve the contract upon such conditions, with respect to modification of the terms thereof or otherwise, as it shall determine.

4. Appoint a guardian of the property to hold the earnings of the minor as provided by s. 743.095.

743.095. Removal of disabilities of minors; artistic or creative services; professional sports contracts; guardianship of the property.

(1) (a) The court may withhold its approval of the contract sought to be approved under ss. 743.08 and 743.09 until the filing of a guardianship plan by the parents or legal guardian of the minor, which shall provide that a part of the minor's net earnings for services performed or rendered during the term of the contract be set aside and saved for the minor under a guardianship of the property as provided in this section, until he or she attains his or her majority or until further order of the court.

(b) The court shall fix the amount or proportion of net earnings to be set aside as it deems for the best interests of the minor, and the amount or proportion so fixed may, upon subsequent application, be modified in the discretion of the court, within the limits of the consent given at the time the contract was approved. In fixing such amount or proportion, consideration shall be given to the

financial circumstances of the parent of the minor and to the needs of their other children or, if the minor has any dependents, to the needs of his or her family. If the minor has no dependents, then the court shall not require the setting aside of an amount or proportion in excess of two-thirds of the net earnings of the minor.

(c) For the purposes of this act, net earnings shall mean the gross earnings received for services performed or rendered by the minor during the term of the contract, less:

1. All sums required by law to be paid as taxes to any government or subdivision thereof with respect to or by reason of such earnings.

2. Reasonable sums to be expended for the support, care, education, coaching, training, and professional management of the minor.

3. Reasonable fees and expenses paid or to be paid in connection with the proceeding for approval, the contract, and its performance.

(d) Notwithstanding anything set forth herein, the creditors of any person, other than of the minor, shall not be entitled to the earnings of the minor.

(2) (a) If a guardian of the property of the minor has been appointed or qualified in this state, he or she shall receive and hold any net earnings directed by the court to be set aside for the minor as provided in subsection (1) and by chapter 744 governing guardians of the property. In any other case a guardian of the property shall be appointed for the purpose of holding the net earnings of the minor pursuant to the contract as directed by the court pursuant to subsection (1) and thereafter shall hold said earnings as a guardian of the property pursuant to chapter 744.

(b) A parent, guardian, or other petitioner is not ineligible to be appointed as guardian of the property or earnings of a minor derived from a contract approved pursuant to ss. 743.08 and 743.09 by reason of his or her interest in any part of the minor's earnings under the contract or proposed contract or by reason of the fact that he or she is a party to or otherwise interested in the contract or in the minor's performance under the contract, provided such interest is fully disclosed to the court.

GEORGIA

DOLORES ALLENE STREET V. COBB COUNTY SCHOOL DISTRICT

Civ. A. No. 81-998

United States District Court for the Northern District of Georgia, Atlanta Division

520 F. Supp. 1170; 1981 U.S. Dist. LEXIS 14294

August 31, 1981

OPINION BY EVANS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter is before the Court on Plaintiff's Motion for a Preliminary Injunction to enjoin the Cobb County School District from preventing her participation in the day school program at South Cobb High School. An evidentiary hearing was held on July 31, 1981. On August 25, 1981, the Court entered an Order granting Plaintiff's Motion. The following findings of fact and conclusions of law are entered in support of that Order.

The basic facts, most of which are undisputed, are found to be as follows: Plaintiff is a seventeen year old who has attended South Cobb High School for the past two years. Until late April, 1981, she lived with her mother and stepfather, who reside in the South Cobb High School District; thereafter, she moved to an apartment to live with her eighteen year old boyfriend and then to her boyfriend's parents' home (also in the South Cobb High School District) where she and her boyfriend presently live.

On May 15, 1981, the high school learned of Plaintiff's living arrangements. She was called to the principal's office and informed that she could no longer attend South Cobb High School because the school district's policies were interpreted to permit only "resident students" to attend. A "resident student" is defined in the school board's policies as "a student who resides with his parents or in the event of divorce, with the custodial parent and/or legal guardian within the Cobb County School District." (Defendant's Exhibit 4).

Plaintiff came to the Court in late May, seeking a temporary restraining order to permit her to complete her junior year at South Cobb High. This restraining order was granted.

Plaintiff seeks preliminary and permanent injunctive relief to permit her to now proceed to commence and complete her senior year at the high school.

The School District's position is two-fold: first, it says Plaintiff does not fit the definition of "resident student" and therefore she cannot attend. It says the rule is based on the reasonable notion that when the student's deportment or academic problems require it, the school should be able to contact his or her adult guardian to obtain information or assistance. Secondly, the School District contends that because of Plaintiff's unconventional living arrangements, her presence in the school population might be a bad influence on impressionable students. The School District points out that it has an adult education program which is available to Plaintiff and that it is not seeking to totally deny her an education.

The evidence at the hearing showed that the School District does permit married students under the age of eighteen who are living apart from their parents to attend the day school program. Also, the School District permits unwed pregnant students to continue in the day school program, provided such students live with a parent or guardian.

Since November 18, 1980, Plaintiff has been employed part-time at a Richway Department Store. Both before and after she left home, she has kept her wages and used them to buy clothing and other items for herself. Since Plaintiff has left home, her mother has attempted to provide her with financial support but Plaintiff has refused such assistance. Plaintiff's mother, who testified at the hearing, does not approve of or consent to Plaintiff's present living arrangements. She stated she wanted her daughter to come home, or alternatively, she said she would consent to her daughter's marrying the boyfriend.

Plaintiff testified that she had traditionally made B's and C's in high school. However, in the spring quarter of 1981, her grades were D's and F's. Plaintiff nonetheless states a definite desire to return to South Cobb High this fall. She considers the adult education program inferior to the day school program.

Having set forth the essential facts, the Court now turns to its dispositive findings and conclusions of law.

For reasons that will be discussed hereinafter, the Court believes the central finding to be made by the Court is whether or not Plaintiff is an emancipated or unemancipated minor. This finding is important both to the Court's analysis of her substantive claim and also to Plaintiff's entitlement to maintain this lawsuit in her own name. If Plaintiff is an unemancipated minor, she may not maintain this suit on her own but rather suit would have to be maintained by her guardian, in this case, her mother. If her mother were not to find the maintenance of the suit in the daughter's interest, that might very well terminate the litigation. n1

n1. Of course, the Court has the power to appoint a "next friend" other than a natural guardian if the natural guardian and child have conflicting interests. However, it is unclear whether this case presents a situation where legal interests conflict, or merely one where opinions differ.

In Georgia, an unemancipated minor is subject to the power of his or her parent or guardian. An emancipated minor is not. See Ga.Code Ann. § 74-108. There are several ways for a minor to become emancipated. First, marriage emancipates. See *McGregor v. McGregor, 237 Ga. 57, 226 S.E.2d 591 (1976).* Additionally, emancipation may be shown by one of the grounds set out in Ga.Code Ann. § 74-108. *Hicks v. Fulton County Dep't of Family and Children Services, 155 Ga.App. 1, 270 S.E.2d 254 (1980).* Section 74-108 provides, in part, that parental power may be lost by:

(1) Voluntary contract, releasing the right to a third person.

(2) Consenting to the adoption of the child by a third person.

(3) Failure to provide necessaries for the child, or abandonment of the child.

(4) Consent to the child's receiving the proceeds of his own labor, which consent shall be revocable at any time.

(5) Consent to the marriage of the child, who thus assumes inconsistent responsibilities.

(6) Cruel treatment of the child.

Looking at the totality of circumstances involved here, the Court finds, not without some hesitation, that Plaintiff is an emancipated minor. She has been living away from home for four months and has evidenced no intent to return. Since November 1980, she has worked and furnished her own income, which income has neither been requested by nor received by her mother. Although her mother has made it clear she wants her daughter to come home, she has also stated she will consent to her daughter's marriage. Finally, Plaintiff is only eight months away from the age of majority.

The Court now looks to see what implications Plaintiff's status as an emancipated minor has for the outcome of this case. She brings this action under *42 U.S.C. § 1983,* which proscribes the deprivation of federally guaranteed rights under color of state law. The Cobb County School District is, of course, an arm of the State. The federally guaranteed right involved, according to Plaintiff, is the equal protection guaranteed by the Fourteenth Amendment of the United States Constitution. Her argument is that the School District does not treat emancipated minors equally, because the School District permits married minors to attend the day school program, but not single emancipated minors.

The initial step in equal protection analysis is to determine the nature of the interest affected or classification involved. *Dunn v. Blumstein, 405 U.S. 330, 92 S. Ct. 995, 31 L. Ed. 2d 274 (1972).* When a state rule is attacked as violating the equal protection clause it must be examined against one of two constitutional tests. Where the state rule impinges upon a fundamental right or creates a classification which is based upon inherently suspect criteria, the required standard of review is that of strict scrutiny. Under strict scrutiny it must be shown that the classification furthers a compelling state interest and that the means chosen to effectuate that purpose is the least restrictive alternative available. *San Antonio School District v. Rodriguez, 411 U.S. 1, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1972).* Where no fundamental right is infringed upon or no suspect class is present, the appropriate constitutional test is rational relationship. Under "rational relationship" the classification must be examined to determine whether it is rationally related to a legitimate state purpose. *San Antonio, supra; Eisenstadt v. Baird, 405 U.S. 438, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972).*

The Supreme Court has held that the right to an education is not a "fundamental" right. *San Antonio, supra.* No suspect classification is involved. Therefore, the test to be applied is the "rational relationship" test.

Is a School District policy which permits a married minor, but not an emancipated single minor to attend school rationally related to a legitimate state purpose? Put another way, is there a rational basis for distinguishing between the two groups? The Court has no difficulty concluding that the School District's stated purpose for the rule does not support the distinction. The School District has contended that it needs access to a parent or guardian who has control over the child when same is required in connection with academic or deportment matters involving the student. In the case of a married minor, the testimony was that the school would simply deal with the student, not his or her spouse. It would seem to the Court that the same situation is presented as to an emancipated minor, who in the Court's view is not apt to be any more or less mature than a married student similarly situated.

This then leaves for the Court's consideration the School District's alternate position, namely, that it desires to exclude from the school population those who may set an undesirable example for impressionable students. The Fifth Circuit has held that a teacher's aide who has borne a child out of wedlock may not be excluded from employment for that reason alone. *Andrews v. Drew Municipal Separate School District, 507 F.2d 611 (5th Cir. 1975).* The court's reasoning, in part, was that students were not apt to "... seek out knowledge of the personal and private family lifestyles of teachers...." *Id. at 617.* The Court is not certain that the same rationale would apply to the facts presented here, but the Court finds it unnecessary to resolve that issue. This is because the School District permits pregnant students to attend the day school program. Thus, assuming the School District may legally enforce policies calculated to foster morality in personal living arrangements, the Court can see no rational basis for excluding someone in Plaintiff's situation, but not excluding a pregnant student. In other words, the School District's stated alternate reason fails equal protection analysis too.

In summary, the Court finds that the School District's policy as applied to Plaintiff is in violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. For that reason, it cannot be enforced against her so as to exclude her from the School District's day school program.

HAWAII[1]

DIVISION 3. PROPERTY; FAMILY

TITLE 31. FAMILY

CHAPTER 577. CHILDREN

§ 577-25. Emancipation of certain minors.

Any law to the contrary notwithstanding, a minor who has been married pursuant to chapter 572 shall be deemed to be emancipated and shall be regarded as though he or she were of legal age and shall have all the rights, duties, privileges, and responsibilities provided by the civil law to a person who has reached the age of majority under civil law; provided that:

(1) Nothing in this section shall be deemed to confer upon such person the right to vote in any federal, state, or county election or the right to purchase, possess, or sell alcoholic beverages; and

(2) Nothing in this section shall change the status of such persons as minors in connection with any criminal law, nor affect the exclusive original jurisdiction of the family court over such persons under section 571-11(1).

For purposes of this section, "minor" means a person under the age of majority.

[1] Under Division 3, Title 31, Chapter 577, Section 25 (Haw. Rev. Stat. § 577-25 (2001)), a minor becomes emancipated as a result of marriage. Because this statute does not form a procedural basis upon which a minor may become emancipated (and thus, fell outside the scope of this analysis), and because Hawaii has no case law discussing emancipation of minors which would lead to conclusions concerning the courts' analysis on it, this statute is included in the appendix.

IDAHO

RUTH EMBREE, PLAINTIFF-APPELLANT V. CLAYTON EMBREE, DEFENDANT-RESPONDENT (two cases)

Nos. 9145, 9146

Supreme Court of Idaho

85 Idaho 443; 380 P.2d 216; 1963 Ida. LEXIS 324

March 29, 1963

OPINION BY SMITH

Two appeals are consolidated for hearing and disposition.

No. 9145 is an appeal from an order of the trial court granting defendant's (respondent) motion for modification of a divorce decree as regards its provisions pertaining to child support.

No. 9146 is an appeal from an order of the trial court denying plaintiff's (appellant) motion for allowance of costs and attorney fees on appeal.

May 21, 1954, after thirteen years of married life, plaintiff obtained a divorce from defendant. Plaintiff was awarded the custody of a male child, the only issue of the marriage, and child support of $ 50 a month ordered paid by defendant during the child's minority.

July 21, 1961, four months prior to the time the boy attained the age of 18 years, defendant presented a motion, supported by his affidavit, for modification of the divorce decree as respects the child support. Defendant, as grounds for the motion, alleged that the boy had become self-supporting; that defendant had sustained an industrial injury causative, to a medical probability, of a lengthy period of physical incapacity; that he is not steadily employed; that he is unable to make the child support payments in the future, and that such alleged facts "constitute a material permanent change in the circumstances of these parties which would warrant the court in issuing an order modifying the decree."

Plaintiff, by her counter affidavit, admitted the boy's age; that he owned an automobile and was able to pay part of his expenses by his work; admitted defendant's industrial injury but alleged that he received a salary in regular employment; that defendant had remarried and that his present wife was employed and that plaintiff, although remarried, was seeking a divorce from her present husband. She prayed for an order denying defendant's motion for modification.

September 29, 1961, the trial court, after a hearing on defendant's motion, entered an order modifying the decree of divorce. The court ordered that defendant be relieved of all child support payments after November 24, 1961, when the child shall have attained the age of 18 years. November 17, 1961, plaintiff appealed from this order, (Appeal No. 9145).

November 24, 1961, plaintiff presented to the trial court a motion, supported by her affidavit, for costs and attorney fees on appeal. Defendant, in opposition thereto, filed a counter affidavit alleging his physical handicap due to industrial injury and inability to pursue full time employment; his take-home pay of $ 86.00 a week; his inability to pay the sums which plaintiff requested; his indebtedness approximating $ 2900; his lack of property other than an automobile; the income of plaintiff and the son, each of whom own an automobile, and the payments being made on the son's car; that plaintiff has never required the son to contribute toward his maintenance and support although he is 18 years of age and steadily employed. December 8, 1961, after a hearing the court entered an order denying plaintiff's motion. Plaintiff appealed from such order (Appeal No. 9146).

Plaintiff, on Appeal No. 9145, assigns error of the trial court in entering the order modifying the decree of divorce, contending that "no permanent change of circumstances was shown," as well as urging the child's minority, his school attendance, and his alleged physical frailty.

Plaintiff in effect urges that once a decree has been entered providing for payment of child support until the child attains majority (as the original decree herein provides), such payments must continue in spite of any contingency until the child attains such age which, in the case of a male, is 21 years, I.C. § 32-101.

I.C. § 32-705, which plaintiff cites in support of her position, reads:

"In an action for divorce the court may, before *or after judgment, give such direction for the custody*, care and education of the children of the marriage as may seem necessary or proper, *and may at any time* vacate or *modify the same*." (Emphasis supplied.)

Such section of the statute does not support plaintiff's position; rather, the emphasized portions show retention of jurisdiction for the purpose of modifying the judgment at any time after its entry, as regards the provisions of child custody, care and education, until the child attains the age of majority. *Arkoosh v. Arkoosh, 66 Idaho 607, 164 P.2d 590; Application of Martin, 76 Idaho 179, 279 P.2d 873, 53 A.L.R.2d 582.* Nor does *Piatt v. Piatt, 32 Idaho 407, 184 P. 470,* cited by plaintiff, support her position as shown by the observation of the court that in the matter of providing maintenance for the children, "the power of the court ends upon their attaining their majority."

The fact that the child is a minor is not the sole criterion of the court's power or jurisdiction to modify the child maintenance obligation of the original decree; rather the fact of dependency of the child constitutes the governing criterion to be considered in imposing the obligation, and thereafter in continuing, modifying or terminating such obligation. A summary of such basic concept is to be found in *Ditmar v. Ditmar, 48 Wash.2d 373, 293 P.2d 759,* in language of the Supreme Court of Washington, as follows:

"The court's jurisdiction to enforce support-money judgments is predicated upon the continued dependency of the children in question. It follows that a mother cannot compel payments of support money for children whose dependency upon her has ceased by reason of death, emancipation by marriage, attainment of majority, service in the Armed Forces of the United States, adoption, incarceration in penal or other custodial institutions, or economic sufficiency resulting from earnings, gifts, or inheritance. In the absence of specific provisions to the contrary, there is a necessary implication in every decree for child support, that its binding effect shall extend into the future only for the period during which the children's dependency upon their custodian continues. [Citations.]"

In *Thomas v. Thomas, Mo.App., 238 S.W.2d 454,* defendant, the divorced husband, succeeded in obtaining a modification of the divorce decree. Plaintiff, the divorced wife, maintained that the obligation of child support of the original decree continued until the child's attainment of majority. The Missouri Court rejected plaintiff's theory of child support in language as follows:

"The defendant [wife] appealed, and urges that the court erred in sustaining plaintiff's motion because it is the primary duty of a father to furnish support for a child until said child attains his majority, 'absent a change in condition.' That is a correct statement of a general principle of law, but it does not mean that under all conditions and circumstances a court *must* require the father to contribute to the support of a son merely because he is under 21 years of age."

See also *Ashton v. Ashton, 59 Idaho 408, 83 P.2d 991,* which recognized that under C.S., sec. 4643, now I.C. § 32-705, the court has power at any time to modify the original decree in its aspects of child maintenance. In *Application of Martin, 76 Idaho 179, 279 P.2d 873, 53 A.L.R.2d 582,* the court held that "[decrees] and orders affecting the custody and support of children are subject to the continuing control of the court and do not become final."

Thus, the child's age is not the sole criterion of the trial court's power or jurisdiction to modify the child maintenance obligation of the original decree.

In fixing the amount to be paid under the obligation of child support, of primary consideration is the financial ability of the payor. A clear recognition of this basic concept appears in *Humbird v. Humbird, 42 Idaho 29, 243 P. 827,* quoted with approval from *Ex parte Spencer, 83 Cal. 460, 23 P. 395, 17 Am.St.Rep. 266,* as follows:

"In fixing this compensation or allowance, the court may regard the earning of the husband, or his ability to earn money (*Eidenmuller v. Eidenmuller, 37 Cal. 364);* and may subsequently reduce the amount (*Eidenmuller v. Eidenmuller, 37 Cal. 364);* or increase it (*Ex parte Cottrell, 59 Cal. 417)* as, in its opinion, the changed circumstances of the parties shall warrant, * * *."

See also *Ashton v. Ashton, 59 Idaho 408, 83 P.2d 991; Hampshire v. Hampshire, 70 Idaho 522, 223 P.2d 950, 21 A.L.R.2d 1159; Application of Martin, 76 Idaho 179, 279 P.2d 873, 53 A.L.R.2d 582; Gilbert v. Gilbert, 98 Cal.App.2d 444, 220 P.2d 573.*

Additionally, in fixing the amount of the payments for child maintenance not only should the order be predicated upon the payor's ability to pay, but upon the necessity of the child or children. *Hampshire v. Hampshire, supra; Gilbert v. Gilbert, supra.*

Supportive of her argument that the minor's age is the controlling factor in determining whether defendant can be released of the obligation of child support, plaintiff advances the aspect of non-emancipation of the son. Here, however, defendant raised the issue, for consideration by the trial court, of the child's emancipation by reason of his alleged self-support through his activities, work and earnings. Emancipation of a minor child by virtue of his own self-sufficiency is a factor which the trial court may properly consider in relieving a parent from his obligation of child support. *Blue v. Blue, 152 Neb. 82, 40 N.W.2d 268; Thomas v. Thomas, Mo.App., 238 S.W.2d 454; Dearborn v. Dearborn, 278 App.Div. 943, 104 N.Y.S.2d 868; Wells v. Wells, Ohio Com.Pl., 86 N.E.2d 818;* 37 Cal.Jur.2d, Parent & Child, § 16; 39 Am.Jur., Parent & Child, § 64. In *Ditmar v. Ditmar, 48 Wash.2d 373, 293 P.2d 759,* is listed "emancipation by *** economic sufficiency resulting from earnings, * * *" as one of the various grounds for discontinuance of child support payments; and in 67 C.J.S. Parent & Child § 88 b, p. 814, appears the statement amply supported by authorities: "Emancipation may also be implied by the parent's acquiescence in the child's working for others, receiving its pay therefor, and spending the money as it pleases."

The evidence shows that the son of the parties was not in poor health, a fact reasonably to be inferred by the son's 16-mile "tote goat" trip over a dusty mountain road and by his skiing; as well as his employment by a service station six hours a day, five days a week, while attending high school; also, that he is self-sustaining in that he earns in such employment approximately $ 40 a week; that he purchased an automobile, pays for its upkeep and makes the payments on the purchase price.

We are aware of the rule that a decree of divorce should not be modified unless and until a permanent material change of circumstances is alleged and proven. *Kalousek v. Kalousek, 77 Idaho 433, 293 P.2d 953; Rogich v. Rogich, 78 Idaho 156, 299 P.2d 91; McMurtrey v. McMurtrey, 84 Idaho 314, 372 P.2d 403.*

However, the trial judge, when he ordered the original decree modified by elimination of the child maintenance obligation, had before him the referred to facts, including the facts of defendant's industrial accident, his incapacity resulting therefrom and his modest take-home pay of $ 86 a week. In *Dearborn v. Dearborn, 278 App.Div. 943, 104 N.Y.S.2d 868,* the divorced husband was granted modification of the original decree by a 50% reduction in the child support payment. Said the appellate court in reversing the lower court, "*** as the son is now employed and has a take-home pay of $ 26 weekly, it was an improvident exercise of discretion to deny the motion." In that case, as here, the son had attained the age of 18 years, whereas the age of majority in New York was 21 years. In the instant case the son's earnings are some $ 40.00 a week.

In *Blue v. Blue, 152 Neb. 82, 40 N.W.2d 268,* wherein was granted modification of the child support obligation of the original decree, upon a showing of the child's self-sufficiency, the court said:

"Certainly this presents a change of circumstances of the parties since the decree, and one which justifies a modification of and relief from the obligation to provide further support and maintenance. It ought not be said that a parent in modest circumstances with a modest income should be required to continue to contribute to the support of a minor child who has become completely independent and self-supporting."

An application for modification of a decree awarding child support, upon the ground of a material permanent change in the circumstances of the parties since the entry of the decree, is addressed to the sound judicial discretion of the trial court. I.C. § 32-705; I.C. § 32-706; *Ashton v. Ashton, 59 Idaho 408, 83 P.2d 991.* In *Finnegan v. Finnegan, 76 Idaho 500, 505, 285 P.2d 488, 492,* we find a cogent statement of such rule as follows:

"Allowance of alimony or support money is in the discretion of the trial court and after consideration of the circumstances of the parties, only when there is a manifest abuse of discretion will the determination of the trial court be interfered with on appeal. Sec. 32-706, I.C.; *Malone v. Malone, 64 Idaho 252, 130 P.2d 674; Smiley v. Smiley, 46 Idaho 588, 269 P. 589.*"

This Court has consistently held that where the findings of the trial court are supported by substantial competent evidence they will not be disturbed on appeal. *Crenshaw v. Crenshaw, 68 Idaho 470, 199 P.2d 264; Watkins v.*

Watkins, 76 Idaho 316, 281 P.2d 1057; Warner v. Warner, 77 Idaho 164, 290 P.2d 212; Shellhorn v. Shellhorn, 80 Idaho 79, 326 P.2d 64; Daniels v. Daniels, 81 Idaho 12, 336 P.2d 112.

Suffice it to say that the evidence in regard to the age, health and self-sufficiency of the son of the parties, and as regards defendant's physical condition and his earnings, is competent and substantial, and sufficient to sustain the trial court's order of modification.

Plaintiff contends further, that defendant cannot seek or be granted relief so long as he is in contempt of court. She bases her contention on the fact that, at the time defendant made application for the modification, he was somewhat delinquent in his support payments required to be made under the original decree.

The contempt statute, I.C. § 7-604, reads:

"When the contempt is not committed in the immediate view and presence of the court or judge, a warrant of attachment may be issued to bring the person charged to answer, or, without a previous arrest, a warrant of commitment may, upon notice, or upon an order to show cause, be granted; and no warrant of commitment can be issued without such previous attachment to answer, or such notice or order to show cause."

Plaintiff took no steps under this statute to have defendant adjudged in contempt. Plaintiff's mere allegation, that defendant is presently in contempt and should be punished accordingly, cannot be substituted for the procedural requisites of the statute. Nevertheless the trial judge, in the order of modification adjudging that defendant should continue the support payments until November 24, 1961 when the child shall have attained the age of 18 years, further specifically adjudged that defendant "shall be responsible for all delinquent child support payments." The court thus, in effect, gave judgment in favor of plaintiff for the delinquent payments, which renders moot such issue which plaintiff argues. Moreover, decision regarding the contempt of defendant was for the trial court. Further, since plaintiff's aforesaid allegation cannot be substituted for a contempt proceeding, the issue of contempt was not before the trial court. The issue of defendant's contempt was an issue to be decided in *contempt proceedings*. *Application of Martin, 76 Idaho 179, 279 P.2d 873, 53 A.L.R.2d 582; Wright v. Wright, 76 Idaho 393, 283 P.2d 1101.* Plaintiff's contention in the premises is without merit.

The judgment of the district court in the matter of Appeal No. 9145 is affirmed. No costs allowed.

We now approach Appeal No. 9146, an appeal from the order of the trial court denying plaintiff's motion for allowance of costs and attorney fees. Plaintiff has assigned error of the trial court in failing to order payment by defendant of such sums to plaintiff, on Appeal No. 9145.

"A divorce action is still pending within the meaning of the statute [I.C., § 32-704], when the motion is made to modify the decree respecting the care and custody of children, and the court has authority to allow wife's attorney fees in the contest." *Richardson v. Richardson, 72 Idaho 19, 236 P.2d 718.*

"When, in a divorce case, the wife has incurred liabilities for attorney fees and other expenses of the suit, the trial court may, in its discretion, *** at any time while the action is pending, upon proper showing being made, order the husband to advance the money to pay them." *Taylor v. Taylor, 33 Idaho 445, 196 P. 211.* See also *Roby v. Roby, 9 Idaho 371, 74 P. 957; Galbraith v. Galbraith, 38 Idaho 15, 219 P. 1059; Gifford v. Gifford, 50 Idaho 517, 297 P. 1100; Wenzel v. Wenzel, 76 Idaho 7, 276 P.2d 485; Wright v. Wright, 76 Idaho 393, 283 P.2d 1101; Daniels v. Daniels, 81 Idaho 12, 336 P.2d 112.*

Plaintiff defended against defendant's motion to modify the original decree of divorce. She defended on behalf and in the interest of the child, and not herself, inasmuch as the modification sought directly involved defendant's obligation under the original decree to continue payments of child support. Moreover at the time of application for modification the child was still plaintiff's adjudged dependent. Further, defendant was the moving party.

Under all the attendant circumstances we are constrained to the view that the trial court erred in failing to grant plaintiff's motion for allowance of costs and reasonable attorney fees on appeal.

In the matter of Appeal No. 9146, the order denying costs and attorney fees to plaintiff on appeal is reversed and the cause is remanded with instructions to determine and allow reasonable sums therefor to be paid by defendant to plaintiff, and to enter an order accordingly.

KNUDSON, C. J., and McQUADE, McFADDEN and TAYLOR, JJ., concur.

ILLINOIS

CHAPTER 750. FAMILIES

EMANCIPATION OF MATURE MINORS ACT

(750 ILCS 30/1)

Sec. 1. Short title. This Act shall be known and may be cited as the Emancipation of Mature Minors Act.

(750 ILCS 30/2)

Sec. 2. Purpose and policy. The purpose of this Act is to provide a means by which a mature minor who has demonstrated the ability and capacity to manage his own affairs and to live wholly or partially independent of his parents or guardian, may obtain the legal status of an emancipated person with power to enter into valid legal contracts. This Act is not intended to interfere with the integrity of the family or the rights of parents and their children. No order of complete or partial emancipation may be entered under this Act if there is any objection by the minor, his parents or guardian. This Act does not limit or exclude any other means either in statute or case law by which a minor may become emancipated.

(750 ILCS 30/3)

Sec. 3. Definitions. Terms used in this Act, unless the context otherwise requires, have the meanings ascribed to them in Sections 3-1 through 3-5.

(750 ILCS 30/3-1)

Sec. 3-1. Minor. "Minor" means a person 16 years of age or over, and under the age of 18 years, subject to this Act.

(750 ILCS 30/3-2)

Sec. 3-2. Mature minor. "Mature minor" means a person 16 years of age or over and under the age of 18 years who has demonstrated the ability and capacity to manage his own affairs and to live wholly or partially independent of his parents or guardian.

(750 ILCS 30/3-3)

Sec. 3-3. Parents. "Parent" means the father or mother of a legitimate or illegitimate child, and includes any adoptive parent. It does not include a parent whose rights in respect to the minor have been terminated in any manner provided by law.

(750 ILCS 30/3-4)

Sec. 3-4. Guardian. "Guardian" means any person, association or agency appointed guardian of the person of the minor under the Juvenile Court Act, the Juvenile Court Act of 1987, the "Probate Act of 1975", or any other statute or court order.

(750 ILCS 30/3-5)

Sec. 3-5. Petition. "Petition" means the petition provided for in Section 7 of this Act, or any other petition filed under the Juvenile Court Act or the Juvenile Court Act of 1987, seeking the emancipation of a minor in accordance with the provisions of this Act.

(750 ILCS 30/4)

Sec. 4. Jurisdiction. The circuit court in the county where the minor resides, is found, owns property, or in which a court action affecting the interests of the minor is pending, may, upon the filing of a petition on behalf of the minor by his next friend, parent or guardian and after a hearing on notice to all persons as set forth in Sections 7 and 8 of this Act, enter a finding that the minor is a mature minor as defined in this Act and order complete or partial

emancipation of the minor. The court in its order for partial emancipation may specifically limit the rights and responsibilities of the minor seeking emancipation.

(750 ILCS 30/5)

Sec. 5. Rights and responsibilities of an emancipated minor. (a) A mature minor ordered emancipated under this Act shall have the right to enter into valid legal contracts, and shall have such other rights and responsibilities as the court may order that are not inconsistent with the specific age requirements of the State or federal constitution or any State or federal law; (b) A mature minor who is partially emancipated under this Act shall have only those rights and responsibilities specified in the order of the court.

(750 ILCS 30/6)

Sec. 6. Duration of emancipation and discharge of proceedings. The court shall retain continuing jurisdiction over the proceedings until the emancipated minor reaches age 18, and may modify or terminate its previous emancipation orders. However, any subsequent modification or termination of a previous order shall be effective only prospectively and shall not affect any rights, duties, obligations or causes of action existing prior to the modification or termination of any order under this Act.

(750 ILCS 30/7)

Sec. 7. Petition. The petition for emancipation shall be verified and shall set forth: (1) the age of the minor; (2) that the minor is a resident of Illinois at the time of the filing of the petition, or owns real estate in Illinois, or has an interest or is a party in any case pending in Illinois; (3) the cause for which the minor seeks to obtain partial or complete emancipation; (4) the names of the minor's parents, and the address, if living; (5) the names and addresses of any guardians or custodians appointed for the minor; (6) that the minor is a mature minor who has demonstrated the ability and capacity to manage his own affairs; and (7) that the minor has lived wholly or partially independent of his parents or guardian.

(750 ILCS 30/8)

Sec. 8. Notice. All persons named in the petition shall be given written notice 21 days prior to the hearing and shall have a right to be present and be represented by counsel. All notices shall be served on persons named in the petition by personal service or by "certified mail, return receipt requested, addressee only". If personal service cannot be made in accordance with the provisions of this Act, substitute service or service by publication shall be made in accordance with the Civil Practice Law.

(750 ILCS 30/9)

Sec. 9. Hearing. Before proceeding to a hearing on the petition the court shall advise all persons present of the nature of the proceedings, and their rights and responsibilities if an order of emancipation should be entered. If, after the hearing, the court determines that the minor is a mature minor who is of sound mind and has the capacity and maturity to manage his own affairs including his finances, and that the best interests of the minor and his family will be promoted by declaring the minor an emancipated minor, the court shall enter a finding that the minor is an emancipated minor within the meaning of this Act, or that the mature minor is partially emancipated with such limitations as the court by order deems appropriate. No order of complete or partial emancipation may be entered under this Act if there is any objection by the minor, his parents or guardian.

(750 ILCS 30/10)

Sec. 10. Joinder, Juvenile Court Proceedings. The petition for declaration of emancipation may, with leave of the court, be joined with any pending litigation affecting the interests of the minor including a petition filed under the Juvenile Court Act or the Juvenile Court Act of 1987. If any minor seeking emancipation is a ward of the court under the Juvenile Court Act or the Juvenile Court Act of 1987 at the time of the filing of the petition for emancipation, the petition shall be set for hearing in the juvenile court.

(750 ILCS 30/11)

Sec. 11. Appeal. Any judgment or order allowing or denying a complete or partial emancipation is a final order for purposes of appeal.

INDIANA

TITLE 31. FAMILY LAW AND JUVENILE LAW

ARTICLE 34. JUVENILE LAW: CHILDREN IN NEED OF SERVICES

CHAPTER 20. DISPOSITIONAL DECREES

§ 31-34-20-6. Emancipation of child.

(a) The juvenile court may emancipate a child under section 1(5) [IC 31-34-20-1(5)] of this chapter if the court finds that the child:

(1) wishes to be free from parental control and protection and no longer needs that control and protection;

(2) has sufficient money for the child's own support;

(3) understands the consequences of being free from parental control and protection; and

(4) has an acceptable plan for independent living.

(b) If the juvenile court partially or completely emancipates the child, the court shall specify the terms of the emancipation, which may include the following:

(1) Suspension of the parent's or guardian's duty to support the child. In this case the judgment of emancipation supersedes the support order of a court.

(2) Suspension of the following:

(A) The parent's or guardian's right to the control or custody of the child.

(B) The parent's right to the child's earnings.

(3) Empowering the child to consent to marriage.

(4) Empowering the child to consent to military enlistment.

(5) Empowering the child to consent to:

(A) medical;

(B) psychological;

(C) psychiatric;

(D) educational; or

(E) social services.

(6) Empowering the child to contract.

(7) Empowering the child to own property.

(c) An emancipated child remains subject to the following:

(1) IC 20-8.1-3 concerning compulsory school attendance.

(2) The continuing jurisdiction of the court.

TITLE 31. FAMILY LAW AND JUVENILE LAW

ARTICLE 37. JUVENILE LAW: DELINQUENCY

CHAPTER 19. DISPOSITIONAL DECREES

§ 31-37-19-27. Emancipation of child.

(a) The juvenile court may emancipate a child under section 1(5) or 5(b)(5) [IC 31-37-19-1(5) or IC 31-37-19-5(b)(5)] of this chapter if the court finds that the child:

(1) wishes to be free from parental control and protection and no longer needs that control and protection;

(2) has sufficient money for the child's own support;

(3) understands the consequences of being free from parental control and protection; and

(4) has an acceptable plan for independent living.

(b) Whenever the juvenile court partially or completely emancipates the child, the court shall specify the terms of the emancipation, which may include the following:

(1) Suspension of the parent's or guardian's duty to support the child. In this case the judgment of emancipation supersedes the support order of a court.

(2) Suspension of:

(A) the parent's or guardian's right to the control or custody of the child; and

(B) the parent's right to the child's earnings.

(3) Empowering the child to consent to marriage.

(4) Empowering the child to consent to military enlistment.

(5) Empowering the child to consent to:

(A) medical;

(B) psychological;

(C) psychiatric;

(D) educational; or

(E) social services.

(6) Empowering the child to contract.

(7) Empowering the child to own property.

(c) An emancipated child remains subject to:

(1) IC 20-8.1-3 concerning compulsory school attendance; and

(2) the continuing jurisdiction of the court.

IOWA[2]

MARION VAUPEL, APPELLANT V. LARRY BELLACH, APPELLEE

No. 52672

Supreme Court of Iowa

261 Iowa 376; 154 N.W.2d 149; 1967 Iowa Sup. LEXIS 899

November 14, 1967

OPINION BY MOORE

This is an action for contribution following judgment against Marion Vaupel for personal injuries received by defendant's mother. She was riding in an automobile, being operated by defendant Larry Bellach through a smoke-filled area on the highway, which collided with an opposite direction vehicle. The smoke was emitting from a fire which the first trial court found was negligently set along the road by Vaupel.

Plaintiff's petition in the case at bar alleges nine specifications charging defendant with negligence which caused the collision and resulting injuries to his mother.

Defendant's answer includes affirmative allegations his mother was a guest, he was an unemancipated minor immune from suit by his mother, there was no common liability and therefore plaintiff had no right of contribution. Plaintiff's reply denies generally these allegations.

Defendant then filed a motion for adjudication of law points as provided for by rule 105, Rules of Civil Procedure. He therein states an adjudication of any of these points of law favorable to defendant would dispose of the whole case.

Rule 105 so far as here applicable provides: "Separate adjudication of law points. The court may in its discretion, and must on application of either party, made after issues joined and before trial, separately hear and determine any point of law raised in any pleading which goes to the whole or any material part of the case * * *."

When this motion came before the trial court it was agreed between counsel and approved by the court that the evidence taken at the earlier trial should be used and considered by the court without taking new evidence. The same trial court had tried the first case without a jury.

This resulted in a trial under rule 186, R.C.P., which provides: "Separate trials. In any action the court may, for convenience or to avoid prejudice, order a separate trial of any claim, counterclaim, cross-claim, or of any separate issue of fact, or any number of any of them. Any claim against a party may be thus severed and proceeded with separately."

Thereafter the trial court filed extensive findings of fact and conclusions of law. They include the court's conclusion plaintiff was an unemancipated minor at the time of his mother's injury and a determination plaintiff was not entitled to recover. From judgment against plaintiff for costs he has appealed.

Plaintiff-appellant has in his assignment of error, his printed brief and in oral argument, specifically limited his contention to the proposition the trial court erred in denying contribution on the ground defendant was unemancipated.

Plaintiff-appellant asserts in his brief and stated in oral argument he was not challenging the claimed rule of family immunity or common liability. They are therefore not before this court for consideration. We shall determine only the question presented.

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[2] In Iowa, Title VI, Subtitle 6, Chapter 252, Section 16 (Iowa Code § 252.16 (2002)) states, “An emancipated minor is one who is absent from the minor's parents with the consent of the parents, is self-supporting, and has assumed a new relationship inconsistent with being a part of the family of the parents.” However, this statute is limited to state support of poor individuals. Iowa does not have statutes by which a minor could become judicially emancipated.

The sole question is whether under the record the trial court erred in finding defendant-appellee was an unemancipated minor.

I. The findings of fact in this action at law are binding upon this court if supported by substantial evidence. Rule 344(f)(1), R.C.P.

II. Parents are entitled to the care, custody, control and services of their children during minority. Code section 599.1 provides the period of minority extends to the age of twenty-one years but all minors attain their majority by marriage. Defendant-appellee was 19 years of age and unmarried at the time of the accident.

"Emancipation" as the term is used in the law of parent and child means the freeing of the child from the custody of the parent and from the obligation to render services to him. *Everett v. Sherfey, 1 Iowa (Clarke) 356, 361, 362;* 39 Am.Jur., Parent and Child, section 64; 67 C.J.S., Parent and Child, section 86. See also Words and Phrases, Perm. Ed., Volume 14, pages 363-366.

In *Bristor v. Chicago & Northwestern Ry. Co., 128 Iowa 479, 482, 104 N.W. 487, 488,* we quote this from *Porter v. Powell, 79 Iowa 151, 154, 155, 44 N.W. 295, 296, 7 L.R.A. 176, 18 Am. St. Rep. 353:* "To emancipate is to release; to set free. It need not be evidenced by any formal or required act. It may be proven by direct proof or by circumstances. To free a child for all the period of minority, from care, custody, control, and service, would be a general emancipation; but to free him from only a part of the period of minority, or from only a part of the parent's rights, would be limited. The parent, having the several rights of care, custody, control, and service during minority, may surely release from either without waiving his right to the other, or for a part of the time without waiving as to the whole. A father frees his son from services. That does not waive the right to care, custody, and control, so far as the same can be exercised consistently with the right waived."

Emancipation is not necessarily a continuing status, even if once established, it may be terminated at anytime during the child's minority. Everett v. Sherfey and Porter v. Powell, both supra.

The fact alone that a child is outside the home expending his own money does not demonstrate emancipation. *Brandhorst v. Galloway Company, Inc., 231 Iowa 436, 1 N.W.2d 651.*

Emancipation is not to be presumed. Whether a child has been emancipated must be determined largely on the particular facts and circumstances in each case. Ordinarily it is a question for the fact finder. *Kubic v. Zemke, 105 Iowa 269, 271, 74 N.W. 748, 749; Parker v. Parker, 230 S.C. 28, 94 S.E.2d 12, 13, 60 A.L.R.2d 1280;* 39 Am.Jur., Parent and Child, section 64, page 702; 67 C.J.S., Parent and Child, section 90, pages 816, 817.

III. We therefore now turn to the particular facts and circumstances as disclosed by the record.

Cora Bellach, defendant's mother, a widow since March 1950, owned and lived on an 80-acre farm in Buchanan County where she had lived 31 years. After her husband's death she did most of the farm work and maintained a home for four minor children. Two were older and one younger than her son Larry.

Larry lived in the family home and attended school until his sophomore year in high school when at the age of 16 or 17 he quit school. Thereafter he continued to live in the home and did farm work in the community.

In October 1961 Larry obtained a job at Wilson Packing Company in Cedar Rapids where he lived in an apartment until February 1962 when he was laid off. He then returned to his prior farm home where he lived with his mother and sister Linda, age 13, until after the accident on April 19, 1962. During part of this period he drew unemployment compensation which he spent as he had done with his wages from Wilson. He had an automobile on which he was making payments. Apparently his mother assisted in making arrangements for financing its purchase but did not sign the papers.

Following his return to the farm home and until after the accident Larry's mother furnished him board and room and did his washing for which he paid nothing. He did little, if any, work on the farm. There is no evidence of emancipation by voluntary act of the mother.

On April 19, 1962, Larry, then age 19, took his mother in his car to Independence where she signed a consent for his marriage license. She also bought groceries for the family. On the return trip at about 2 p.m. the accident involved herein occurred and the mother was seriously injured. As planned Larry married that evening but changed his plan to move to Cedar Rapids and remained on the farm for some time as his mother was unable to work.

The trial court's findings and conclusions include: "We find then that at the time when the circumstances must be examined to determine the issue of emancipation, the son was living in the home, receiving the care of his mother, dependent upon her generosity and was what is known in the vernacular a 'star boarder'. He was not emancipated."

The trial court's findings of fact are supported by substantial evidence. The applicable legal principles sustain the trial court's conclusion that under the facts defendant-appellee was not emancipated at the time of the accident.

On the issue presented the judgment of the trial court must be affirmed. -- Affirmed.

All Justices concur.

KANSAS

CHAPTER 38. MINORS

ARTICLE 1. GENERAL PROVISIONS

38-101. Period of minority.

The period of minority extends in all persons to the age of eighteen (18) years, except that every person sixteen (16) years of age or over who is or has been married shall be considered of the age of majority in all matters relating to contracts, property rights, liabilities and the capacity to sue and be sued.

38-102. Minor bound by contracts, when.

Except as otherwise provided in K.S.A. 38-615 through K.S.A. 38-622, and amendments thereto, a minor is bound not only by contracts for necessaries, but also by the minor's other contracts, unless the minor disaffirms them within a reasonable time after the minor attains the minor's majority and restores to the other party all money or property received by the minor by virtue of the contract and remaining within the minor's control at any time after the minor attaining the minor's majority.

38-103. Contracts that may not be disaffirmed.

No contract can be thus disaffirmed in cases where, on account of the minor's own misrepresentations as to his majority, or from his having engaged in business as an adult, the other party had good reasons to believe the minor capable of contracting.

38-104. Payment for personal services.

When a contract for the personal service of a minor has been made with him alone, and those services are afterwards performed, payment made therefor to such minor in accordance with the terms of the contract is a full satisfaction for those services, and the parent or guardian cannot recover therefor.

38-108. District court may confer rights of majority.

That the district courts for the several counties in this state shall have authority to confer upon minors the rights of majority, concerning contracts and real and personal property, and to authorize and empower minors to purchase, hold, possess and control in their own person and right, and without the intervention or control of a guardian or trustee, any goods, chattels, rights, interests in lands, tenements and effects by such minor lawfully acquired or inherited; and such minor shall have full power to hold, convey and dispose of the same, and to make contracts and be subject to all the liabilities incident thereto, sue and be sued, and in all respects to exercise and enjoy all rights of property and of contracts in the same manner and to the same extent as persons at the age of majority.

38-109. Petition for rights of majority; notice; hearing; decree.

Any minor, desiring to obtain the rights of majority for the purposes named in the preceding section, may, by his or her next friend, file a petition in the district court of the county in which such minor shall reside, setting forth, first, the age of the minor petitioner, and that said petitioner is then and has been a bona fide resident of such county for at least one year next preceding the filing of the petition; second, the cause for which petitioner seeks to obtain the rights of majority. Such petition shall be filed as in other cases and notice of the hearing on said petition shall be given by publishing such notice for three consecutive weeks in some newspaper authorized by law to publish legal notices and the time of the hearing on said petition shall be not less than thirty days after the date of the first publication of said notice.

Upon proof in open court of the truth of the allegations in such petition and that said petitioner is a person of sound mind and able to transact his or her own affairs and that the interest of the petitioner shall be promoted thereby, the court may, in its discretion, order and decree that the petitioner be empowered to exercise the rights of majority for any and all purposes mentioned in K.S.A. 38-108, or any acts amendatory thereof or supplemental thereto; and

thereupon such order and decree shall be entered on the records of said court; and thereafter all acts by said petitioner done and performed concerning any contract, rights in action, or interests in real or personal property, shall have the same force, validity and effect as if made by a person of full age.

38-110. Costs of proceedings under 38-108 to 38-110.

The costs of proceedings under this act shall be taxed against the minor petitioner, and the same shall be paid before the entry of the decree herein provided for.

KENTUCKY

MARY E. CARRICATO, APPELLANT V. MILDRED LOUISE CARRICATO ET AL., APPELLEES

Court of Appeals of Kentucky

384 S.W.2d 85; 1964 Ky. LEXIS 78

Nov. 13, 1964

OPINION BY TIPTON

A summary judgment was rendered in the Jefferson Circuit Court, Common Pleas Branch, Fourth Division, in an action in which the appellant was the plaintiff and appellees Carricato were defendants.

This action concerned an automobile collision and in the trial before a jury the matter of liability insurance was injected into the testimony, whereupon on motion a mistrial was ordered. Thereafter it was stipulated by all parties that the matter would be decided on the record by the trial judge and a summary judgment was rendered.

The trial judge held as follows:

1. The sole cause of the collision was the negligence of Mildred Louise Carricato and therefore a summary judgment was given for William E. Lange and William E. Lange, Jr.

2. That Mildred Louise Carricato was not "Emancipated" and therefore the action of her mother, Mary E. Carricato, against her must fall.

3. That the only basis of the action of Mary E. Carricato against her husband, Frank Carricato, was the family purpose doctrine, but that since the automobile was owned by, controlled by and maintained and used by Mildred Louise Carricato that the action against him must fall.

The three above questions are the only matters involved in this appeal.

On October 9, 1958, at the intersection of 16th and Main Streets, Louisville, Kentucky, the automobile operated by Mildred Louise Carricato, in which Mary E. Carricato was a passenger, collided with the automobile of William E. Lange which was being operated by William E. Lange, Jr. Mildred Louise at the time of the collision lacked two months of being twenty-one years of age. The automobile of Mildred Louise was licensed in the name of her father, Frank Carricato.

Mary E. Carricato testified that Mildred Louise was taking her to work and was proceeding south on 16th Street and just ran through the boulevard stop sign on Main Street at about twenty-five to thirty-five miles per hour when they were hit by a car. Mildred Louise testified that she did not see a stop sign and didn't slow down or stop and went on into the intersection, and at about half way through, and in an instant or two, the cars hit. William E. Lange, Jr., testified in his deposition that he was going west on Main Street and was in the second lane from the north curb (first lane or lane next to curb was a parking lane) and was traveling twenty-five to thirty miles per hour and he saw the red car just flash in front of him - happened so quickly - saw her coming at the stop sign, but there wasn't anything he could do; that his car came to rest at the northwest corner of the intersection and her car, after striking another car, at the southwest corner of the intersection.

In this action Mary E. Carricato sought damages for her personal injuries from all appellees. None of the appellees sought any damages. Mary E. testified as to her personal injuries, but same are not material on this appeal.

The matter of "Emancipation" is a question of fact and the evidence is as follows: Frank Carricato in his deposition testified that he owned an auto and his daughter owned the auto that was in the collision; that his daughter picked out the car and he helped her finance it and that she paid him back, and it was put in his name because of his credit being established; his daughter lived in his home, took her meals there, paid no board, made money contributions when needed and when he was off work she did more than her part and paid groceries and rent; since reaching

twenty-one years the arrangement has not been any different; she has been on her own since leaving high school at seventeen years and she was emancipated at the time of the collision; he meant by being emancipated she had her own way and did what she pleased and that women always did that and that is what he meant; she drove her car and he drove his.

Mary E. Carricato testified her daughter was emancipated and in explanation stated that she had her own job, bought her own clothes, came and went as she pleased, did as she pleased, bought her own furniture, contributed to household expenses if needed, exercised control of her own funds, had her own bank account; after graduation from high school they have not exercised any control over her or the company she kept; she paid her own income taxes; they did not claim her as an exemption since she became eighteen years of age; there was a definite understanding between her, her husband and daughter that the daughter would be on her own after graduation from high school; she worked before she quit school and financed her last year of high school; as to church or the movies they did not exercise any control over her; she was free to come and go as she desired; she picked out and paid for her furniture; she obtained her own employment; took trips without consulting her parents; her earnings are about $300 per month; Mary E. Carricato's earnings were about $100 to $130; on cross-examination she explained "emancipation" in that her daughter had the ability to take care of herself and make her own living and she spends her own salary as she sees fit and as she pleases; she did live at home and take her meals there; she carried life insurance and her mother was the beneficiary; her daughter had never been asked to leave home; when her husband was off work it was not necessary to ask her daughter for help on expenses as she just volunteered; she has her own checking account; her daughter does not require supervision.

Mildred Louise testified she was twenty years and ten months of age at the time of the collision; she selected the auto and paid for it and maintained it; she was emancipated at the time of the collision; she was independent and had been working since high school; did not ask consent or get consent from parents for anything she did; spent her money as she pleased; had a bank account; she did have a specific understanding with her parents when she graduated that she would be on her own; selected her own clothing and personal things; made trips without consultation and even went to Virginia without consulting them; bought her a new bedroom suite; her parents have never controlled her as to her company or friends; the situation or relationship is no different now than it was at the time of the collision; she is independent and can do as she wants to do.

What constitutes an emancipation is a question of law, but whether an emancipation has occurred in a particular case is a question of fact. 67 C.J.S. Parent and Child § 90b, page 817.

The testimony as to the facts on the matter of emancipation are as set out hereinbefore and they are undisputed; that is, no one else testified on the subject on the trial or by deposition except the three parties, Mary E. Carricato and Frank Carricato as the parents and Mildred Louise Carricato as the child.

Emancipation of a minor child is not presumed and the burden of proof is on the one alleging same to establish it by clear, cogent and convincing evidence either direct or circumstantial. 67 C.J.S. Parent and Child § 90, page 817.

In determining whether emancipation has occurred, the intention of the parent governs and the intention may be expressed either in writing or orally or it may be implied, and it is the intention of the parent and not the child that controls. 67 C.J.S. Parent and Child § 88b, page 812.

In Nichols v. Harvey & Hancock et al. (1924), 206 Ky. 112, 266 S.W. 870, it was quoted with approval as follows:

"Emancipation in turn may be classified as express emancipation and implied emancipation. Express emancipation results when the parent and child voluntarily agree that the child, able to take care of himself, may go out from his home and make his own living, receive his own wages and spend them as he pleases. An implied emancipation grows out of the parent's acquiescence in his child's working for others, receiving his pay therefor and spending same as he pleases, thereby impliedly consenting to same."

In the case of Rounds Bros. v. McDaniel (1909), 133 Ky. 669, 118 S.W. 956, the above principle of law was approved and it was also stated therein as follows:

"The doctrine of 'emancipation', * * * is a recognition of the right of the parent to relinquish control and authority over his child to whose custody and service he is entitled; or to surrender, if he so elects and desires, to his minor son, who is capable of making his own living, the right to do so, and the privilege of receiving the wages that he earns. * * * In other words, when a child has been emancipated, he occupies the same legal relation towards the parent as if he has arrived at full age."

In the case of Thompson v. Thompson (1954), Ky., 264 S.W.2d 667, it is set out that a parent can maintain a tort action against a minor child who has been emancipated. In the Thompson case the only witness testifying was the mother who sought the damages and the court held in effect that the judge did not have to believe her testimony as she was an interested witness and she was the only witness.

In the case at bar, the daughter was twenty years and ten months of age and not seventeen years; her father testified, whereas in the Thompson case the father did not testify. Actually the intention of the father controls as to an express emancipation, and the father testified that she was emancipated at the time of the collision and this was corroborated by his wife, stating that there was a definite understanding that the daughter would be on her own after graduation, and this was corroborated by the daughter who stated she was emancipated. There is no one to say that there was not an express emancipation. It is difficult to conceive of a more complete implied emancipation than in this case and about all that could be lacking is that the young lady did not leave home and continued to eat her meals there, but nowhere does any opinion hold that it is required that they must leave home and not eat at home.

We conclude that the sole cause of the collision was the negligence of Mildred Louise Carricato and that the trial court correctly gave summary judgment for William E. Lange and William E. Lange, Jr., and we also conclude that since the automobile was actually owned by Mildred Louise Carricato, used by her and maintained and controlled by her that the same was not maintained by Frank Carricato for family purposes and that the trial court correctly gave summary judgment for Frank Carricato.

We further conclude that the trial court was in error in awarding a summary judgment for Mildred Louise Carricato since she was emancipated, and that part of the judgment should be reversed.

Wherefore, we recommend that the judgment of the lower court be affirmed in part and reversed in part.

The opinion is approved by the Court; the judgment is affirmed insofar as it affects the rights of Frank Carricato, William E. Lange, and William E. Lange, Jr.; the judgment is reversed on the claim of Mary E. Carricato v. Mildred Louise Carricato, with directions to try that claim on the issue of damages only.

LOUISIANA

LOUISIANA CIVIL CODE

BOOK I. OF PERSONS

TITLE VIII. OF MINORS, OF THEIR TUTORSHIP AND EMANCIPATION

CHAPTER 2. OF EMANCIPATION

SECTION 4. OF EMANCIPATION RELIEVING THE MINOR FROM THE TIME PRESCRIBED BY LAW FOR ATTAINING THE AGE OF MAJORITY

Art. 385. Emancipation of minor sixteen years or older.

A minor sixteen years of age or older may be judicially emancipated and relieved of the disabilities which attach to minority as provided in Article 3991 through 3994 of the Louisiana Code of Civil Procedure.

LOUISIANA CODE OF CIVIL PROCEDURE

BOOK VII. SPECIAL PROCEEDINGS

TITLE V. JUDICIAL EMANCIPATION

Art. 3991. Petition; court where proceeding brought.

The petition of a minor for judicial emancipation shall be filed in the district court in the parish of his domicile, and shall set forth the reasons why he desires to be emancipated and the value of his property, if any.

Art. 3992. Consent of parent or tutor.

The petition of the minor shall be accompanied by a written consent to the emancipation and a specific declaration that the minor is fully capable of managing his own affairs, by the following:

(1) The father and mother if both are alive, or the survivor if one is dead. If either parent is absent or unable to act, the consent of the other parent alone is necessary. If the parents are judicially separated or divorced, and the custody of the minor has been awarded by judgment to one of the parents, the consent of that parent alone is necessary. A surviving parent is not required to qualify as natural tutor in order to give such consent, nor is the appointment of a special tutor necessary.

If the petition is filed on the ground of ill treatment, refusal to support, or corrupt examples, parental consent is unnecessary, but the parents or the surviving parent shall be cited to show cause why the minor should not be emancipated.

(2) The tutor of the minor if one has been appointed. If a tutor of his property and a tutor of his person have been appointed for the minor, the consent of both is necessary. If no tutor has been appointed, or if the tutor has died, resigned, or been removed, and there is no surviving parent who is able to act, a special tutor shall be appointed. If the tutor or special tutor refuses to give his consent, he may be cited to show cause why the minor should not be emancipated.

Art. 3993. Hearing; judgment.

If the judge is satisfied that there is good reason for emancipation and that the minor is capable of managing his own affairs, he shall render a judgment of emancipation, which shall declare that the minor is fully emancipated and relieved of all the disabilities which attach to minority, with full power to perform all acts as fully as if he had reached the age of majority.

MAINE

TITLE 15. COURT PROCEDURE—CRIMINAL

PART 6. MAINE JUVENILE CODE

CHAPTER 511. INTERIM CARE; RUNAWAYS

§ 3506-A. Emancipation.

1. PETITION FOR EMANCIPATION. If a juvenile is 16 years of age or older and refuses to live in the home provided by his parents, guardian or custodian, he may request the District Court in the division in which his parents, guardian or custodian resides to appoint counsel for him to petition for emancipation.

2. CONTENTS OF PETITION. The petition shall state plainly:

A. The facts which bring the juvenile within the court's jurisdiction and which form the basis for the petition;

B. The name, date of birth, sex and residence of the juvenile; and

C. The name and residence of his parent or parents, guardian or custodian.

2-A. MEDIATION. Upon the filing of a petition and prior to a hearing under this section, the court may refer the parties to mediation. Any agreement reached by the parties through mediation on any issues shall be stated in writing, signed by the parties and presented to the court for approval as a court order.

3. HEARING. On the filing of a petition, the court shall schedule a hearing and shall notify the parent or parents, guardian or custodian of the date of the hearing, the legal consequences of an order of emancipation, the right to be represented by legal counsel and the right to present evidence at the hearing. Notice shall be given in the manner provided in the Maine Rules of Civil Procedure, Rule 4, for service of process.

4. ORDER OF EMANCIPATION. The court shall order emancipation of the juvenile if it determines that:

A. The juvenile has made reasonable provision for his room, board, health care and education, vocational training or employment; and

B. The juvenile is sufficiently mature to assume responsibility for his own care and it is in his best interest to do so.

5. DENIAL OF PETITION. If the court determines that the criteria established in subsection 4 are not met, the court shall deny the petition and may recommend that the Department of Human Services provide continuing services and counseling to the family.

6. APPEAL. Any person named in the petition who is aggrieved by the order of the court may appeal to the Superior Court.

7. PUBLIC PROCEEDING; EXCEPTION. Notwithstanding section 3307, subsection 2, paragraph B, the court shall not exclude the public unless the minor or the minor's parent or parents, guardian or custodian, requests that the public be excluded and the minor or the minor's parent or parents, guardian or custodian, does not object. If the public is excluded, only the parties, their attorneys, court officers and witnesses may be present.

MARYLAND

JOANN HOLLY ET AL. V. MARYLAND AUTOMOBILE INSURANCE FUND ET AL.

No. 299, September Term, 1975

Court of Special Appeals of Maryland

29 Md. App. 498; 349 A.2d 670; 1975 Md. App. LEXIS 342

December 31, 1975, Decided

OPINION BY MENCHINE

Joann Holly (Holly) and Mary Ann Josiah (Josiah) sustained injuries in an accident on October 31, 1971 while passengers in an automobile operated by an uninsured motorist. After obtaining judgments against the motorist for $ 2500.00 and $ 15,000.00 respectively, Holly and Josiah petitioned for payment thereof under the Unsatisfied Claim and Judgment Fund Law. (Article 66 1/2, § 7-601 through § 7-635 of the Annotated Code of Maryland, 1970 Replacement Volume). n1 In separate answers to the petitions, the Maryland Automobile Insurance Fund (Fund) denied responsibility for payment of the judgments upon the ground that the judgment creditors were not residents of the State of Maryland on the date of the accident within the meaning of the statute governing their claims.

> n1 The Unsatisfied Claim and Judgment Fund Law was repealed by Ch. 73 § 2 of the Acts of 1972, effective January 1, 1973. Under § 1 of that Chapter, however, claims against the Unsatisfied Claim and Judgment Fund existing as of December 31, 1972 were transferred to and deemed to be claims against the Maryland Automobile Insurance Fund as therein created. (Codified as Article 48A, § 243G.)

The trial court, after hearing, concluded that neither Holly nor Josiah were "qualified persons" within the meaning of former Article 66 1/2, § 7-602 and thus not entitled to receive payment of the judgment from the Fund.

Initially enacted as Article 66 1/2, § 145A by Ch. 836 of the Acts of 1957, the section underwent codification identity changes to § 150 (Annotated Code of Maryland, 1957) and to § 7-602 (Annotated Code of Maryland, 1970 Replacement Volume) but without change in the definition of the term "Qualified Person." n2 That constant definition reads as follows:

"(g) '*Qualified person*' means a resident of this State or the owner of a motor vehicle registered in this State or a resident of another state, territory, or federal district of the United States or province of the Dominion of Canada, or foreign country, in which recourse is afforded to residents of this State, of substantially similar character to that provided for by this part * * *."

> n2 *See: Footnote 1, Liberty Mut. Ins. Co. v. Craddock, 26 Md. App. 296, 338 A. 2d 363 (1975).*

Appellants concede, as indeed they must, that the word "resident" as used in the section has been equated with "domiciliary" by judicial interpretation. In *Maddy v. Jones, 230 Md. 172, 186 A. 2d 482 (1962),* it was said at 179 [485]:

"It is our opinion that the design and the terms of the Act require the conclusion that Sec. 150 (g), defining a 'qualified person' as a 'resident of this State', contemplates one who possesses or has acquired a domiciliary status, in the legal sense, in this State, as distinguished from one who merely has a temporary abode in Maryland. It seems obvious that the Legislature intended, in enacting this statute, primarily to protect its own citizens, particularly those least able financially to bear the loss or injury inflicted by irresponsible or unidentified motorists, many of whose victims otherwise would require medical and welfare attention at public costs. A further significant factor is the reciprocity provision in Sec. 150 (g). This provision (which uses the words 'resident' and 'residents') could logically and effectively apply, we feel, only to domiciliaries of Maryland and of the reciprocating jurisdictions, and not to temporary sojourners. Our conclusion that 'resident' must be equated with 'domiciliary' in this statute is fortified by the fact that the Fund is produced by taxes imposed on all motorists, insured as well as uninsured, whose vehicles

are registered in Maryland, and on liability insurance premiums collected in this State. Transients, unless covered by portions of Sec. 150 (g) other than the residence provision, would not seem to come within the scheme of this legislation."

In *Walsh Admr. v. Crouse, 232 Md. 386, 387, 194 A. 2d 107, 108 (1963)* and in *Rumbel v. Schueler, 236 Md. 25, 27, 202 A. 2d 368 (1964)* the holding in *Maddy, supra,* was expressly reiterated. *Compare: Liberty Mut. Ins. Co. v. Craddock, 26 Md. App. 296, 338 A. 2d 363 (1975).*

Nonetheless, appellants urge upon us that the residency requirement of the statute is unconstitutional under the Equal Protection or Privileges and Immunities Clauses of the Fourteenth Amendment or under Article IV § 2 of the Constitution of the United States. They argue that judicial interpretation of the word "resident" as equated with "domiciliary" under *Maddy, Walsh* and *Rumbel*, all supra, "did not flow out of an analysis of the nature and purpose of the UCJ Law nor does it now comport with constitutional standards."

Constitutionality

Appellants rely upon *Memorial Hospital v. Maricopa County, 415 U.S. 250, 94 S. Ct. 1076, 39 L.Ed.2d 306 (1974); Dunn v. Blumstein, 405 U.S. 330, 92 S. Ct. 995, 31 L.Ed.2d 274 (1972)* and *Shapiro v. Thompson, 394 U.S. 618, 89 S. Ct. 1322, 22 L.Ed.2d 600 (1969).* Their reliance is misplaced. The statute in each of the cited cases imposed durational residential requirements upon: (a) health and welfare essentials (hospital care); or (b) a fundamental political right (voting); or (c) the basic necessities of life (welfare payments).

The very language of the Supreme Court in *Memorial Hospital, supra, at page 255* [1080-81], [313] itself demonstrates the distinction between the statutes struck down in the three cited cases and the subject statute:

"Even a bona fide residence requirement would burden the right to travel, if travel meant merely movement. But, in Shapiro, the Court explained that '[t]he residence requirement and the one-year waiting-period requirement are distinct and independent prerequisites' for assistance and only the latter was held to be unconstitutional. Id., at 636, 22 L Ed 2d 600. Later, in invalidating a durational residence requirement for voter registration on the basis of Shapiro, *we cautioned that our decision was not intended to 'cast doubt on the validity of appropriately defined and uniformly applied bona fide residence requirements*.' *Dunn v. Blumstein, 405 U.S. 330, 342, n. 13, 31 L.Ed.2d 274, 92 S. Ct. 995 (1972).*" (Emphasis added)

In the subject case the statute imposed no durational residential requirement inhibiting the fundamental right to migrate from state to state.

Section 7-602 applied equally to all persons within the boundaries of the State. Its accruing benefits were not conditioned upon durational prerequisites. A person claiming its benefits was required only to demonstrate that she was a resident of the State as that status had been "appropriately defined and uniformly applied" to all sojourners within its borders. There was, in short, no impingement of fundamental constitutional rights.

In the absence of such impingement, the State is not required to make a showing that the statute is "necessary to promote a *compelling* governmental interest." *Shapiro, supra, at 634,* [1331], [615]. Rather, validity of the statute will be determined under the test clearly and succinctly stated in *Md. St. Bd. of Barber Exmrs. v. Kuhn, 270 Md. 496, 507, 312 A. 2d 216, 222 (1973):*

"In cases brought under the Equal Protection Clause of the Fourteenth Amendment, but not involving so-called 'suspect classifications' or 'fundamental personal rights,' the Supreme Court and this Court have applied the more traditional 'rational relationship' or 'fair and substantial relation' tests, which require, at a minimum, that a statutory classification bear some 'rational relationship' to a legitimate state purpose."

The previously quoted language in *Maddy, supra,* clearly demonstrates that the statute meets this test and is valid.

Applicability of § 7-602 to Appellants

What we have said thus far applies equally to both appellants. Each is bound by the terms of this valid statute and must show that she qualifies as a domiciliary of this State.

Common to both appellants is the critical circumstance that they were minors (Holly age 18 years) (Josiah aged 19 years) at the time of arrival within the State of Maryland and at the time of the accident in which they were injured. n3

n3 Ch. 651 of the Acts of 1973 (Maryland Code Article 1, *§ 24*, *1975* Supp.) whereby the age of majority was lowered from 21 to 18 years had no application to the appellants. Section 51 of that Act provided, *inter alia*: "That the provisions of this Act shall be construed only prospectively and shall not be applied or interpreted to have any effect upon or application to any event or happening occurring prior to the effective date of this Act."

It is uniformly held that the domicile of the father is in legal contemplation the domicile of a minor child, and an infant cannot acquire a domicile on her own volition. 25 Am.Jur.2d *Domicile*, § 63 (1966); 1 Restatement, Conflict of Laws (2d) § 22 (1971); *Sudler v. Sudler, 121 Md. 46, 50, 88 Atl. 26, 28.*

The mere fact that the appellants were minors does not mean, however that this universally recognized rule of law is necessarily dispositive of the subject case. This is so because there is, in some jurisdictions a recognized exception that an emancipated child may acquire a domicile of choice. The exception is thus stated in 1 Restatement, Conflict of Laws, *supra*, at page 90:

"*f. Emancipated child*. An emancipated child may acquire a domicil of choice. A parent has no power to control the domicil of an emancipated child."

We pass, accordingly, to a consideration of the question whether the appellants were emancipated.

The early case of *Mercer v. Walmsley, 5 H & J 27 (1820)* makes plain that emancipation of an infant must emanate from the parent and not the child, saying at page 34:

"*** the right of the father to the services of the daughter, during minority, depends not on her. Let her design to leave him be ever so determined, she has no legal right so to do, or when from under his roof, she has no right to form a determination never to return; and if such a determination is made, still the father has a right to compel her return, and have the benefit of her services. Nor is it clear to me, that even with the consent of the father, that she should permanently leave his protection, would the case be materially different; for as no contract between the father and minor daughter would be binding, a stipulation or understanding that she should permanently leave him, and shift for herself, would be nugatory. But that is not the case now before the Court."

Bullett v. Worthington, 3 Md. Ch. 67 (1851), expressed a similar view, the Court saying at page 71:

"*** the services were rendered whilst the son lived with the father, and during his minority. Under such circumstances, and, indeed, even though the son did not live with the father, still, being a minor, the father was entitled to his services, and could maintain an action for them, *unless, by some act of his own, he had divested himself of his control over him*." (Emphasis added)

Greenwood v. Greenwood, 28 Md. 369, 381 (1868) although recognizing that a father is entitled to the custody of his minor children and to the value of their labor during minority, declared that such right may be destroyed "by some act of his own." The Court in *Greenwood* went on to say at 384: "In what manner and by what acts this can be done must depend on the special circumstances of each case."

Malone v. Topfer, 125 Md. 157, 93 Atl. 397 (1915), and *Lucas v. Maryland Drydock Co., 182 Md. 54, 31 A. 2d 637 (1943)* recognized the doctrine of emancipation resulting from the forfeiture of parental rights by reason of abandonment or mistreatment.

Bradford v. Futrell, 225 Md. 512, 171 A. 2d 493 (1961), discussing tangentially the question of emancipation, said at 520 [497]:

"Whether the entering of a dependent child into the military service constitutes an emancipation falls under the general principle that whether emancipation has occurred in a given case is a factual question."

We distill from those decisions the following general principle: emancipation of a minor may not be achieved by the voluntary action of the child but may result (a) from abandonment or mistreatment by the parent, or (b) from a voluntary relinquishment of parental rights.

In the subject case there is not the slightest evidence of neglect, misconduct or abandonment by the parents of either Holly or Josiah. We turn, accordingly, to the question whether emancipation of either or both has occurred by reason of voluntary relinquishment of parental rights.

The case of *Parker v. Parker, 94 S.E.2d 12, 13* (S. Car., 1956) stated what we believe to be the proper test governing determination of the emancipation issue in a given case:

"Emancipation during minority results not from any act of the child alone, but primarily from agreement of the parent, which may be either express or implied. It may be either partial or complete. If partial, it frees the child for only a part of the period of its minority, or from only a part of the parent's rights, or for some special purpose, such as the right to earn and spend its own wages. If complete, it completely severs the parental relationship so far as legal rights and liabilities are concerned. Whether or not a minor child has been emancipated depends upon the peculiar facts and circumstances of each case, and is, therefore, generally a question for the jury. Emancipation of a minor child is never presumed, and the burden of proof is upon him who alleges it."

The trial judge concluded from the evidence that "*** the facts in this case are not sufficient to establish that there was, in fact, emancipation." The trial judge's conclusion upon this factual issue must stand unless our examination of the record shows that it was clearly erroneous. Maryland Rule 1086. Thus, if there is any competent, material evidence directly or by reasonable inference tending to justify that conclusion, we must affirm. *Carling Brewing Co. v. Belzner, 15 Md. App. 406, 413, 291 A. 2d 175, 179 (1972).*

No testimony by the parents of either appellant was presented to the trial judge. We are left, accordingly, to an examination of the record to determine whether emancipation must be implied as a matter of law. We think not.

Common to the claims of both is the circumstance that they undertook to pursue studies at the nursing school for three years and to bind themselves thereafter for two years of service as nurses at the Provident Hospital.

Further Evidence as to Josiah

Mary Ann Josiah was born in Antigua on January 8, 1952. She was a citizen of the West Indies, in the United States on a student visa. Her parents continued to lend her financial support whenever she needed it after her arrival in Maryland. She came to the United States in April, 1971 with a plan to live with an aunt in Takoma Park and to attend Howard University in Washington, D. C. The decision to attend nursing school in Baltimore was made after arrival. She commenced her classes in September, 1971. She was not qualified for permanent residence in the United States.

Josiah's parents had provided her with funds for her upkeep both initially and in the subsequent course of her schooling. This circumstance alone prevents us from a declaration that the conclusion of the trial judge was clearly erroneous as to Josiah. Rule 1086.

Further Evidence as to Holly

The issue as to Holly is not so clear cut. Joann Holly was born in Pennsylvania on April 6, 1953. She came to Baltimore in September, 1971 to become a nursing student at the Helene Fuld School of Nursing in Baltimore. Her parents at all times were residents of Pennsylvania. She had a Pennsylvania driver's license. She registered to vote in Maryland -- after the accident. When asked about her future plans at the time she came to Baltimore in September, 1971 she replied, "Well, I was planning to stay here for at least the next five years. I didn't know what I was going to do after that."

The testimony showed she was self-supporting without financial contributions by the parents subsequent to her arrival within this State. Her stay in Maryland prior to the accident and injury had been of only about two months duration. We do not regard these circumstances as conclusively establishing emancipation for the full period of her minority. Nor do they demonstrate as a matter of law, the voluntary relinquishment of all parental rights. Although the issue is close, we cannot declare, as a matter of law, that the evidence shows a voluntary relinquishment of all parental rights and obligations. We must recognize that the contractual undertaking with the nursing school was voidable during infancy. We must recognize also that the parents may have, during the minority of their child, required her to return to Pennsylvania. The trial judge was not required to assume that parental control had been fully relinquished; or parental responsibility ended.

Because we conclude that the decision of the trial judge was not clearly erroneous, we do not reach the interesting question whether the emancipation of a minor child encompasses the right to acquire a domicile of choice.

The contention that appellants may qualify under the statute as "apprentices" of Provident Hospital was not raised below. It is not before us. Rule 1085. In any event there is no evidence that either appellant qualified as an apprentice as defined in Article 100, § 96 (f).

Judgments affirmed.

Costs to be paid by appellants.

MASSACHUSETTS

JUDY R. LARSON V. RICHARD A. LARSON

No. 90-P-1297

Appeals Court of Massachusetts, Middlesex

30 Mass. App. Ct. 418; 569 N.E.2d 406; 1991 Mass. App. LEXIS 214

December 17, 1990 April 1, 1991

OPINION BY LAURENCE

The present appeal contests the validity of Probate Court contempt judgments against Richard A. Larson (Richard) for refusing to make child support payments to Judy R. Larson (Judy), as required by a separation agreement (the agreement) incorporated into, but explicitly surviving, the parties' divorce judgment. n1 Richard presents several arguments against the judgments and the judge's refusal to set them aside on his motions. All of them condense to a single proposition: that the Probate Court lacked jurisdiction to enter the judgments. Richard's position, however, is based upon a misreading of a prior opinion of this court and a misapplication of principles of res judicata and related doctrines. We, accordingly, affirm the judgments.

n1 Richard filed two separate notices of appeal: one on August 24, 1990, from the August 1, 1990, contempt judgment and the August 22, 1990, denials of his motions for new trial and relief from that judgment; and the other taken on September 28, 1990, from a judgment of contempt entered September 26, 1990. The Probate Court combined the two appeals in its assembly of the record, and both appeals were entered as one case on the docket of this court.

1. *The prior proceedings*. Richard, a surgeon, and Judy, a homemaker, obtained a judgment of divorce nisi from the Middlesex Probate and Family Court on March 31, 1983. The judgment ordered the parties to comply with the provisions of the agreement, which expressly survived the judgment with independent legal significance. The agreement required that Richard would pay Judy, as unallocated alimony for her support and that of the three children of the marriage (who were then nineteen, sixteen, and thirteen years old), the sum of $ 2,500 per month. n2

n2 By January, 1987, the monthly payments had been adjusted upward, by a formula in the agreement, to $ 2,600, where they appear to have remained as of the date of this appeal.

The agreement provided that the monthly payments were to continue until certain specified events. The only terminating event relevant to this litigation was to occur when all of the children became "emancipated according to law." The record is silent as to what the parties intended by that phrase. Upon that event, Richard's payments to Judy would cease to include child support and would equal thirty percent of his annual gross earned income. The agreement also obligated Richard to pay the children's educational and related expenses. Finally, it declared that any "dispute or misunder-standing arising under this [a]greement as to the meaning, interpretation, application or performance of any provision of this [a]greement ... shall be submitted to the Middlesex Probate and Family Court if the parties are unable to resolve the question by mutual agreement."

When the youngest child, Elizabeth, turned eighteen on April 1, 1987, Richard unilaterally decreased the amount of his monthly payments to Judy to one-twelfth of thirty percent of his annual gross earned income, which had by then been much diminished as a result of his voluntary reduction of the level of his medical practice. On August 24, 1987, Judy filed a complaint for contempt alleging that Richard's reduction in payments as of April 1, 1987, and each month thereafter violated the divorce judgment.

It was "apparent that Richard's reduction in support payments was pursuant to the emancipation clause of the agreement." *Larson v. Larson, 28 Mass. App. Ct. 338, 339 n.1 (1990)* (*Larson I)*. Richard appears to have implicitly adopted the position that Elizabeth's eighteenth birthday on April 1, 1987, had triggered the support termination provision of the agreement and that the monthly child support obligation had thereupon ceased. n3 Inexplicably,

however, neither party referred to or relied upon the agreement in the course of the proceedings on Judy's 1987 complaint for contempt. Instead, they tried the case on the single legal theory that *G. L. c. 208, § 28*, governed Judy's entitlement to child support. n4 Richard submitted as the outcome-determinative issue that Judy failed to satisfy one of the two statutory standards authorizing the court to order support for a child between the ages of eighteen and twenty-one, namely, whether Elizabeth was "principally dependent" upon her for maintenance. See *Larson I, supra* at 339-341.

n3 *General Laws c. 231, § 85P*, as inserted by St. 1975, c. 315, § 1, declares that any person eighteen years old "shall for all purposes ... be deemed of full legal capacity .... " *General Laws c. 4, § 7*, cl. fifty-first, defines "age of majority" as eighteen years of age. Neither party has cited to these statutes. No statute appears to define "emancipation." It is clear that there is no fixed age when emancipation occurs; it does not automatically occur on reaching the age of majority. *Turner v. McCune, 4 Mass. App. Ct. 864, 865 (1976).*

n4 *General Laws c. 208, § 28*, as amended through St. 1976, c. 279, § 1, provides, in pertinent part, that "[t]he court may make appropriate orders of maintenance, support and education of any child who has attained age eighteen but who has not attained age twenty-one and who is domiciled in the home of a parent, and is principally dependent upon said parent for maintenance."

The judge disagreed with Richard and found for Judy on the "sole question" whether Elizabeth was "principally dependent" upon her. *Id.* at 340. n5 On the first appeal, in addition to criticizing the judge's application of *G. L. c. 208, § 28*, Richard advanced a contention not made below: "that the judge erred in determining that Elizabeth was not 'emancipated according to law' as provided in the separation agreement ... [because] under Massachusetts law a child becomes emancipated upon attaining the age of eighteen years." *Larson I, supra* at 340.

n5 The judge found Richard in contempt on September 30, 1988, and ordered him to pay Judy $ 33,524.29, consisting of $ 24,674.00 in arrears, $ 3,284.55 in interest, and $ 5,565.74 in costs and attorneys' fees.

This court, however, rejected Richard's belated new argument in *Larson I*. We observed that the case had been tried below solely on the theory of the applicability of *G. L. c. 208, § 28*, reminded Richard of the settled principle that the theory of law on which by assent a case is tried cannot be disregarded when the case comes before an appellate court for review, and stated unambiguously that "[w]e, therefore, do not consider the question whether Elizabeth was emancipated as matter of law upon attaining the age of eighteen." *Larson I, supra* at 341. We affirmed the contempt judgment on the issue of principal dependency under *G. L. c. 208, § 28*, and authorized Judy to file a petition for appellate costs and fees.

2. *The present proceedings*. On April 1, 1990, when Elizabeth, then a college junior, became twenty-one, Richard again curtailed his child support payments, without explanation. On May 29, 1990, Judy filed a new complaint for contempt for the full amounts of the April and May, 1990, payments. n6 Richard, who had by that time left Massachusetts to reside in Maine, was personally served on June 13, 1990, with copies of the complaint and the summons, which ordered him to appear at the Probate Court at 9:00 A.M. on August 1, 1990. At some point in early June, 1990, Richard's then attorney also received copies of these documents from Judy's attorney.

n6 Richard had additionally failed to make a payment for the month of October, 1988, which Judy also sought in her May 29, 1990, complaint.

Meanwhile, Judy, acting pursuant to the authorization of *Larson I, supra* at 343-344, had filed a petition with this court for counsel fees and costs in connection with the first appeal on May 24, 1990. Though given a reasonable time to respond to the petition, Richard failed to do so, and neither he nor his counsel appeared at the scheduled June 26, 1990, hearing on the petition. On June 26, 1990, Richard was ordered by this court to pay Judy $ 9,193.57 as counsel fees and costs on or before July 26, 1990. The order further provided that "[a]ny proceedings necessary to enforce payment are to be brought in the Probate Court." On July 27, 1990, Judy, having heard nothing from either Richard or his counsel, amended her complaint for contempt by adding claims for his failure to pay the fees and costs awarded by this court, as well as for his continued failure to make $ 2,600 payments for June and July, 1990.

At the appointed August 1, 1990, contempt hearing before the Probate Court, neither Richard nor his counsel was present. No answer had been served to either the original or the amended complaint, nor was any motion for continuance filed. The judge found Richard in contempt and ordered him to pay Judy $ 27,083.79 in arrears, interest, and attorney's fees. n7 This judgment finally stirred Richard to action. On August 10, 1990, his then counsel filed motions for a new trial and for relief from the August 1, 1990, judgment, pursuant to

Mass.R.Dom.Rel.P. 59(a), 60(b)(4), and 60(b)(6) (1975). The sole ground for these motions was the assertion that the contempt judgment was void because the Probate Court lacked jurisdiction to enter any support orders with respect to a nondisabled child over the age of twenty-one. Accompanying the motions was an affidavit of Richard's then counsel attempting to explain the failure to appear at the August 1, 1990, hearing on the basis of the counsel's emergency surgery just before the hearing, his inability to contact Richard following receipt of Judy's May 29, 1990, complaint, and a failed effort to negotiate a continuance with Judy's counsel on the eve of the hearing. n8

n7 This amount represented $ 24,793.57 in arrears, $ 268.57 in interest, and $ 2,021.65 in attorneys' fees.

n8 Judy's attorney had been willing to assent to a continuance of the August 1 hearing on the condition that Richard pay the undisputed amounts he owed Judy (the $ 2,600 for October, 1988, support and the $ 9,193.57 in fees and costs for *Larson I*) on or before August 1, 1990. No agreement ensued because Richard failed to make those payments as requested, although he did pay them at the August 22, 1990, hearing on his motions.

On August 22, 1990, the judge held a hearing on Richard's motions. Richard appeared personally and by new counsel. His new attorney elaborated the lack of jurisdiction argument by propounding the theory that Judy was estopped by the prior proceedings to assert the applicability of the separation agreement, or to deny *G. L. c. 208, § 28*, as the sole basis for the Probate Court's jurisdiction. Since that statute conferred power to make support orders only as to children between the ages of eighteen and twenty-one and since the parties' youngest child was concededly over twenty-one, counsel argued that Richard was entitled to relief or a new trial on the ground of "mistake of law ... [namely] the entry of a judgment without jurisdiction. It is our position that under Section 28, this court cannot make an order for a [nondisabled] child over the age of twenty-one ...."

The judge questioned Richard at the August 22, 1990, hearing as to his reasons for not appearing or taking any action earlier. Richard testified, inconsistently with his former counsel's affidavit, that he had in fact discussed matters with his former counsel after reviewing Judy's May, 1990, complaint and was told by counsel that he did not have to appear. The judge also received an affidavit from Judy's attorney materially contradicting the affidavit of Richard's former counsel regarding the events surrounding that counsel's late July request for a stipulated continuance. With all this in hand, the judge denied Richard's motions (later recalling that he simply did not believe Richard's explanation for his nonappearance). Richard took a timely appeal from the denials and from the August 1, 1990, contempt judgment on August 24, 1990.

Judy then filed a second complaint for contempt, on August 29, 1990, alleging that Richard had failed to pay $ 15,290.22 of the $ 27,083.79 due under the August 1, 1990, contempt judgment. This time Richard answered, repeating his contention that the court's August orders were void as matter of law for want of jurisdiction, and also filed a motion to stay all proceedings until the determination of his pending appeal. At a September 26, 1990, hearing on Judy's second complaint and Richard's stay motion, Richard's counsel reiterated his previous position that Judy "is estopped from denying it's anything but a [*G. L. c. 208] Section 28* case, and that the case turned on the relatively narrow issue of whether you [the judge] exceeded your authority in ordering support for a child over the age of twenty-one."

The judge denied Richard's stay motion, adjudged him in contempt, and ordered him to pay Judy $ 18,590.22, an amount Richard conceded he was able to pay. n9 Richard appealed from this judgment of contempt and obtained from a single justice of this court a stay of proceedings on both outstanding judgments pending resolution of his appeals.

n9 The components of this sum were the $ 15,290.22 from the August 1, 1990, judgment, plus a $ 2,600 payment for September, 1990, and $ 700 for attorneys' fees. Judy's counsel had sought $ 2,944.10 in attorneys' fees and costs.

3. *The Probate Court's jurisdiction*. Richard's entire argument on appeal depends upon the success of his proposition that the Probate Court's judgments are void as matter of law because the court lacked jurisdiction to order support once Elizabeth turned twenty-one. n10 Richard correctly states that a Probate Court judge has no authority under *G. L. c. 208, § 28*, to make support orders for a child over twenty-one. He then insists that the court's only jurisdiction in this case was provided by that statute, leaving it without any basis to order support for a child such as Elizabeth.

n10 Richard does not argue here what would objectively appear to be the only substantial point to be litigated in this case, namely, whether he should be relieved of his support obligation because Elizabeth has become "emancipated according to law"; nor does he assign as error anything done by the judge that rejected such an argument or prevented him from making such an argument below. Instead, he asserts that, "[b]ecause the original contempt [in *Larson I*] was pre-tried, tried and decided on appeal as a Section 28 proceeding, traditional views of emancipation and the factors employed to determine whether it has occurred were not then and are not now applicable to the facts of the case." Both Judy's May 24, 1990, contempt complaint and July 27, 1990, amended contempt complaint alleged the continued applicability of Richard's obligation to make monthly support payments "until the youngest child is emancipated according to law." Although Richard was not deemed to have admitted these averments by his failure to deny them in a responsive pleading (there is no rule in the domestic relations rules corresponding to Mass.R.Civ.P. 8(d), *365 Mass. 750 (1974);* see Kindregan & Inker, Family Law & Practice § 184, at 267 [1990]), and although Richard's September 24, 1990, answer did deny the same allegation contained in Judy's August 29, 1990, contempt complaint and averred further that "the claim for child support is barred by the child's emancipation and her having obtained the age of 21," he did not, as noted above, subsequently press or argue this point, but rather appears to have expressly abandoned it.

Without citing or discussing *Kotler v. Spaulding, 24 Mass. App. Ct. 515, 517-520 (1987),* Richard implicitly acknowledges that, where a divorce judgment provides by its terms for child support past the age of twenty-one, the Probate Court retains the power to enforce the provision through contempt orders. He contends, however, that the parties' agreement here is no longer a source of jurisdiction, despite its express bestowal of jurisdiction on the Probate Court over disputes as to its meaning and application. Judy is barred from resort to the agreement, he maintains, by the doctrines of claim preclusion, issue preclusion, and judicial estoppel. He asserts that *Larson I* operates as res judicata, precluding Judy from relying on the agreement, because she has waived her rights to child support pursuant to the agreement. The alleged waiver consisted of allowing the earlier litigation to proceed solely on the basis of *G. L. c. 208, § 28*.

Richard's argument n11 is without merit. The contention that Judy waived reliance on the agreement ignores the determinative fact that this appeal does not deal with the same claims, issues, or arguments as did *Larson I.* That decision announced, as emphatically as could be done, that it did not address the agreement, let alone consider the meaning or application of the term "emancipated according to law." *Larson I, supra* at 341.

n11 Richard did not affirmatively set forth estoppel or res judicata as defenses in his answer to Judy's August, 1990, contempt complaint, as required by Mass.R.Dom.Rel.P. 8(c) (1975); nor did he raise them in arguing against the judgment on her May, 1990, contempt complaint or her July, 1990, amended contempt complaint, which he never answered, contrary to Mass.R.Dom.Rel.P. 7(a) & 8(b) (1975). The judge nonetheless allowed Richard to present his jurisdictional argument during the hearings below, without objection from Judy, so the failure to plead was not fatal. Compare *Brash v. Brash, 407 Mass. 101, 104 n.4 (1990); Davidson v. Davidson, 19 Mass. App. Ct. 364, 368 n.3 (1985).* In any event, since the issues may recur as to future monthly payment obligations, we would choose to discuss them in the interest of judicial economy.

a. *Claim preclusion*. This doctrine, traditionally known as merger or bar, prohibits the maintenance of any action based on the same claim that was the subject of and was decided in an earlier action between the parties or their privies. *Heacock v. Heacock, 402 Mass. 21, 23 (1988). Bagley v. Moxley, 407 Mass. 633, 636-637 (1990).* It has no application to the instant matter because the contempt judgments appealed from constituted new claims based on different facts from those at issue in *Larson I.*

The original contempt judgment that gave rise to *Larson I*, dated September 30, 1988, involved claims for violation of the divorce judgment's monthly payment obligations through that date only, as did the *Larson I* opinion. The judgments at issue in the present appeal cover claims for subsequent payment violations, from April through September, 1990. These later violations were not and could not have been raised in the original action because the times for payment had not yet occurred or given rise to any cause of action in favor of Judy. Each violation of Richard's continuing monthly payment obligation under the divorce judgment constituted a new claim for preclusion purposes, as with any contract calling for continuous separate performances over a period of time or for payment of money in separate installments. See *Dunbar v. Dunbar, 180 Mass. 170, 173 (1901),* aff'd, *190 U.S. 340 (1903); Phelps v. Shawprint, Inc., 328 Mass. 352, 356-358 (1952);* 18 Wright, Miller & Cooper, Federal Practice &

Procedure § 4409, at 77-78 n.11 (1981); 4 Corbin, Contracts § § 948, 949, & 956 (1951). Accordingly, the doctrine of claim preclusion cannot provide a basis for Richard's jurisdictional argument.

b. *Issue preclusion*. This modern term for collateral estoppel prevents relitigation of an issue of fact or law determined in an earlier action when the same issue arises in a later proceeding, even though based on a different claim, between the parties or their privies. *Heacock, supra at 23 n.2.* The central requirements are that the issue sought to be foreclosed was actually litigated and was essential to the decision in the prior action. See *Cousineau v. Laramee, 388 Mass. 859, 863 n.4 (1983); Moat v. Ducharme, 28 Mass. App. Ct. 749, 753 (1990).*

Neither of these prerequisites obtains here. *Larson I* dealt exclusively with the propriety and sufficiency of the judge's finding that Elizabeth was "principally dependent" upon Judy under *G. L. c. 208, § 28*. No issue relating to the agreement was litigated or essential to the rulings in that prior action; indeed, they were expressly disavowed by both courts as a basis for their decisions. The prior action concerned Richard's support obligation to a child between eighteen and twenty-one; the present claim involves his obligation to a child over twenty-one. Issue preclusion has no application here.

c. *Judicial estoppel*. This term appears to describe the doctrine that a party who has maintained one position in a legal proceeding may not, in a subsequent proceeding between the same parties, assume a contrary or inconsistent position, at least when the prior position has been acted or relied upon by an adverse party. While this basic principle seems to be recognized in Massachusetts, see *Brown v. Quinn, 406 Mass. 641, 646 (1990),* application of the doctrine would be inappropriate here because Judy has not taken contrary positions in the two lawsuits. It is perfectly consistent for her to have argued, in the prior case, that Elizabeth was principally dependent upon her for support, as defined by *G. L. c. 208, § 28*, and to argue, in the present action, that Richard remains bound to pay child support pursuant to the agreement. Cf. *Turner v. McCune, 4 Mass. App. Ct. 864, 865 (1976)* (emancipation is not automatic upon reaching the age of majority). Compare *Brown v. Quinn, supra at 646* (argument that an appeal was premature estopped because it contradicted party's earlier position that judgment appealed from was final). Until Elizabeth turned twenty-one, Judy in fact had no occasion or necessity to resort to the agreement, since *G. L. c. 208, § 28*, provided a sufficient alternative basis to enforce Richard's support obligations.

In summary, Richard's res judicata arguments are inapposite. The Probate Court had ample sources of authority, including the agreement, to act on Judy's complaint, and its judgments were therefore not void for want of jurisdiction.

4. *Other arguments*. Richard's only contention on appeal not founded on his unsuccessful jurisdictional points is directed to the judge's alleged abuse of discretion in denying his rule 59(a) motion for a new trial. He presents, however, no reasoned analysis of the circumstances constituting the alleged abuse. Richard's cursory, three-sentence presentation does not assist the court with meaningful citation of authority and cannot be said to rise to the level of acceptable appellate argument under Mass.R.A.P. 16(a)(4), as amended, *367 Mass. 921 (1975).* See *Lolos v. Berlin, 338 Mass. 10, 13-14 (1958); Hastoupis v. Gargas, 9 Mass. App. Ct. 27, 39 (1980).* Richard's position with respect to the judge's refusal to grant him relief from the August 1, 1990, judgment under rule 60(b) makes no mention of any abuse of discretion by the judge. Rather, it rests entirely on the court's supposed lack of jurisdiction and consequent voidness of its judgments. Given the inconsistent statements of Richard and his attorney as to the purported reasons for their failures to answer or appear at the August 1, 1990, hearing, as well as the conflicting affidavits of counsel regarding the background of the nonappearance, there was no abuse of discretion in the judge's denial of Richard's motions in any event. Deference is particularly due the judge's exercise of discretion because of his lengthy involvement in the proceeding. *Burger Chef Sys., Inc. v. Servfast of Brockton, Inc., 393 Mass. 287, 289 (1984).* n12

> n12 Since each monthly payment obligation under the agreement gives rise to a separate claim, see the discussion in part 3a, *supra* at 11-12, Richard remains free to raise any arguments he may have against enforcement of that agreement in a future proceeding, including whether Elizabeth has become "emancipated according to law." This court is unable to make such a determination on the present record, because the issue was not briefed or argued either before the Probate Court or on appeal.

5. *Costs and fees on appeal*. Both parties have requested an award of counsel fees and costs in connection with this appeal. Richard's appeal having failed, he is not entitled to them. *Yorke Mgmt. v. Castro, 406 Mass. 17, 20 (1989).* Richard has conceded his ability to pay any judgments issued and is in a financial position to defray the costs of this appeal superior to that of Judy, who has prevailed. Judy was awarded fees and costs not only for the first appeal but also for the two 1990 contempt proceedings in the Probate Court, which awards Richard does not here contest.

Therefore, as in the prior appeal, Judy may submit to this court a motion for counsel fees within thirty days after issuance of our rescript, in accordance with the procedural requirements of *Yorke Mgmt. v. Castro, supra at 20.* See *Larson I, supra* at 343-344.

Judgments affirmed.

Order denying motion for new trial affirmed.

MICHIGAN

CHAPTER 722. CHILDREN

MINORS

§ 722.4. Emancipation by operation of law or pursuant to petition filed by minor with family division of circuit court.

Sec. 4. (1) Emancipation may occur by operation of law or pursuant to a petition filed by a minor with the family division of circuit court as provided in this act.

(2) An emancipation occurs by operation of law under any of the following circumstances:

(a) When a minor is validly married.

(b) When a person reaches the age of 18 years.

(c) During the period when the minor is on active duty with the armed forces of the United States.

(d) For the purposes of consenting to routine, nonsurgical medical care or emergency medical treatment to a minor, when the minor is in the custody of a law enforcement agency and the minor's parent or guardian cannot be promptly located. The minor or the minor's parent shall remain responsible for the cost of any medical care or treatment rendered pursuant to this subdivision. An emancipation pursuant to this subdivision shall end upon the termination of medical care or treatment or upon the minor's release from custody, whichever occurs first.

(e) For the purposes of consenting to his or her own preventive health care or medical care including surgery, dental care, or mental health care, except vasectomies or any procedure related to reproduction, during the period when the minor is a prisoner committed to the jurisdiction of the department of corrections and is housed in a state correctional facility operated by the department of corrections or in a youth correctional facility operated by the department of corrections or a private vendor under section 20g of 1953 PA 232, MCL 791.220g; or the period when the minor is a probationer residing in a special alternative incarceration unit established under the special alternative incarceration act, 1988 PA 287, MCL 798.11 to 798.18. This subdivision applies only if a parent or guardian of the minor cannot promptly be located by the department of corrections or, in the case of a youth correctional facility operated by a private vendor, by the responsible official of the youth correctional facility.

(3) An emancipation occurs by court order pursuant to a petition filed by a minor with the family division of circuit court as provided in sections 4a to 4e.

§ 722.4a. Petition; filing; signature; verification; contents; affidavit; service on parents or guardian; notice of hearing.

Sec. 4a. (1) A minor seeking emancipation shall file a petition for emancipation in the family division of circuit court in the county where the minor resides. The petition shall be signed and verified by the minor, and shall include all of the following information:

(a) The minor's full name and birth date, and the county and state where the minor was born.

(b) A certified copy of the minor's birth certificate.

(c) The name and last known address of the minor's parents, guardian, or custodian.

(d) The minor's present address, and length of residency at that address.

(e) A declaration by the minor indicating that he or she has demonstrated the ability to manage his or her financial affairs. The minor may include any information he or she considers necessary to support the declaration.

(f) A declaration by the minor indicating that he or she has the ability to manage his or her personal and social affairs. The minor may include in this section any information he or she considers necessary to support the declaration.

(2) The petition shall include an affidavit by any of the following individuals declaring that the individual has personal knowledge of the minor's circumstances and believes that under those circumstances emancipation is in the best interests of the minor:

(a) Physician.

(b) Nurse.

(c) Member of the clergy.

(d) Psychologist.

(e) Family therapist.

(f) Certified social worker.

(g) Social worker.

(h) Social work technician.

(i) School administrator.

(j) School counselor.

(k) Teacher.

(l) Law enforcement officer.

(m) Duly regulated child care provider.

(3) A copy of the petition and a summons to appear at the hearing shall be served on the minor's parents or guardian. A notice of hearing shall be sent to the individual who provided the affidavit required under subsection (2).

§ 722.4b. Powers of court.

Sec. 4b. After a petition is filed, the court may do 1 or more of the following:

(a) Assign an employee of the court to investigate the allegations of the petition and to file a report containing the results of the investigation with the court.

(b) Appoint legal counsel for the minor.

(c) Appoint legal counsel for the minor's parents or guardian if they are indigent and if they oppose the petition.

(d) Dismiss the petition if the minor's custodial parent does not consent and is providing support.

§ 722.4c. Hearing.

Sec. 4c. (1) The hearing shall be before a judge or referee sitting without a jury. If the minor requests that the hearing be before a judge, the hearing shall be before a judge and not before a referee.

Issuance of emancipation order.

(2) The court shall issue an emancipation order if it determines that emancipation is in the best interest of the minor and the minor establishes all of the following:

(a) That the minor's parent or guardian does not object to the petition; or if a parent or guardian objects to the petition, that the objecting parent or guardian is not providing the minor with support.

(b) That the minor is at least 16 years of age.

(c) That the minor is a resident of the state.

(d) That the minor has demonstrated the ability to manage his or her financial affairs, including proof of employment or other means of support. "Other means of support" does not include general assistance or aid to families with dependent children administered under the social welfare act, Act No. 280 of the Public Acts of 1939, being sections 400.1 to 400.121 of the Michigan Compiled Laws.

(e) That the minor has the ability to manage his or her personal and social affairs, including, but not limited to, proof of housing.

(f) That the minor understands his or her rights and responsibilities under this act as an emancipated minor.

Petitioner's burden of proof.

(3) A minor who petitions the court for emancipation shall have the burden of showing by a preponderance of evidence that emancipation should be ordered.

Copy of order, retention.

(4) If the court issues an emancipation order, the court shall retain a copy of the order until the emancipated minor becomes 25 years of age.

Emancipation obtained by fraud, voidability.

(5) An emancipation obtained by fraud is voidable. Voiding such an order does not affect an obligation, responsibility, right, or interest that arose during the period of time the order was in effect.

Appeal.

(6) The minor or a parent or guardian of the minor may file an appeal from the court's grant or denial of an emancipation petition. The appeal shall be filed in the court of appeals.

§ 722.4d. Petition for rescission; service of copy and summons; determinations; order; effect of rescission on obligations, rights, or interests; appeal.

Sec. 4d. (1) A parent of a minor emancipated by court order or a minor emancipated by court order may petition the family division of circuit court that issued the order to rescind the order. If the order of emancipation is entered by the probate court before January 1, 1998, the parent or minor may petition the family division of the circuit court in the county in which the order was entered to rescind the order.

(2) A copy of the petition for rescission and a summons shall be served on the minor or the minor's parents.

(3) The court shall grant the petition and rescind the order of emancipation if it determines 1 or more of the following:

(a) That the minor is indigent and has no means of support.

(b) That the minor and the minor's parents agree that the order should be rescinded.

(c) That there is a resumption of family relations inconsistent with the existing emancipation order.

(4) If a petition for rescission is granted, the court shall issue an order rescinding the emancipation order and retain a copy of the order until the minor becomes 25 years of age.

(5) Rescission of an emancipation order does not alter any contractual obligations or rights or any property rights or interests that arose during the period of time that the emancipation order was in effect.

(6) The minor or a parent of the minor may file an appeal from the court's grant or denial of a petition for rescission of an emancipation order. The appeal shall be filed in the court of appeals.

§ 722.4e. Rights and responsibilities of emancipated minor; obligation and liability of parents.

Sec. 4e. (1) A minor emancipated by operation of law or by court order shall be considered to have the rights and responsibilities of an adult, except for those specific constitutional and statutory age requirements regarding voting, use of alcoholic beverages, and other health and safety regulations relevant to him or her because of his or her age. A minor shall be considered emancipated for the purposes of, but not limited to, all of the following:

(a) The right to enter into enforceable contracts, including apartment leases.

(b) The right to sue or be sued in his or her own name.

(c) The right to retain his or her own earnings.

(d) The right to establish a separate domicile.

(e) The right to act autonomously, and with the rights and responsibilities of an adult, in all business relationships, including, but not limited to, property transactions and obtaining accounts for utilities, except for those estate or property matters that the court determines may require a conservator or guardian ad litem.

(f) The right to earn a living, subject only to the health and safety regulations designed to protect those under the age of majority regardless of their legal status.

(g) The right to authorize his or her own preventive health care, medical care, dental care, and mental health care, without parental knowledge or liability.

(h) The right to apply for a driver's license or other state licenses for which he or she might be eligible.

(i) The right to register for school.

(j) The right to marry.

(k) The right to apply to the medical assistance program administered under the social welfare act, Act No. 280 of the Public Acts of 1939, being sections 400.1 to 400.121 of the Michigan Compiled Laws, if needed.

(l) The right to apply for other welfare assistance, including general assistance and aid to families with dependent children administered under Act No. 280 of the Public Acts of 1939, if needed.

(m) The right, if a parent, to make decisions and give authority in caring for his or her own minor child.

(n) The right to make a will.

(2) The parents of a minor emancipated by court order are jointly and severally obligated to support the minor. However, the parents of a minor emancipated by court order are not liable for any debts incurred by the minor during the period of emancipation.

MINNESOTA

IN RE APPLICATION OF COUNTY OF ST. LOUIS TO DETERMINE SETTLEMENT OF LADEAN FIIHR. COUNTY OF ST. LOUIS V. COUNTY OF SCOTT

No. 42371

Supreme Court of Minnesota

289 Minn. 322; 184 N.W.2d 22; 1971 Minn. LEXIS 1227

February 12, 1971

OPINION BY NELSON

Appeal by Scott County from an order of the District Court of St. Louis County whereby Scott County was adjudicated the legal settlement for poor relief purposes within the State of Minnesota of LaDean Fiihr and her minor child, Julie Fiihr, and was ordered to assume the expenses of care and support of Julie Fiihr. The appeal results from an action initiated by respondent, St. Louis County, to determine whether respondent or appellant, Scott County, would ultimately bear the expense of caring for Julie Fiihr, born out of wedlock to LaDean Fiihr on April 18, 1968.

The mother, LaDean Fiihr, was born near Brookings, South Dakota, on October 15, 1947, and lived with her parents until November 25, 1966, when she moved to Shakopee, Scott County, Minnesota. In Shakopee she lived with her brother and spent the first three weeks of her stay babysitting for his family and looking for a job. She eventually obtained a job in Golden Valley, and a short time later moved out of her brother's house but continued to reside in Shakopee.

Sometime during the fall of 1967, LaDean became pregnant and was sent by the putative father to the Bethel Home for unmarried expectant mothers in Duluth to await the birth of her illegitimate child. On April 18, 1968, LaDean gave birth to a baby girl, Julie Fiihr, at the Bethel Home. LaDean gave up the baby while she was at the home, and her parental rights were subsequently terminated. She returned to Shakopee on April 27, 1968, to resume her residence there, leaving the child in St. Louis County under the care and support of the St. Louis County Welfare Department. Unfortunately, the child was born a hydrocephalic with serious mental deficiencies. Substantial expense has already been incurred for her care, treatment, and support, and the outlook is that Julie will probably require full support and care during her entire lifetime.

Respondent petitioned the district court pursuant to Minn. St. 261.08 to affix and determine the legal settlement for poor-relief purposes for LaDean Fiihr, there being a dispute between the two counties as to which county was responsible under the law for the care and maintenance of Julie Fiihr. Both parties stipulated that the Bethel Home, situs of LaDean's residence while in St. Louis County, is a public institution under § 261.07, n1 so that all of the time LaDean spent in St. Louis County was excluded time and could not be used for purposes of determining settlement; and that her only purpose for going to Duluth was to have the child, leave it, and return to Shakopee.

n1 See, Minn. St. 261.07, subds. 1, 2, and 3.

After hearing testimony and receiving other evidence, the court issued findings of fact, conclusions of law, and an order determining that Scott County was the legal settlement for poor-relief purposes of LaDean Fiihr and Julie Fiihr and that Scott County must assume the expense of care and support for the minor child.

The issues involved here are: (1) Was LaDean an emancipated minor from November 27, 1966, to November 27, 1967, the time during which she lived in Scott County, and therefore eligible for a legal settlement for poor-relief purposes in Scott County? (2) Is a proponent of evidence bound by the evidence he introduces?

1. Appellant contends that LaDean was an unemancipated minor between November 27, 1966, and November 27, 1967, when she was 19 years old and resided in Scott County before the birth of her child. As such, appellant contends, she never obtained settlement in the State of Minnesota and thus could not gain settlement in Scott

County. The district court found that LaDean settled in Scott County in her own right, lived apart from and was not supported by her parents, and was an emancipated minor during the time in question.

Appellant argues that the great weight of evidence adduced at the hearing showed that LaDean was not an emancipated minor. In its brief, it cites evidence that she lived with her brother, who acted as agent for her parents in looking after her; that she planned to return home if things did not work out in Shakopee; that she left most of her clothing with her parents when she came to Shakopee; that she returned home three or four times for visits during the year in question; and that she received gifts from her parents on holidays.

The foregoing evidence is by no means conclusive on the question of LaDean's status as a minor. Appellant in its brief admitted that after finding employment LaDean moved out of her brother's home and lived elsewhere in Shakopee. The fact that she planned to return home if things did not work out in Shakopee seems quite insignificant in light of subsequent events. Of more persuasive force is the fact that when she became pregnant, instead of going home, she went to Duluth to have her child, and after the baby was born, she did not return to South Dakota but returned to Shakopee. Also, when she went to South Dakota for the Christmas holidays in 1966, she collected all of her clothing and belongings and took them to Shakopee with her after Christmas. Making occasional visits to one's parents and receiving birthday and Christmas gifts from them are certainly not indicative of continuing dependence on them, but rather of parental-filial esteem and love which both parents and children may share throughout their lives.

This court has had but few occasions to discuss and legally define an emancipated minor. In *Taubert v. Taubert, 103 Minn. 247, 249, 114 N.W. 763, 764,* a tort action by a minor against his parent, this court stated:

"*** The general rule is that a minor cannot sue his parent for a tort; but, if he has been emancipated, he can. A mere waiver, however, by the parent of the right to the earnings of his minor child, does not alone constitute such emancipation. There must be a surrender by the parent of the right to the services of his minor child, and also the right to the custody and control of his person."

In *Lufkin v. Harvey, 131 Minn. 238, 240, 154 N.W. 1097, 1098,* this court said:

"*** In the United States the doctrine of emancipation has been applied with some liberality. Emancipation is not, however, to be presumed. It must be proved. *** A minor may be emancipated by an instrument in writing, by verbal agreement, or by implication from the conduct of the parties. *** There may be complete emancipation, even though the minor continues to reside with his parents. ***

"Complete emancipation gives to the minor his time and earnings and gives up the parents' custody and control, and in fact works an absolute destruction of the filial relation."

In *In re Settlement of Horton, 212 Minn. 7, 9, 2 N.W. (2d) 149, 150,* we stated:

"*** Emancipation is the act of the parent * * *. Emancipation need not be in writing or in express words. It may be implied from conduct. These considerations apply in whatever form of action or proceeding emancipation is for determination."

Other courts have held that a parent's consent to a child's departure from the parental home to make his own way in the world is an emancipation of the child. See, *Spurgeon v. Mission State Bank (8 Cir.) 151 F. (2d) 702; Rounds Bros. v. McDaniel, 133 Ky. 669, 118 S.W. 956; Holland v. Hartley, 171 N.C. 376, 88 S.E. 507.* In *Swenson v. Swenson, 241 Mo. App. 21, 227 S.W. (2d) 103, 20 A.L.R. (2d) 1409,* the Kansas City Court of Appeals held that emancipation of a child is the relinquishment by the parent of control and authority over the child, conferring on him the right to his earnings and terminating the parent's legal duty to support the child.

In 39 Am. Jur., Parent and Child, § 64, it is stated:

"Whether a child has been emancipated must be determined largely upon the peculiar facts and circumstances of each case and is ordinarily a question for the jury."

In reviewing the abbreviated record submitted on this appeal, and in the light of the authorities cited above, this court is satisfied that the trial court, as sole arbiter of the facts and circumstances, committed no error when it found that LaDean Fiihr became an emancipated minor when she left her home in South Dakota and came to live in Shakopee. As an emancipated minor with a year's residence in Scott County, LaDean acquired legal settlement for poor-relief purposes in Scott County pursuant to § 261.07, subd. 1. Appellant argues that her first three weeks in Shakopee, spent with her brother, gave her only the status of a visitor and, therefore, she did not have the full year of

residence required by the statute. Appellant, however, cites no authority for this proposition, and the wording of § 261.07, subd. 1, "Every person except those hereinafter mentioned, who has resided one year continuously in any county, shall be deemed to have settlement therein," does nothing to strengthen its argument. The evidence is clear that LaDean was a resident of Scott County for the period of November 27, 1966, to November 27, 1967.

2. Appellant further contends that respondent is bound by a memorandum of the State Department of Public Welfare which respondent attached to its petition and which respondent later offered and had received into evidence. It is difficult to see how appellant's contention is a real issue in this case. The memorandum was in response to the Scott County Welfare Department's inquiry as to whether LaDean had obtained a settlement for poor-relief purposes in Minnesota. The memorandum, in effect, stated that in the state department's opinion LaDean was not an emancipated minor and had not gained a poor-relief settlement in Minnesota, but that if she were found to be in need of relief assistance in Minnesota, the county where she was presently residing had the obligation of supplying her emergency needs. Scott County, relying on this memorandum, refused to provide support or expenses for the care of Julie Fiihr, who was under the legal custody of the St. Louis County Welfare Department. It is this memorandum which caused respondent to petition the court to determine who was to provide support for the child.

The court below determined, contrary to the memorandum, that LaDean was an emancipated minor; that she acquired legal settlement for poor-relief purposes in Scott County pursuant to § 261.07, subd. 1; and that Julie, an unemancipated minor, had the same legal settlement as her mother pursuant to § 261.07, subd. 3. The evidence supports this determination.

The position of the welfare department's memorandum at the hearing was not one of uncontradicted and unimpeached evidence, binding respondent, but only of an opinion rendered by a state agency which respondent, under § 261.08, was entitled to challenge in the district court proceeding.

The order of the district court is affirmed.

Affirmed.

MISSISSIPPI

TITLE 93. DOMESTIC RELATIONS

CHAPTER 19. REMOVAL OF DISABILITY OF MINORITY

§ 93-19-1. Removal of disability as to real estate.

The chancery court of the county in which a minor resides, or the chancery court of a county in which a resident minor owns real estate in matters pertaining to such real estate, may remove the disability of minority of such minor. In cases of married minors, the residence of the husband shall be the residence of the parties. The chancery court of a county in which a nonresident minor of the State of Mississippi owns real estate or any interest in real estate may remove the disability of minority of such minor as to such real estate, so as to enable said minor to do and perform all acts with reference to such real estate, to sell and convey, to mortgage, to lease, and to make deeds of trust and contracts, including promissory notes, concerning said real estate, or any interest therein which may be owned by such minor, as fully and effectively as if said minor were twenty-one (21) years of age. The jurisdiction thus exercised shall be that of a court of general equity jurisdiction, and all presumptions in favor of that adjudged shall be accorded at all times.

§ 93-19-3. Application; defendants.

The application therefor shall be made in writing by the minor by his next friend, and it shall state the age of such minor and join as defendants his parent or parents then living, or, if neither be living, two of his adult kin within the third degree, computed according to the civil law, and the reasons on which the removal of disability is sought; and, when such petition shall be filed, the clerk shall issue process as in other suits to make such person or persons parties defendants, which shall be executed and returned as in other cases, and shall make publication for nonresident defendants as required by law, and any person so made a party, or any other relative or friend of the minor, may appear and resist the application.

In cases where a minor has been adopted by decree of court, the adoptive parent or parents, or the next of kin of the adoptive parent, or parents, as the case may be, shall be joined as defendants in lieu of the natural parents or the next of kin of the natural parents, as herein provided. Where the custody and control of a minor has been by decree of court awarded to one of the natural parents to the exclusion of the other, it shall be sufficient herein to join as defendant only the parent to whom the custody and control has been awarded.

§ 93-19-5. Application; when defendants are not necessary.

If the parent or parents then living, or, if they both be not living, if any two of his adult kin within the third degree shall unite with the minor and his next friend in his application, or if the minor has no parent then living and no kindred within the prescribed degree whose place of residence is known to him or his next friend, it shall not be necessary to make any person defendant thereto. But the court shall proceed to investigate the merits of such application, and decree thereon as in other cases.

In cases where a minor has been adopted by decree of court, the adoptive parent or parents, or the next of kin of the adoptive parent or parents, as the case may be, may unite with the minor and his next friend in his application in lieu of the natural parents or the next of kin of the natural parents, as herein provided. Where the custody and control of a minor has been by decree of court awarded to one of the natural parents or adopted parents, as the case may be, to the exclusion of the other, it shall be sufficient herein for only the parent to whom the custody and control has been awarded to unite with the minor and his next friend in his application, as herein provided.

§ 93-19-7. Trial and decree.

When the proper persons have been made parties to the application, the court shall examine it, and the objections to it, if any, and may hear testimony in open court, in reference thereto, and shall make such decree thereon as may be for the best interest of the minor.

§ 93-19-9. Terms of decree.

The decree may be for the partial removal of the disability of the minor so as to enable him to do some particular act proposed to be done and specified in the decree; or it may be general, and empower him to do all acts in reference to his property, and making contracts, and suing and being sued, and engaging in any profession or avocation, which he could do if he were twenty-one years of age; and the decree made shall distinctly specify to what extent the disability of the minor is removed, and what character of acts he is empowered to perform notwithstanding his minority, and may impose such restrictions and qualifications as the court may adjudge proper.

§ 93-19-11. Married minor not under disability for purpose of action involving marital rights.

A married minor shall not be under the disability of minority for the purpose of bringing or defending a suit for divorce, separate maintenance and support, temporary maintenance or support, custody of children or any other action involving marital rights as between the parties, and any married minor may file or defend such a suit in his own name without the necessity of being represented by a next friend or guardian ad litem, and be considered adult for the purposes of such a suit.

§ 93-19-13. Persons eighteen years of age or older competent to contract in matters affecting personal property.

All persons eighteen (18) years of age or older, if not otherwise disqualified, or prohibited by law, shall have the capacity to enter into binding contractual relationships affecting personal property. Nothing in this section shall be construed to affect any contracts entered into prior to July 1, 1976.

In any legal action founded on a contract entered into by a person eighteen (18) years of age or older, the said person may sue in his own name as an adult and be sued in his own name as an adult and be served with process as an adult.

§ 93-19-15. Age requirements for participation in physiological training.

(1) Notwithstanding any other provision of state law, persons eighteen (18) years of age or older shall be entitled to participate in physiological training.

(2) For the purpose of this section, physiological training means the training of flying personnel, passengers, and crew members, military and civilian, which shall include instruction in one (1) or more of the following areas: altitude chamber flights; rapid decompression chamber flights; physiological effects of altitude; human factors in rapid decompression; oxygen equipment; cabin pressurization and decompression; pressure breathing; principles and problems of vision, spatial disorientation and other sensory phenomena; noise and vibration; speed; acceleration; escape from aircraft; emergency procedures; ejection seat and parachute training; and prechamber flight indoctrination.

MISSOURI

MARIAN WURTH, BY HARRY GERSHENSON, HER NEXT FRIEND, APPELLANT, V. JOHN S. WURTH, RESPONDENT

No. 47070

Supreme Court of Missouri En Banc

322 S.W.2d 745; 1959 Mo. LEXIS 856

03/09/59

OPINION BY WESTHUES, J.

Plaintiff Marian Wurth, by Harry Gershenson, her next friend, filed this suit against her father, defendant John S. Wurth, to recover $25,000 as damages for personal injuries alleged to have been sustained through the negligence of the defendant. A trial before a jury resulted in a verdict for plaintiff in the sum of $5,700. The trial court sustained defendant's motion to set aside the verdict and to enter judgment for the defendant. From the judgment entered, plaintiff appealed to the St. Louis Court of Appeals which court affirmed the judgment of the trial court. *313 S.W.(2d) 161.* This court ordered the case transferred here for determination.

The trial court set aside the verdict for plaintiff and entered a judgment for the defendant on the theory that plaintiff was a minor and had not been emancipated at the time she was injured and that therefore she could not maintain a suit in tort against her father. That is the principal question briefed and the point for our determination is whether the evidence was sufficient to support a finding that plaintiff had been emancipated. The question was submitted to a jury and by the verdict it found for the plaintiff.

Defendant, in the brief, did not question the sufficiency of the evidence to sustain a finding that plaintiff was injured as a result of his negligence. A brief statement of the evidence therefore will be sufficient. Plaintiff was, on January 9, 1953, employed by the Bell Telephone Company and worked at the office located at 2317 South Grand Avenue, St. Louis, Missouri. On the morning of that day, defendant, as was his habit, took plaintiff to work. The streets were icy in spots and some streets were pretty well covered with ice. Plaintiff admonished defendant not to drive so fast because of the icy condition. Shortly thereafter, the car went into a spin and struck a lamp post. Plaintiff was thrown from the car and was injured. This suit was filed to recover damages to compensate her for her injuries.

Plaintiff's evidence to sustain her claim that she had been emancipated supports the following statement of facts: Plaintiff, when 19 years of age, began to work for the Bell Telephone Company. This was about a year and a half before she was injured. Plaintiff retained her wages and paid for her clothing, her medical and doctor bills, paid her parents for board and room, and, in general, paid all of her own bills. After she was injured, she paid the hospital bills, one of which amounted to $327.45. She had not paid all of the expenses incurred by reason of the injuries she received, but she was personally obligated to pay for them. There was no evidence that plaintiff's parents paid for any of her needs after plaintiff started working at the Bell Telephone Company nor is there any evidence that the parents assumed any obligation on her behalf after plaintiff began working.

The defendant offered no evidence and it may be inferred that the parents acquiesced and agreed that plaintiff should retain all of her wages and pay her own way.

Defendant, in the first point briefed, asserts that the trial court ruled correctly in entering judgment for defendant because an unemancipated minor cannot sue his parents by reason of an unintentional tort. We may concede that to be the rule. We so held in a case cited by the defendant where the question was reviewed at some length. *Baker v. Baker, 364 Mo. 453, 263 S.W.(2d) 29.*

Defendant also says in another point that the burden of proof rests upon the party asserting emancipation, in this case, the plaintiff. That may also be conceded to be the correct rule. *Beebe v. Kansas City, 223 Mo.App. 642, 17 S.W.(2d) 608,* l.c. 612(9,10); 67 C.J.S. 816, Sec. 90.

Defendant, in briefing the principal question before us, says that the trial court ruled correctly in entering judgment for the defendant because "there was a failure of proof, by competent, credible and sufficient evidence that plaintiff was a completely emancipated minor on the date of her casualty." As to the quantum of proof necessary to establish voluntary emancipation, we note and quote excerpts from 67 C.J.S. 812-814, Sec. 88, as follows: "The intention of the parent to emancipate the child may be expressed either in writing or orally, or it may be implied from his conduct or from other circumstances. *** Emancipation may also be implied by the parent's acquiescence in his child's working for others, receiving its pay therefor, and spending the money as it pleases." It may be noted that, generally speaking, the parents must consent or agree that a minor child be emancipated and unless the parents so give their consent, the child retains the status of an unemancipated minor.

Plaintiff in this case sued her father, the defendant, on the theory that she had been emancipated. Plaintiff offered evidence to sustain her claims, the substance of which we have heretofore stated. In our opinion, the facts proven are sufficient to sustain a finding that plaintiff had been emancipated. The evidence of plaintiff was not contradicted by any circumstance or any evidence of the defendant.

The Supreme Court of Errors of Connecticut had before it a case very similar to the one before us in *Wood v. Wood, 135 Conn. 280, 63 A.(2d) 586.* The plaintiff in that case sued her father in a personal injury action alleging that she had been injured through her father's negligent operation of a car in which she was a passenger. Her evidence as to emancipation was about the same as plaintiff's evidence in the case at bar. There is this difference: in the Wood case, the minor did not pay her parents anything for her board while in the case at bar, the plaintiff did pay board. This fact, we think, makes a stronger case for Marian Wurth than for plaintiff in the Wood case. The Connecticut court, in the course of the opinion, *63 A.(2d) at 588*(4), said, "These facts afford strong support for an inference of emancipation, as is shown by many authorities, of which we mention but a few. (Citation of cases omitted.) These authorities indicate that as a general rule the fact that a child has entered into a relation which is inconsistent with the idea of his being in a subordinate situation in his parent's family is sufficient to effect an emancipation. 39 Am.Jur. 704."

In the case of *Zozaski v. Mather Stock Car Co., 312 Ill.App. 585, 38 N.E.(2d) 825,* the evidence as to emancipation was that a minor son employed by the defendant company had paid board and room at his home and paid all of his own bills and that neither his father nor his mother contributed in any way to his support or maintenance. The court held the son was emancipated. *38 N.E.(2d) at 826*(2-4).

The opinions in the Connecticut and Illinois cases disclose that the court in each case considered cases from other jurisdictions and cited such cases as supporting their decisions. The general rule is that the question of emancipation under conflicting evidence is for a jury. *Wood v. Wood, supra, 63 A.(2d) 588*(6,7). Missouri cases have followed that rule. *Brosius v. Barker, 154 Mo.App. 657, 136 S.W. 18; McMorrow v. Dowell, 116 Mo.App. 289, 90 S.W. 728; Dierker v. Hess, 54 Mo. 246.*

Defendant cited the case of *Swenson v. Swenson, Mo. App., 227 S.W.(2d) 103.* That case involved the question of whether a minor is emancipated by enlisting in the military service with the consent of his parents. The Court of Appeals said he was. In the case of *Beebe v. Kansas City, supra,* a father sued the defendant for damages sustained by his son. One of the defenses presented on appeal was that the son had been emancipated. The Court of Appeals held that in such cases emancipation, if relied on as a defense, must be pleaded; that it was not so pleaded, and therefore the defendant could not take advantage of such a defense. The court commented that the consent of a father that his son should retain his wages was but a license and could be revoked. *17 S.W.2d at 612* (9,10). The question of emancipation was not presented as an issue in the case.

We rule that the evidence in the case before us justified the submission of emancipation to a jury. The jury found this issue for the plaintiff.

The order of the trial court sustaining defendant's motion to set aside the verdict and judgment in plaintiff's favor and to enter a judgment for the defendant and the order of the trial court entering a judgment for the defendant are hereby set aside with directions to the trial court to reinstate the verdict of the jury and to enter judgment thereon in plaintiff's favor as of the date of the verdict.

It is so ordered.

Hollingsworth, C.J., Hyde, Storckman, and Dalton, JJ., Concur; Eager, J., dissents; Leedy, J., dissents and adopts opinion of St. Louis Court of Appeals as his dissenting opinion, found at *313 S.W.2d 161.*

MONTANA

TITLE 41. MINORS

CHAPTER 1. RIGHTS AND OBLIGATIONS OF MINORS

PART 5. LIMITED EMANCIPATION

41-1-501. Limited emancipation.

(1) The court may, upon the request of a youth who is 16 years of age or older, the youth's parent, or the department of public health and human services, enter an order granting limited emancipation to the youth.

(2) Limited emancipation may be granted only if the court has found:

(a) that limited emancipation is in the youth's best interests;

(b) that the youth desires limited emancipation;

(c) that there exists no public interest compelling denial of limited emancipation;

(d) that the youth has, or will reasonably obtain, money sufficient to pay for financial obligations incurred as a result of limited emancipation;

(e) that the youth, as shown by prior conduct and preparation, understands and may be expected to responsibly exercise those rights and responsibilities incurred as a result of limited emancipation;

(f) that the youth has graduated or will continue to diligently pursue graduation from high school, unless circumstances clearly compel deferral of education; and

(g) that, if it is considered necessary by the court, the youth will undergo periodic counseling with an appropriate advisor.

(3) An order of limited emancipation must specifically set forth the rights and responsibilities that are being conferred upon the youth. These may include but are not limited to one or more of the following:

(a) the right to live independently of in-house supervision;

(b) the right to live in housing of the youth's choice;

(c) the right to directly receive and expend money to which the youth is entitled and to conduct the youth's own financial affairs;

(d) the right to enter into contractual agreements and incur debts;

(e) the right to obtain access to medical treatment and records upon the youth's own authorization; and

(f) the right to obtain a license to operate equipment or perform a service.

(4) An order of limited emancipation must include a provision requiring that the youth make periodic reports to the court upon terms prescribed by the court.

(5) The court, on its own motion or on the motion of the county attorney or any parties to the dispositional hearing, may modify or revoke the order upon a showing that:

(a) the youth has committed a material violation of the law;

(b) the youth has violated a condition of the limited emancipation order; or

(c) the best interests of the youth are no longer served by limited emancipation.

41-1-202. Enforcement of minor's rights.

A minor may enforce his rights by civil action or other legal proceedings in the same manner as a person of full age, except that a guardian must conduct the same.

41-1-306. Minor cannot disaffirm certain obligations.

A minor cannot disaffirm an obligation, otherwise valid, entered into by him under the express authority or direction of a statute or when he has been granted limited emancipation, including a specific right to enter into contracts, under 41-1-501 and 41-3-438.

41-3-438. Disposition -- hearing -- order.

(1) Unless a petition is dismissed or unless otherwise stipulated by the parties pursuant to 41-3-434 or ordered by the court, a dispositional hearing must be held on every petition filed under this chapter within 20 days after an adjudicatory order has been entered under 41-3-437. Exceptions to the time limit may be allowed only in cases involving newly discovered evidence, unavoidable delays in the notification of parties, and unforeseen personal emergencies.

(2) (a) A dispositional order must be made after a dispositional hearing that is separate from the adjudicatory hearing under 41-3-437. The hearing process must be scheduled and structured so that dispositional issues are specifically addressed apart from adjudicatory issues. Hearsay evidence is admissible at the dispositional hearing.

(b) A dispositional hearing may follow an adjudicatory hearing in a bifurcated manner immediately after the adjudicatory phase of the proceedings if:

(i) all required reports are available and have been received by all parties or their attorneys at least 5 working days in advance of the hearing; and

(ii) the judge has an opportunity to review the reports after the adjudication.

(3) If a child is found to be a youth in need of care under 41-3-437, the court may enter its judgment, making any of the following dispositions to protect the welfare of the child:

(a) permit the child to remain with the child's parent or guardian, subject to those conditions and limitations the court may prescribe;

(b) grant an order of limited emancipation to a child who is 16 years of age or older, as provided in 41-1-501;

(c) transfer temporary legal custody to any of the following:

(i) the department;

(ii) a licensed child-placing agency that is willing and able to assume responsibility for the education, care, and maintenance of the child and that is licensed or otherwise authorized by law to receive and provide care of the child; or

(iii) a relative or other individual who is recommended by the department or a licensed child-placing agency designated by the court and who is found by the court to be qualified to receive and care for the child;

(d) order a party to the action to do what is necessary to give effect to the final disposition, including undertaking medical and psychological evaluations, treatment, and counseling that does not require an expenditure of money by the department unless the department consents and informs the court that resources are available for payment. The department is the payor of last resort after all family, insurance, and other resources have been examined.

(e) order further care and treatment as the court considers in the best interests of the child that does not require an expenditure of money by the department unless the department consents and informs the court that resources are available for the proposed care and treatment. The department is the payor of last resort after all family, insurance, and other resources have been examined pursuant to 41-3-446.

(4) (a) If the court awards temporary legal custody of an abandoned child other than to the department or to a noncustodial parent, the court shall award temporary legal custody of the child to a member of the child's extended family, including adult siblings, grandparents, great-grandparents, aunts, and uncles, if:

(i) placement of the abandoned child with the extended family member is in the best interests of the child;

(ii) the extended family member requests that the child be placed with the family member; and

(iii) the extended family member is found by the court to be qualified to receive and care for the child.

(b) If more than one extended family member satisfies the requirements of subsection (4)(a), the court may award custody to the extended family member who can best meet the child's needs.

(5) If reasonable efforts have been made to prevent removal of a child from the home or to return a child to the child's home but continuation of the efforts is determined by the court to be inconsistent with permanency for the child, the department shall make reasonable efforts to place the child in a timely manner in accordance with a permanent plan and to complete whatever steps are necessary to finalize the permanent placement of the child.

(6) If the court finds that reasonable efforts are not necessary pursuant to 41-3-442(1) or subsection (5) of this section, a permanency plan hearing must be held within 30 days of that determination and reasonable efforts must be made to place the child in a timely manner in accordance with the permanency plan and to complete whatever steps are necessary to finalize the permanent placement of the child.

(7) If the time limitations of this section are not met, the court shall review the reasons for the failure and order an appropriate remedy that considers the best interests of the child.

NEBRASKA

ACCENT SERVICE COMPANY, INC., APPELLEE V. VIOLET EBSEN, APPELLANT

No. 43353

SUPREME COURT OF NEBRASKA

209 Neb. 94; 306 N.W.2d 575; 1981 Neb. LEXIS 878

June 5, 1981, Filed

OPINION BY VAN PELT

This is an appeal from a $ 2,555.01 judgment of the District Court of Knox County, Nebraska, entered in favor of the plaintiff-appellee, as assignee, against the defendant-appellant for hospital expenses incurred by defendant's son. The District Court, in affirming the judgment of the county court, found that the evidence was insufficient to establish emancipation by the minor, and that the evidence did establish a contractual liability on the part of the defendant to pay for her son's medical services.

Appellant's first assignment of error is that the trial court erred in finding that there was insufficient evidence of a complete emancipation. Violet Ebsen, a widow, and her 18-year-old son, Dwaine, lived together until approximately December 1976. Dwaine then began associating and staying overnight with people his mother did not like and of whom she did not approve. Arguments over his associations and conduct took place in December of 1976 and in January of 1977. As a result of one such argument, on February 1, 1977, Dwaine took his personal belongings and moved from his mother's home in Verdigre, Nebraska, to Orchard, Nebraska. Both the mother and son agreed that he should move out and support himself. After moving out, Dwaine received no further support from his mother. On February 24, 1977, while still living in Orchard, Dwaine was shot and taken to a hospital in Norfolk, Nebraska. There, the hospital expenses were incurred that are the subject of this litigation. After being hospitalized for 2 weeks, Dwaine returned to his mother's home for 3 days and then left. He has been self-supporting and has not returned to his mother's home since leaving.

Whether Dwaine Ebsen was emancipated at the time of his hospitalization is relevant, since the complete emancipation of a child relieves the parent from liability to those who furnish necessaries of life to that child. *Brosius v. Barker, 154 Mo. App. 657, 136 S.W. 18 (1911); Timmerman v. Brown, 268 S.C. 303, 233 S.E.2d 106 (1977); Poudre Valley Hospital District v. Heckart, 491 P.2d 984 (Colo. App. 1971).*

The emancipation of a child by a parent may be proved by circumstantial evidence or by an express agreement, or implied from the conduct of the parties. *Adams & Burke Co. v. Cook, 82 Neb. 684, 118 N.W. 662 (1908).* Although this court has not had an occasion to discuss the factors to be considered in determining whether a minor has become emancipated, they were recently analyzed in Annot., *98 A.L.R.3d 334, 335-36 (1980):* "In general, even in the absence of statute, parents are under a legal as well as a moral obligation to support, maintain, and care for their children, the basis of such a duty resting not only upon the fact of the parent-child relationship, but also upon the interest of the state as parens patriae of children and of the community at large in preventing them from becoming a public burden. However, various voluntary acts of a child, such as marriage or enlistment in military service, have been held to terminate the parent's obligation of support, the issue generally being considered by the courts in terms of whether an emancipation of the child has been effectuated. In those cases involving the issue of whether a parent is obligated to support an unmarried minor child who has voluntarily left home without the consent of the parent, the courts, in actions to compel support from the parent, have uniformly held that such conduct on the part of the child terminated the support obligation.

"Correlative to a parent's obligation of support and maintenance of a minor child is the liability of a parent to others who have performed the support obligation for the parent by furnishing the child with necessaries. Generally, a parent's liability for necessaries furnished a minor child will depend on a variety of circumstances, but it appears clear that no liability exists where the parent has been ready and willing at all times to supply necessaries himself

and to otherwise fulfill his obligation to support the child. Thus, it has been held that a parent was not liable to a third person furnishing necessaries to an unmarried minor child while voluntarily living apart from the parent with consent, the courts concluding that in such a case the parent was under no obligation to support the child and that the child carried with him no authority to bind the parent for the necessaries furnished. However, a parent has been held liable for necessaries furnished his unmarried minor child by a third person while the child was living apart from the parent without consent, where there was evidence that the parent authorized the sale of the goods to the child."

Where a child departed from the family home and the parent consented to the departure, the child was found to be emancipated in *Holland v. Hartley, 171 N.C. 376, 88 S.E. 507 (1916);* in *Poudre Valley Hospital District v. Heckart, supra;* and in *Timmerman v. Brown, 268 S.C. 303, 233 S.E.2d 106 (1977).*

In the instant case, after several months of arguing and the defendant in effect telling her son to either change his behavior or move out, he left his mother's home with her consent. From that time until the hospital expense was incurred, he furnished his own support and received nothing from his mother. Under these facts, Dwaine Ebsen became emancipated, and his mother became relieved of liability to those furnishing him necessaries.

Appellant's second assignment of error is that the trial court erred in finding that there was evidence of a contractual agreement by the defendant to pay her son's hospital expenses. If such an agreement existed, defendant would be liable, regardless of her son's emancipation, under general principles of contract law.

The county court was unable to make a finding that there was or was not a contractual agreement, but entered judgment for the plaintiff on the basis that Dwaine Ebsen was not emancipated. The District Court affirmed the judgment of the county court, with the following additional finding: "3. That Defendant authorized Plaintiff's assignor to furnish medical services of an emergency nature to her minor son, Dwaine Ebsen, orally and by the execution of Exhibit '3' in writing, immediately prior to the furnishing of the first of said services."

Exhibit 3, referred to, is a consent to operation, anesthetics, and other medical services. This document contains no language of a promise, express or implied, to pay for the services. Lucille Loberg, the hospital employee who was present when the defendant signed exhibit 3, testified that normally the hospital uses another document which specifies how the bill is to be paid. However, no such document signed by the defendant was ever produced or received in evidence.

Nor does the record reveal any oral promise to pay the hospital expenses. The closest testimony to such a promise was in the county court, where the defendant, under examination by the plaintiff's attorney, stated that by signing exhibit 3 she wanted her son attended to and wanted him to stay alive. Under examination by her own attorney, she testified that at no time did she say anything to anyone at the hospital that she could or would pay the bill. Plaintiff has the burden of proving any oral or written agreement by a preponderance of the evidence. There is no such evidence in the record.

It should be noted that as to both assignments of error it is difficult to ascertain the plaintiff's exact position, since it filed no brief in this court and did not appear at oral argument. For the reasons set forth above, the order and judgment of the District Court are reversed, and the cause is remanded with directions to dismiss plaintiff's petition and cause of action, at plaintiff's costs.

Reversed and remanded with directions to dismiss.

NEVADA

TITLE 11. DOMESTIC RELATIONS

CHAPTER 129. MINORS' DISABILITIES; JUDICIAL EMANCIPATION OF MINORS

MINORS' DISABILITIES

§ 129.010. Age of majority.

All persons of the age of 18 years who are under no legal disability, and all persons who have been declared emancipated pursuant to NRS 129.080 to 129.140, inclusive, are capable of entering into any contract, and are, to all intents and purposes, held and considered to be of lawful age.

§ 129.020. Disability of minority removed in connection with any transaction entered into pursuant to Servicemen's Readjustment Act of 1944.

1. The disability of minority of any person otherwise eligible for guaranty or insurance of a loan pursuant to the Servicemen's Readjustment Act of 1944, as amended (38 U.S.C. §§ 3701 et seq.), and of the minor spouse of any eligible veteran, irrespective of his or her age, in connection with any transaction entered into pursuant to that act, as amended, is hereby removed for all purposes in connection with such transactions, including, but not limited to, incurring of indebtedness or obligations, acquiring, encumbering, selling, releasing or conveying property or any interest therein, and litigating or settling controversies arising therefrom, if all or part of any obligations incident to such transaction are guaranteed or insured by the Secretary of Veterans Affairs pursuant to such act.

2. This section must not be construed to impose any other or greater rights or liabilities than would exist if such person and such spouse were under no such disability.

TITLE 11. DOMESTIC RELATIONS

CHAPTER 129. MINORS' DISABILITIES; JUDICIAL EMANCIPATION OF MINORS

JUDICIAL EMANCIPATION OF MINORS

§ 129.080. Minor may petition juvenile or family division of district court for decree of emancipation; reference to master.

Any minor who is at least 16 years of age, married or living apart from his parents or legal guardian, and who is a resident of the county, may petition the juvenile division or family division of the district court of that county for a decree of emancipation. The district court may refer the petition to a master appointed pursuant to chapter 62 or 432B of NRS.

§ 129.100. Notice of filing of petition: Form.

1. After a petition has been filed, unless the person to be served voluntarily appears and consents to the hearing, the court shall direct the clerk to issue a notice, reciting briefly the substance of the petition, stating the time and date set for the hearing of the petition, and requiring the person served with the notice to appear before the court at the hearing if he desires to oppose the petition.

2. The notice issued pursuant to subsection 1 must be in substantially the following form:

In the Judicial District Court of the State of Nevada, in and for the County of .

In the matter of the emancipation of , a minor.

Notice

To , the father or , the mother of the above-named minor; or, to the father and mother of the above-named minor; or, to , the legal guardian of the above-named minor; or, to , related to the above-named minor as :

You are hereby notified that there has been filed in the above-entitled court a petition praying for the emancipation of the above-named minor person, and that the petition has been set for hearing before this court, at the courtroom thereof, at , in the County of , on the day of the month of of the year at o'clock _m., at which time and place you are required to be present if you desire to oppose the petition.

Dated (month) (day) (year)

Clerk of court.

(SEAL)

By

Deputy.

NEW HAMPSHIRE[3]

THE CONCORD GROUP INSURANCE COMPANIES V. ERIC R. SLEEPER AND KENNETH J. ANDERSON

No. 91-011

Supreme Court of New Hampshire

135 N.H. 67; 600 A.2d 445; 1991 N.H. LEXIS 137

November 8, 1991, Decided

OPINION BY BROCK

The defendants, Eric Sleeper and Kenneth Anderson, appeal from a ruling of the Superior Court (*Hampsey*, J.) denying them insurance coverage under an insurance policy issued by the plaintiff, Concord Group Insurance Companies (CG). We reverse and remand.

The action arises from a June 9, 1987 automobile accident in Franklin. A Chevrolet S-10 pickup truck driven by Eric Sleeper, a youth of sixteen years at the time, and owned by Mark Gauthier, overturned causing serious injuries to Kenneth Anderson, a passenger. CG filed a petition for declaratory judgment seeking to deny coverage to Eric under an automobile liability policy it issued to Sally French, Eric's grandmother, on the ground that Eric was not a resident of his grandmother's household.

The following underlying facts are not in dispute. Because of disciplinary problems at home, Eric lived at various times with his father in Virginia; his paternal grandmother in Virginia; his maternal grandmother, Sally French, in Franklin; and with his mother and stepfather, Phyllis and Steven Taylor, also of Franklin. Between November 1986 and February 1987, he lived in either his mother's or his grandmother's household in Franklin. At some point in January or February 1987, problems with his mother came to a head, and Eric moved into his grandmother's guest room. He brought with him a partial wardrobe, posters, a stereo, and certain necessities. At least some of his other belongings remained stored in his bedroom at his mother's home, and he continued to use his mother's mailing address. When applying for his first driver's license in the spring of 1987, prior to the accident, he used his grandmother's address.

In February 1987, Eric was arraigned for criminal mischief in Franklin District Court and subsequently placed under the supervision of the probation department. Eric, together with his attorney, then developed a diversion program requiring, among other conditions, that he continue to live with his grandmother. In early May, despite the probation condition, Eric moved into an apartment on Prospect Street in Franklin with several friends. This arrangement was short-lived and, according to Eric, he moved again approximately two weeks later. From Prospect Street, he moved into an apartment with his girl friend in Franklin, which is where Eric lived at the time of the accident.

Shortly after the accident, he broke up with his girl friend, moved to his mother's residence for a period of about a week, and then moved back to his grandmother's house by July 11, 1987, where he remained only until the fall of 1987. On this evidence the trial court concluded that Eric was not a resident of his grandmother's home for purposes of insurance coverage at the time of the accident and granted summary judgment in favor of CG.

Summary judgment affords savings in time, effort, and expense by avoiding a full trial under certain circumstances. *Green Mt. Ins. Co. v. Bonney, 131 N.H. 762, 766, 561 A.2d 1057, 1059 (1989).* The value of judicial economy may not be gained, however, at the expense of denying "a litigant the right of trial where there is a genuine issue of material fact to be litigated." *New Hampshire York Co. v. Titus Constr. Co., 107 N.H. 223, 225, 219 A.2d 708, 710*

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[3] Under Title 1, Chapter 21-B:2 (N.H. Rev. Stat. Ann. § 21-B:2), New Hampshire will recognize the legally emancipated status of a minor judicially effectuated in another state.

(1966). Consequently, RSA 491:8-a, III places on the moving party the burden of showing "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Moreover, the reviewing court must consider the evidence in the light most favorable to the party opposing the motion, giving that party the benefit of all favorable inferences that may be reasonably drawn from the evidence. *McElroy v. Gaffney, 123 N.H. 58, 60, 457 A.2d 429, 430 (1983).* It has been recognized that the presence of a question involving state of mind or intent does not automatically foreclose the application of summary judgment, but it should be cautiously and sparingly invoked in such instances. *See generally Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473 (1962);* C. Wright, A. Miller & M. Kane, Federal Practice and Procedure: Civil § 2730, at 236-38 (2d ed. 1983).

The defendants argue that CG has failed to satisfy its burden of showing that no genuine issue of material fact exists relating to Eric Sleeper's residency at the time of the accident for purposes of insurance coverage.

The insurance policy issued by CG to Eric's grandmother, Sally, provides under Part I that "Persons Insured" include:

"(b) with respect to a non-owned automobile, ... (2) any relative, but only with respect to a private passenger automobile or trailer, provided his actual operation ... is with the permission, or reasonably believed to be with the permission, of the owner and is within the scope of such permission."

The policy definitions under Part I further provide: "'[R]elative' means a relative of the named insured who is a resident of the same household." The term "residence," in this context, refers to the place where an individual physically dwells, while regarding it as his principal place of abode. *Metropolitan Prop. & Liabil. Ins. Co. v. Martin, 132 N.H. 593, 596, 574 A.2d 931, 933 (1989).* A determination of residency involves weighing a number of factors, *Holyoke Mutual Ins. Co. v. Carr, 130 N.H. 698, 699, 546 A.2d 1070, 1071 (1988); Connolly v. Galvin, 120 N.H. 219, 220-21, 412 A.2d 428, 429 (1980),* and in cases where a period of residency is followed by physical absence, as in this case, the individual's intent is particularly important. Annotation, *Who is "Resident" or "Member" of Same "Household" or "Family" as Named Insured, within Liability Insurance Provision Defining Additional Insureds*, *93 A.L.R. 3d 420, 427-28 (1979); see also* 1 Widiss, Uninsured & Underinsured § § 4.12, 4.13, at 94-95 (2d ed. 1990).

CG argues that Eric's own deposition testimony demonstrates his intent eventually to return to his mother's home once they resolved their problems and, in any event, not to return to his grandmother's home after he moved out in the late spring of 1987. His statements, however, must be weighed against the complexities lent by his young age, immaturity, court involvement, and strained family relationships at that time. These circumstances support an inference that, by moving from his grandmother's home, Eric attempted what may be considered an experiment with independence. Eric, however, was a sixteen-year-old ninth grade dropout, and, although employed, he did not achieve financial independence from his mother and grandmother. While his general desire to return to his mother's home at some time in the future is evident, the record does not conclusively reveal where Eric intended to live in the likely event that he failed to make it on his own.

Furthermore, in light of Eric's young age, the import of his deposition testimony is obscured by the additional issue of whether Eric was an emancipated child at the time of the accident. We are concerned with emancipation in the sense that it relates to the parental rights of control and authority over the child. 59 Am. Jur. 2d *Parent and Child* § 80 (1987). If Eric was not emancipated, his intent diminishes as a factor, and our focus becomes more concerned with his parents' intentions regarding his living arrangements. *See Tencza v. Aetna Casualty and Surety Co., 111 Ariz. 226, 228, 527 P.2d 97, 99 (1974)* (upholding trial court's finding that stepdaughter was emancipated and therefore not a resident of stepfather's household for insurance purposes).

Emancipation is never presumed; rather, the person asserting it has the burden of proving that the child is indeed emancipated. 59 Am. Jur. 2d, *supra* § 85. Moreover, it is the parents' intent that governs whether a child has been emancipated, and with the few exceptions of entering into marriage or military service, emancipation may not be accomplished by an act of the child alone. 59 Am. Jur. 2d, *supra* § § 80, 83-85. Although emancipation is often implied from the particular facts and circumstances of a given case, we are unable to say that Eric achieved emancipation and was therefore freely able to terminate residency in his grandmother's household.

We must, therefore, conclude that the question of whether Eric Sleeper, at the time of the accident, was a resident of his grandmother's household for purposes of insurance coverage could not properly be decided on summary judgment. Accordingly, the trial court erred in granting CG's motion, and we reverse and remand for further proceedings consistent with this opinion. *Reversed and remanded*.

NEW JERSEY[4]

CARLENE BISHOP, PLAINTIFF V. ROBERT BISHOP, DEFENDANT

Docket No. FM-21122-86

Superior Court of New Jersey, Chancery Division, Family Part, Passaic County

287 N.J. Super. 593; 671 A.2d 644; 1995 N.J. Super. LEXIS 600

July 28, 1995, Decided

OPINION BY DE LUCCIA

The issue in this case is whether a 20-year old cadet enrolled at the United States Military Academy at West Point (West Point) should be declared emancipated, thus relieving his divorced father from any obligation to provide his former spouse with child support. This question does not appear to have been previously considered in any reported decision in this jurisdiction. What hereinafter follows is the court's written supplementation of its oral decision rendered from the bench on July 28, 1995.

The matter is before the court by way of plaintiff's post-judgment motion which seeks enforcement of a certain interspousal agreement entered into at the time of the divorce. Plaintiff requests an increase in child support as well as establishment of support arrears. Other issues not germane to this question were also presented for the court's consideration. They were separately addressed in the court's oral decision, and are not included in this opinion.

The present controversy evolved as follows: The parties were divorced by judgment entered January 7, 1988. The judgment incorporated the terms of a "verbal property settlement and support agreement" which had been placed upon the record on an earlier date. The agreement purportedly resolved the custody and economic issues in the dissolution of their marriage.

The agreement provided that the parties were to share "joint legal custody" of their three children with physical custody reposing with plaintiff. Defendant was obligated to pay child support in the sum of $ 600 per month. The support payments were allocated $ 200 per month per child. The agreement also required that "...the payment of support for each child ... continue until such time as each child is emancipated." The parties failed to define "emancipation" in their agreement. The agreement also stipulated that the parties were to "...share expenses for the attendance at college by the children on a basis consistent with the respective financial abilities to pay at the time a particular child attends college." The agreement did not recite a formula or method for the determination of that obligation. However, the parties were to confer in respect of the selection of any post-secondary educational opportunity for the children.

Sometime prior to this motion, defendant reduced his support payments from $ 600 to $ 400. This action was apparently the consequence of the emancipation of the parties' eldest child. This reduction has not been contested by plaintiff. However, when the parties' second child entered West Point in August 1993, defendant again unilaterally reduced his monthly child support obligation by an additional $ 200. Plaintiff now resists defendant's action.

Plaintiff contends that notwithstanding her son's status as a cadet at West Point, she continues to provide him with significant financial support, and therefore, is entitled to have defendant's support obligation continue, if not increased. Plaintiff argues that their son should be treated in the same fashion as any other unemancipated child attending college. She claims that she continues to maintain the former marital home in part to accommodate her son's seven to nine weekend visits per semester. Additionally, her son returns home for approximately one month

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[4] Emancipation as a status is recognized under N.J. Stat. Ann. § 55:14L-2 (2001), but is there limited to individuals living with human immunodeficiency virus (HIV) who are currently homeless, or at risk of homelessness, for the purposes of services relating to HIV status under Title 55, “Tenement Houses and Public Housing,” Chapter 14l, “Scattered Site Aids Permanent Housing Program,” (N.J. Stat. Ann. § 55:14L-1 - § 55:14L-5 (2001)).

during the summer. Plaintiff maintains that during such visits she incurs additional expenses for food and transportation.

Defendant argues that his son's status at West Point is not analogous to the typical college student. He maintains that federal law considers cadets at West Point as members of the United States Army on active duty. He further notes that not only does his son receive his education without parental contribution, but all of his other expenses including room and board are paid by the military. In addition, he receives a stipend of $ 100.00 per month. He notes that traditionally, minors who enter the military are deemed emancipated.

The parties submitted certifications and affidavits in support of their respective positions. Upon review, the court has concluded that there are no material facts which are genuinely controverted. Consequently, the motion will be addressed without the benefit of a plenary hearing. *Shaw v. Shaw, 138 N.J. Super. 436, 440, 351 A.2d 374 (App. Div. 1976).* n1

> n1 Unfortunately in a misguided effort to bolster their respective arguments, each party had their son submit a certification in support of their respective positions. Not only were the certifications singularly unhelpful, but they unnecessarily interjected this young man in the midst of a legal squabble between his parents. In the certification submitted in support of plaintiff's application, the son stated that he was "not emancipated." In the pleading submitted on behalf of defendant, he retracted that conclusion. Since the facts contained in his certifications were not seriously in dispute, his conclusions as to his status are superfluous. Embroiling this young man in the present controversy served no purpose other than to unnecessarily divide his loyalties between his parents.

It is firmly established that there is no specific age at which the emancipation of a child occurs. The issue is fact sensitive and requires a critical evaluation of then prevailing circumstances as they are presented in each case. *Newburgh v. Arrigo, 88 N.J. 529, 543, 443 A.2d 1031 (1982).* Generally, a rebuttable presumption against emancipation exists prior to the attainment of the age of majority which is eighteen. Reaching age eighteen establishes prima facie, but not conclusive proof of emancipation. Ibid.

The reported decisions in this jurisdiction hold that the emancipation of a child occurs when the fundamental defendant relationship between parent and child is terminated. When a child moves beyond the sphere of influence and responsibility exercised by a parent and obtains an independent status on his or her own, generally he or she will be deemed emancipated. Thus emancipation has been recognized upon a child's marriage, *Leith v. Horgan, 24 N.J. Super. 516, 518, 95 A.2d 15 (App. Div. 1953);* induction into the military service, *Slep v. Slep, 43 N.J. Super. 538, 543, 129 A.2d 317 (Ch. Div. 1957),* or by the entry of a court order based upon a determination as to the child's best interest, *N.J. Div. of Youth & Family Serv. v. V, 154 N.J. Super. 531, 536-537, 381 A.2d 1241* (J. & D. R. Ct. 1977).

In *Newburgh, supra,* the Supreme Court recognized that, "...in appropriate circumstances, the privilege of parenthood carries with it the duty to assure a necessary education for children." *Id. at 543.* Consonant with that principal, our courts have required divorced parents to contribute towards a child's post-secondary education, *Khalaf v. Khalaf, 58 N.J. 63, 71-72, 275 A.2d 132 (1971);* required supporting spouses to continue support payments while a child was enrolled in a full time undergraduate program, *Limpert v. Limpert, 119 N.J. Super. 438, 442-443, 292 A.2d 38 (App. Div. 1972);* and have even required the continuation of support payments for a twenty-three year old child pursuing a post-graduate law degree, *Ross v. Ross, 167 N.J. Super. 441, 444-446, 400 A.2d 1233 (Ch. Div. 1979).* An examination of the facts in these cases reveals that the children continued to maintain a dependent relationship with the custodial parent notwithstanding their chronological age. Accordingly, the parental support obligations continued.

The issue in the present case must be examined by the same standards. Thus, it is not Cadet Bishop's age that is dispositive, rather it is his status as a West Point cadet and how, if at all, that status affects his dependency upon his parents. Although New Jersey courts have yet to report any decisions on this issue, other states have addressed this question. In *Porath v. McVey, 884 S.W.2d 692 (Mo. App. S. D. 1994),* the Missouri Court of Appeals concluded that an eighteen year old West Point cadet was emancipated, as a consequence of which his father's child support obligation was terminated. Although the decision in Porath in part relied upon a specific Missouri statute which legislatively terminated child support obligations when a child entered "active duty in the military", that court's analysis of this issue is nonetheless here pertinent. The Missouri court was required to determine whether the child's attendance at West Point constituted "active duty in the military" as that term was employed in the Missouri statute authorizing termination of child support payments. The parties in Porath framed the issues in a similar fashion as

have the parties here. The Missouri Court of Appeals analyzed the issue in view of whether the lifestyle changes imposed upon a cadet by West Point had by their very nature terminated parental control and responsibility.

Although the Missouri-statute did not define the meaning of "active duty in the military", the court resorted to review of the United States Code to determine whether a West Point cadet obtained that status. The court found that:

10 U.S.C. § 101(d) 1 defines active duty as "...full time duty in the active military service of the United States. Such term includes full time training duty, annual training duty, and attendance while in the active military service, at a school designated as a service school by law or by the Secretary of the military department concerned." [emphasis added *Id. at 695.]*

Furthermore, by virtue of *10 U.S.C. § 3075* West Point cadets are deemed part of the Regular Army, which is the component of the Army that consists of persons whose continuous service on active duty in both peace and war is contemplated by law. Ibid.

The Missouri court also observed that *10 U.S.C. § 4349* divided the Corp of Cadets into companies with each company being commanded by a commissioned officer of the Army; required a cadet to perform duties at such places and of such type as the President may direct; and required the Corp of Cadets to be trained in the duties of members of the Army with yearly encampments. Ibid.

The court determined that West Point cadets receive room, board, tuition and medical care from the military and are paid $ 6500 a year all of which is retained for the expenses of a personal computer, uniforms, textbooks and activity fees except for $ 75 (now $ 100) per month which is available to the cadet for personal use. Ibid.

The court observed that plebes entering the academy must complete a six-week cadet basic training program, designed to teach them to be both soldiers and cadets. Between the first and second years at the Academy, cadets are required to undergo eight weeks of military field training. Ibid. Most significantly, the court also found that a West Point cadet's time is rigidly structured and free time is minimal. For example, first year cadets are entitled to only two weekend passes and leave at Christmas and Thanksgiving. The daily schedule for cadets provides for specific times for meals with the cadet's day commencing at 6:30 a.m., taps at 11:30 p.m. and lights out at 12:00. Ibid.

The court also cited other evidence which would distinguish the status of a West Point cadets from students attending non-military educational institutions. For example, cadets are required to sign an oath of allegiance by which they agree to obey the Uniform Code of Military Justice. They also sign an Agreement to Serve wherein they agree to complete the course of instruction at West Point and to thereafter accept an appointment as a commissioned officer and serve on active duty for not less than six consecutive years subsequent to such appointment. Ibid. However, cadets who enter the academy as civilians and who subsequently resign or are separated from the academy prior to their third year do not have any other active service obligation. Ibid.

Based upon the significant degree of control over a West Point cadet by the government, coupled with the fact that a cadet is a full time member of the Army, and actively pursuing a military endeavor, the Missouri Court of Appeals concluded that a West Point cadet's "...status is inconsistent with remaining subject to parental control." *Id. at 696.* Consequently, attendance at West Point qualified a cadet as being in the "active duty of the military" so as to terminate child support obligations under Missouri law. Ibid.

A similar conclusion was reached by the Appellate Division of the New York Supreme Court in *Zuckerman v. Zuckerman, 154 A.D.2d 666, 546 N.Y.S. 2d 666* (App. Div. 2 Dept. 1989). The court also reasoned that since a West Point cadet is a member of the Regular Army, subject to extensive governmental control which is inconsistent with a parent's control and support of a child, and is provided with free tuition, room, board, health care and monthly pay, the cadet was therefore self-supporting and financially independent of his parents. *Id. at 668.* Significantly, the Zuckerman court arrived at its conclusion in the absence of any analogous legislation as existed in Porath. The New York court reached its determination based upon New York case law which defines emancipation as "the renunciation of legal duties by a parent and the surrender of parental rights to a child." (Citations omitted) *Id. at 667.* This definition is consistent with the concept adopted in New Jersey. See *Newburgh v. Arrigo, supra, 88 N.J. at 543.*

In *Dingley v. Dingley, 121 N.H. 670, 433 A.2d 1281 (N.H. 1991)* the New Hampshire Supreme Court determined that a cadet at the United States Air Force Academy was deemed emancipated within the context of a divorce decree which terminated a father's support obligation upon the "emancipation" of his children. In reaching its conclusion, the New Hampshire Supreme Court adopted the same rationale as did the courts in Porath and Zuckerman. The court stated:

"the general rule is that a child becomes emancipated when he enters the military, at least for the period of his military service." (Citations omitted.) The rationale underlying this rule is that a minor who joins the armed forces places himself under the control of the government and enters into a new relationship that is inconsistent with the parent's control and support of the child." (Citations omitted) Id. at 1282.

The New Hampshire Supreme Court specifically rejected the custodial parent's argument that her son was merely a student at the Air Force Academy and not unlike any other college student attending school away from home on a scholarship. The court observed that military academies are quite different from non-military schools, particularly in respect of a cadet's daily life activities which are subject to governmental regulation and supervision. Id. at 1283.

This court's research reveals that this issue has not been uniformly treated in all jurisdictions. For example, in *Koon v. Koon, 50 Wash. 2d 577, 313 P.2d 369 (Wash. 1957)* the Washington Supreme Court declined to emancipate a minor child who had resided with and was supported by his mother during his entire two-year period of military service. In order to accommodate her son, the mother rented a larger apartment at an additional expense. The court continued his divorced father's obligations for support payments.

In *Omohundro v. Omohundro, 8 Ohio App. 3d 318, 457 N.E.2d 324 (Ohio 1982),* the Ohio Court of Appeals concluded that a child who entered the United States Army Reserve for the purposes of attending a drug rehabilitation program and to finish high school, continued to be dependent upon his custodial parent and therefore was not emancipated. The court found that the minor's absence from his mother's home for the purpose of basic training was "temporary," and that upon his return home, she continued to support him. The court held that temporary support from another source followed by a resumption of parental support does not necessarily constitute emancipation unless there is an accompanying renouncement of parental rights. *Id. at 326.*

In *Backstatter v. Backstatter, 66 Misc. 2d 331, 320 N.Y.S.2d 613 (1971)* the New York Supreme Court declined to emancipate a minor child who entered the United States Merchant Marine Academy at Kings Point. The court found that although enrollment at the Merchant Marine Academy was the equivalent of enlistment in the Armed Forces, under particular the circumstances of that case, it did not serve to break his ties with his family. The court determined that the cadet's residence was still his mother's home, which home intended to return to and remain at after completion of his course study at Kings Point.

In Backstatter, the court reached its conclusions based upon the language in the parties separation agreement. The court found that the agreement did not contemplate the circumstance of admission into Kings Point. The agreement provided that support would continue until either the child died, reached 21 years of age, became self-supporting, married or permanently changed his residence to one other than his mother's. The court found that under the specific facts of that case, there was no change in the son's permanent residence while he was attending Kings Point. The court also ruled that the child was not self-supporting. This conclusion was apparently based on his economic circumstances at Kings Point, and the fact that the child's mother provided food and shelter when he was on leave. Id. at 616.

This court finds these authorities to be factually distinguishable from the present case. Furthermore, to the extent that any of these cases may be read to support a contrary conclusion, this court finds the reasoning employed and the results obtained in Porath, Dingley and Zuckerman to be more persuasive.

In the present case, the court is satisfied that Cadet Bishop is in the active duty of the United States Army by virtue of his appointment to West Point. See *Minnich v. World War II Service Compensation Bd., 244 Iowa 715, 57 N.W.2d 803 (Iowa 1953).* While it is true that he is pursuing an education in the Arts and Sciences and, upon graduation, will receive a Bachelor of Science degree, those are perhaps two of the very few circumstances he shares in common with his contemporaries attending non-military colleges. The government provides for all of his educational needs and virtually all of his material requirements, in exchange for which he has abdicated his independence to the government. His primary allegiance is no longer to his custodial parent, but rather to the President of the United States who serves as Commander in Chief of the military. It is the Army, in the form of the authorities at West Point, which determines when he will awake, eat and retire for the day. This regimen stands in stark contrast to collegiate life at non-military colleges and universities.

Plaintiff's claim that she maintains her home to accommodate her son's periodic visits does not alter his status. In the first instance, the seven visit he per semester makes appear to be more a function of the proximity of plaintiff's residence in Wayne, N.J. to West Point, N.Y., rather than an index of his continued dependency. This court is convinced that if he was in attendance at the Air Force Academy rather than West Point, the number of per semester visits would be significantly reduced.

Furthermore, home visits by members of the Armed Forces while on leave is not uncommon. However, such sojourns are temporary and generally do not alter their emancipated status. See *Dingley v. Dingley, supra 433 A. 2d at 1283.* Accordingly, for the foregoing reasons, the court finds that upon his appointment to and enrollment in West Point as a cadet, plaintiff relinquished any remaining control and responsibility over her son. He is therefore deemed emancipated. Consequentially defendant is relieved from his child support obligations for that child.

Although the judgment of divorce specifically allocated child support payments at $ 200 per month per child, the court concludes that the emancipation of Cadet Bishop should not result in an automatic reduction of support by that amount. "Although a court order or agreement of the parties may allocate separate amounts as alimony for the supported spouse and support for each child, these allocations are often arbitrary and may not accurately reflect the actual needs of the individual members of the family." *Ohlhoff v. Ohlhoff, 246 N.J. Super. 1, 8, 586 A.2d 839 (App. Div. 1991).* It has been seven-and-one-half years since defendant's support obligations were first established. The passage of time and the concomitant increases in the cost of living are sufficient to establish changed circumstances justifying a revision of an order or agreement relating to child support. See *Lepis v. Lepis, 83 N.J. 139, 151, 416 A.2d 45 (1980);* see also *Shaw v. Shaw, supra, 138 N.J. Super. at 441.* Accordingly, the support for the party's unemancipated child shall be recalculated consistent with the Child Support Guidelines. See Rule 5:6A.

NEW MEXICO

CHAPTER 32A. CHILDREN'S CODE

ARTICLE 21. EMANCIPATION OF MINORS

§ 32A-21-1. Short title.

Sections 47 through 53 [32A-21-1 to 32A-21-7 NMSA 1978] of this act may be cited as the "Emancipation of Minors Act".

§ 32A-21-2. Legislative findings and purpose.

It is the purpose of the Emancipation of Minors Act [32A-21-1 to 32A-21-7 NMSA 1978] to provide a clear statement defining emancipation and its consequences and to permit an emancipated minor to obtain a court declaration of his status.

§ 32A-21-3. Emancipated minors; description.

An emancipated minor is any person sixteen years of age or older who:

A. has entered into a valid marriage, whether or not the marriage was terminated by dissolution;

B. is on active duty with any of the armed forces of the United States of America; or

C. has received a declaration of emancipation pursuant to the Emancipation of Minors Act [32A-21-1 to 32A-21-7 NMSA 1978].

§ 32A-21-4. Emancipation by declaration.

Any person sixteen years of age or older may be declared an emancipated minor for one or more of the purposes enumerated in the Emancipation of Minors Act [32A-21-1 to 32A-21-7 NMSA 1978] if he is willingly living separate and apart from his parents, guardian or custodian, is managing his own financial affairs and the court finds it in the minor's best interest.

§ 32A-21-5. Over the age of majority; purpose.

An emancipated minor shall be considered as being over the age of majority for one or more of the following purposes:

A. consenting to medical, dental or psychiatric care without parental consent, knowledge or liability;

B. his capacity to enter into a binding contract;

C. his capacity to sue and be sued in his own name;

D. his right to support by his parents;

E. the rights of his parents to his earnings and to control him;

F. establishing his own residence;

G. buying or selling real property;

H. ending all vicarious liability of the minor's parents, guardian or custodian for the minor's torts; provided that nothing in this section shall affect any liability of a parent, guardian, custodian, spouse or employer of a minor imposed by the Motor Vehicle Code or any vicarious liability that arises from an agency relationship; or

I. enrolling in any school or college.

§ 32A-21-6. Public entitlement of emancipated minors.

A declared emancipated minor shall not be denied benefits from any public entitlement program to which he may have been entitled in his own right prior to the declaration of emancipation**.**

§ 32A-21-7. Declaration of Emancipation; petition; contents; notice; mandate.

A. A minor may petition the children's court of the district in which he resides for a declaration of emancipation as described in the Emancipation of Minors Act. The petition shall be verified and shall set forth with specificity the facts bringing the minor within the provisions of the Emancipation of Minors Act [32A-21-1 to 32A-21-7 NMSA 1978].

B. Before the petition is heard, notice shall be given to the minor's parents, guardian or custodian in accordance with the Rules of Civil Procedure for the District Courts.

C. If the court finds that the minor is sixteen years of age or older and is a person described under Section 48 [32A-21-2 NMSA 1978] of this act, the court may grant the petition unless, after having considered all of the evidence introduced at the hearing, it finds that granting the petition would be contrary to the best interests of the minor.

D. If the petition is sustained, the court shall immediately issue a declaration of emancipation containing specific findings of fact and one or more purposes of the emancipation**,** which shall be filed by the county clerk.

E. If the petition is denied, the minor has a right to file a petition for a writ of mandamus.

F. If the petition is sustained, the parents, guardian or custodian of the minor has a right to file a petition for a writ of mandamus if he appeared in the proceeding and opposed the granting of the petition.

G. A declaration of emancipation granted in accordance with the Emancipation of Minors Act [32A-21-1 to 32A-21-7 NMSA 1978] shall be conclusive evidence that the minor is emancipated.

NEW YORK

IN THE MATTER OF ALICE C., RESPONDENT V. BERNARD G. C., APPELLANT

91-03399

Supreme Court of New York, Appellate Division, Second Department

193 A.D.2d 97; 602 N.Y.S.2d 623; 1993 N.Y. App. Div. LEXIS 8718

January 11, 1993, Argued

September 27, 1993, Decided

OPINION BY EIBER, J.

Although a parent's duty to support his or her child until the child reaches the age of 21 years is a matter of fundamental public policy in New York, it has long been recognized that a child may be deemed emancipated, and thus forfeit the right to support, where the child voluntarily and without sufficient cause leaves the parent's home and withdraws from parental control and guidance *(see, Matter of Roe v Doe, 29 NY2d 188).* On this appeal, we are asked to consider whether a child who left his father's home following a heated argument to live with his mother, and thereafter had little contact with his father, emancipated himself through his conduct, thus relieving the father of his obligation of support. For the reasons which follow, in the present case we reject the father's contention that his son was emancipated, and conclude that the father remains obligated to provide support for his child.

I

The petitioner Alice C. married the respondent Bernard C. in the State of Michigan on May 1, 1954, when she was 21 years old. Bernard, who was serving in the Navy when he and Alice were first married, subsequently earned his undergraduate degree at the University of Michigan, and attended medical school. The couple later relocated to New York, and had five children: four daughters and one son. In July 1982 after more than 28 years of marriage, Bernard and Alice separated. The parties were thereafter divorced by judgment dated July 31, 1984. In accordance with a stipulation of settlement dated February 3, 1984, which was not merged in the judgment, custody of the parties' two youngest daughters, 16-year-old Amanda and 9-year-old Alexandra, was awarded to the petitioner mother. Custody of the parties' 13-year-old son Joseph was, however, awarded to the father, Bernard C. Pursuant to the judgment of divorce, Bernard, a physician specializing in internal medicine, was required to pay Alice maintenance in the sum of $ 150 per week until she reached the age of 65, and to pay the sum of $ 150 per week "each for the support and maintenance of the parties' infant children, Amanda and Alexandra". In view of the fact that the father was awarded custody of Joseph, no provision for Joseph's support was included in either the stipulation of settlement or the judgment of divorce.

In May 1986 when Joseph was 15 years old, he and his father became involved in a "confrontation", and as a result, Joseph left his father's home to live with his mother and sisters. Following this change in physical custody, the father began voluntarily making payments of $ 650 per month directly to Joseph, who turned these funds over to his mother to use for his support. However, the father ceased these payments in April 1989 when Joseph was 18 years old. The mother responded by filing a petition to modify the parties' divorce judgment by requiring the husband, *inter alia,* to pay $ 250 per week each for the support and maintenance of the two youngest children, Alexandra and Joseph. *

> * Although the mother also sought increased support for Amanda, the Family Court did not consider an upward modification of support for her because Amanda reached the age of 21 years on May 13, 1989.

The mother's petition alleged that since entry of the judgment of divorce, "there has been a change of circumstances in that [the] child Joseph has returned to the home of the petitioner on or about May of 1986". She further alleged that there had been "a substantial increase in her expenses such as mortgage, taxes, tuition, utilities and the needs of the children". The father countered by filing a cross petition seeking to reduce the mother's maintenance to $ 75 per

week, and to terminate maintenance in 1990 because "the petitioner has had a substantial increase in her earnings, and the respondent has had a substantial decrease in his net earnings".

II

A hearing on the parties' respective applications was commenced in July 1989. At the hearing, the father recalled that Joseph came to live with him shortly after the parties' separation, when he was a 13-year-old eighth grade student. The following year, when Joseph entered high school, his parents decided that he should attend a private school, because it was "closer to where we lived", and better suited "in terms of his needs". During Joseph's first year at his new school, he was an "A" student. However, by early 1986 Joseph was "having growing academic difficulties", and had become "an increasing social problem in the classroom". Joseph's academic performance deteriorated progressively during the winter of 1986, and, according to the father, with the decline in school performance, "our own interactions, father-son, which I thought excellent began to deteriorate". The tension in the father's relationship with his son "accumulated" one evening in May 1986 when he and Joseph began to quarrel over a school homework assignment. Although the father's testimony regarding the argument was somewhat vague, he stated that Joseph's tone of voice began to rise, and that the argument was on the point of turning into a physical confrontation when he advised Joseph that he was going to call the police. While his father telephoned the police precinct, Joseph put on his coat and prepared to leave. As Joseph left the residence, his father warned him, "you go out that door, do not come back". Although the father denied that he had "locked" Joseph out of his home, when questioned as to whether Joseph would have been permitted to reside with him following the altercation, he testified as follows:

"[Q.] Was he permitted to return to reside in your house after he left?

"[A.] He came back ...

"[Q.] No just answer the questions Doctor, yes or no. Was he permitted to reside in your house after that date?

"[A.] In the presence of the police he would have been allowed back in the house, yes madam.

"[Q.] Was he in fact allowed back in the house?

"[A.] The answer is no, not until the police arrived.

"[Q.] He was not yet 18 at that time?

"[A.] That is correct.

"[Q.] He was not employed?

"[A.] He had a part time job with me.

"[Q.] He was not self sufficient?

"[A.] No madam.

"[Q.] So he had to go live somewhere, correct Doctor?

"[A.] He had to live somewhere yes.

"[Q.] After that date did you not make it your ... you did not assume the responsibility for where he was going to live, is that a fair statement?

"[A.] I had no control of where he was going to live.

"[Q.] But he was not going to live with you guys?

"[A.] He exercised his own control.

"[Q.] OK, but he was not going to live with you?

"[A.] It seemed that way, yes."

The issue of the father's contact with Joseph after he went to live with his mother was touched upon only briefly during the hearing. Asked whether he had maintained contact with Joseph "on a regular basis" since his move, the father responded "I have tried numerous times". He then added, "I believe I saw him once, actually, last summer at his sister's wedding, but we did not speak".

The father additionally testified during the hearing that his business income in 1984, when the parties divorced, was approximately $ 99,000. Four years later, in 1988, his business income had increased to approximately $ 123,000.

Joseph C., then 19 years old, also testified at the hearing concerning the events which led him to leave his father's home in 1986. While Joseph maintained that he could not recall the cause of the quarrel which resulted in his move to his mother's home, he denied that he had "in any way threaten[ed] to use [his] hands" against his father during the altercation. Joseph admitted that, immediately following the argument, he voluntarily left his father's home, and made no efforts to return.

Discussing his relationship with his father, Joseph stated that they "got along superbly" during the first two and one-half to three years that they lived together. Joseph added that he still loved his father, despite their shared tendency to be stubborn. While Joseph admitted that he had made no attempt to contact his father since leaving his father's home, he added that, to the best of his knowledge, his father had made no attempt to contact him.

Joseph additionally testified that he was involved in an accident in 1983 while he was living with his father, and that he was subsequently awarded $ 41,000 in settlement of a personal injury suit. He received the money on his eighteenth birthday, after obtaining authorization from his father to withdraw the settlement funds. According to Joseph, his father signed the authorization without offering any advice or instruction about how to use the money, and he did not consult with his father about what to do with the funds. After obtaining the funds, Joseph initially placed $ 15,000 in an account with Merrill Lynch, and spent $ 13,000 to purchase a new car. He was later involved in two accidents, requiring the expenditure of an additional $ 7,000 to repair his car. Joseph further testified that he lent $ 5,000 to a close friend, who failed to pay him back, and that he spent approximately $ 1,200 on gifts for three of his sisters. Joseph also spent $ 2,400 to pay for his room and board and books for his first year at Hofstra University, $ 2,000 for clothing, and about $ 600 to purchase a video cassette recorder, refrigerator, and television for his dormitory room. At the time of the hearing, no money was left in the Merrill Lynch account.

Joseph entered Hofstra University in the fall of 1988, and registered for 16 credits during the fall semester, and 16 credits during the spring semester. However, he "had a problem with attendance", and ended up dropping all of his spring courses. He earned only six credits during his freshman year, and was placed on academic probation. Hofstra University subsequently agreed that if he attended Nassau Community College for one year, he could return to Hofstra University for his junior year. At the time of the hearing, Joseph was enrolled in Nassau Community College, and was taking 12 credits. He was living at home with his mother, and had only missed one class since the beginning of the semester. Joseph further noted that his tuition at Nassau Community College had been $ 765 for the fall semester, and that his mother had paid this fee. Although Joseph was not employed at the time of the hearing, he testified that he had previously held part-time jobs in a movie rental store, and with the Public Safety Department at Hofstra University. No evidence concerning Joseph's earnings from these positions was presented at the hearing.

The petitioner mother Alice C. also testified briefly concerning the circumstances surrounding the change in Joseph's custody. According to the mother, one evening in May 1986 Joseph came to her home and asked if he could live with her because his father had locked him out. She then had a discussion with her son, advising him that if he returned "it would have to be on my terms". On the following day, Joseph removed his possessions from his father's home, and never returned there. Unable to pay Joseph's tuition at his private school, the mother transferred him to West Hempstead High School, after obtaining a signed change of residence form from the father. The mother was not questioned with respect to Joseph's relationship or visitation with his father.

With respect to the financial aspects of her application for an upward modification of child support, the mother testified that when the parties divorced in 1984, she had a part-time position at Hofstra University, and earned about $ 100 per week. She subsequently obtained a full-time position at Hofstra University, and her salary had risen to $ 28,885 per year by the time of the hearing. The mother also testified that in the four years following the divorce, most of her monthly expenses including mortgage payments, food, and insurance premiums, had increased, as had Alexandra's tuition and the cost of her music lessons.

At the conclusion of the hearing, the father's attorney urged the Hearing Examiner to conclude that Joseph was emancipated, arguing that he had "declare[d] he ... is independent" by leaving the custodial residence, and refusing to submit to any form of discipline. The Hearing Examiner rejected the father's argument, instead finding that the father "appears to have washed his hands of his son following an argument in May [1986], and this court is left with no satisfactory explanation as to what exactly happened". The Hearing Examiner also found that the mother had demonstrated significant increases in living expenses for herself and the children, and that the father's income had increased substantially since the divorce. The Hearing Examiner concluded that in view of these changed

circumstances, the father should be required to pay the increased sum of $ 225 per week in support for the parties' daughter, and $ 225 per week for Joseph. Although the father subsequently filed objections to the Hearing Examiner's determination, the Family Court agreed that he should be required to provide support for Joseph, finding insufficient proof that he was emancipated.

On this appeal, the father continues to maintain that Joseph emancipated himself by his conduct, which included leaving the father's home "voluntarily", making no effort to return to his father's residence, and not speaking to his father following the May 1986 argument. The father also submits that Joseph's wasteful and irresponsible use of the $ 41,000 personal injury award establishes his emancipation.

III

In New York, it "has always been, and remains a matter of fundamental policy ... that a [parent] of a minor child is chargeable with the discipline and support of that child" until the child attains the age of 21 years *(Matter of Roe v Doe, 29 NY2d 188, 192-193, supra).* A parent's obligation to support his or her children "in accordance with their needs and his [or her] means" *(Matter of Kummer, 93 AD2d 135, 185; see also, Sassano v Sassano, 143 AD2d 893)* is codified by Family Court Act *§ 413* (1) (a), which provides that "the parents of a child under the age of twenty-one years are chargeable with the support of such child and, if possessed of sufficient means or able to earn such means, shall be required to pay for child support a fair and reasonable sum as the court may determine".

Despite the fact that parents have a continuing obligation to support their children until they reach the age of 21 years, it is beyond cavil that emancipation of the child suspends the parent's support obligation. Children are emancipated if they become economically independent of their parents through employment, entry into military service, or marriage, and may also be deemed constructively emancipated if, without cause, they withdraw from parental control and supervision *(see,* Besharov, Practice Commentary, McKinney's Cons Laws of NY, Book 29A, Family Ct Act *§ 413*, at 70; *see also, Matter of Roe v Doe, supra).*

Turning first to the issue of whether Joseph was emancipated because he was economically independent of his parents, we find that the record contains insufficient evidence to justify a finding that Joseph was self-supporting. While Joseph testified at the hearing that he had previously held two part-time jobs, no evidence regarding his earnings was adduced. Moreover, at the time of the hearing, Joseph was unemployed, was living with his mother, and was attending a local community college as a full-time student *(see, Schneider v Schneider, 116 AD2d 714).* Thus, it is clear that he was not economically independent of his parents.

We further find that Joseph's dissipation of the personal injury settlement he received when he reached the age of 18 did not render him emancipated. Although Family Court Act *§ 413* permits a child's resources to be considered in determining the level of support *(see, Matter of Avitzur v Rose, 174 AD2d 843),* " '[a]bsent evidence of need, children should not be forced ... to use their funds or diminish their assets' " to supply their basic needs, such as shelter, food and clothing *(Malamut v Malamut, 133 AD2d 101, 103,* quoting *Gold v Gold, 96 Misc 2d 481, 483; see also, Guiry v Guiry, 159 AD2d 556, 557).* Thus, a parent is not entirely relieved of his support obligation merely because the child has been awarded a sum of money as compensation for a personal injury. Since the record demonstrates that Joseph had expended the settlement funds prior to the hearing, to deny him support would only serve to cast the entire burden of support on his custodial parent. Moreover, the Court of Appeals has observed that, "delinquent behavior of itself, even if unexplained or persistent, does not generally carry with it the termination of the duty of a parent to support" *(Matter of Roe v Doe, 29 NY2d 188, 193, supra; see also, Matter of Toft v Frisbie, 122 AD2d 456).* Accordingly, while it is apparent that some of Joseph's expenditures were improvident, they do not form a basis for termination of the parental duty of support.

Having found that Joseph was not economically independent of his parents, we must now consider the second distinct basis upon which a finding of emancipation can be based, namely, withdrawal from parental control. Under this doctrine, which has its origins in the holdings of the Court of Appeals in *Matter of Roe v Doe (supra)* and *Matter of Parker v Stage (43 NY2d 128),* a child who is not financially self-sufficient may nevertheless be deemed emancipated if he or she abandons the parental home without sufficient cause and refuses to comply with reasonable parental demands. In *Matter of Roe v Doe (supra)* the 20-year-old daughter of a New York attorney disobeyed her father by taking up residence with a female classmate in an off-campus apartment. Upon learning of his daughter's actions, the father cut off all further support and instructed her to return to New York. Ignoring her father's demands, the daughter sold her automobile, and elected to finish out the school year, living off the proceeds realized from the sale. Upon her return to New York, she chose to reside with the parents of a classmate on Long Island. Under these circumstances, the Court of Appeals concluded that the daughter was no longer entitled to support, holding that

"where, as in the case at bar, a minor of employable age and in full possession of her faculties, voluntarily and without cause, abandons the parent's home, against the will of the parent and for the purpose of avoiding parental control she forfeits her right to demand support" *(Matter of Roe v Doe, supra, at 192).*

Similarly, in *Matter of Parker v Stage (supra)* the Court of Appeals determined that the Department of Social Services could not compel a father to support his 18-year-old daughter, who had left home, voluntarily and against his wishes, to live with her boyfriend and have a child. In concluding that the daughter was no longer entitled to parental support, despite her eligibility for public assistance, the Court observed: "It should be emphasized that this is not a case of an abandoned child, but of an abandoned parent. There is nothing to indicate that the respondent abused his daughter or placed unreasonable demands upon her. There is no showing that he actively drove her from her home or encouraged her to leave in order to have the public assume his obligation of support. Indeed the contrary appears to be true. The undisputed proof in this record establishes that the father continuously supported his daughter from birth; that he urged her to remain at home and continue her schooling; that he was a forgiving parent who always accepted her back after her absences and that he made efforts to obtain employment for her. We simply hold that under these circumstances the courts below could properly refuse to compel him to pay for her support when she chose to leave home to live with her paramour" *(Matter of Parker v Stage, supra, at 134-135).*

On the other hand, "where the child leaves the home for good cause or with the approval of the custodial parent, [he or] she retains [his or] her right to support from the parent" *(Matter of Monroe County Dept. of Social Servs. v San Filippo, 178 AD2d 1011, 1012).* Thus, for example, in *Matter of Knoll v Kilcher (100 AD2d 686),* where the custodial parent apparently consented to a change in custody, the Appellate Division, Third Department, concluded that the Family Court had erred in denying the father child support for the parties' daughter Stephanie. Stephanie left her mother's home to live with her father, who then filed a petition seeking a change in custody and child support. The Family Court awarded custody to the father, but dismissed his petition for child support because Stephanie had voluntarily left her mother's home, and her father had not encouraged her to return. The appellate Court concluded, however, that support had been improperly denied, noting that "[a]lthough Stephanie voluntarily left her mother's home, at that time she was a 15-year-old high school student and, shortly thereafter, her father applied for a change of custody, which request was approved" *(Matter of Knoll v Kilcher, supra, at 687).*

Furthermore, in *Matter of Drago v Drago (138 AD2d 704),* this Court concluded that a child who left her alcoholic mother and refused her father's demand to attend boarding school or join the military, was not emancipated and remained entitled to support from her father. In *Drago,* we found that the child had made out a clear case of misfeasance and neglect on the part of her parents, noting that she had good cause to leave her mother's home because the mother's alcohol abuse resulted in a tumultuous home environment. While a parent may impose reasonable regulations upon a child in return for his support, we further found that the father's demands that his daughter either attend boarding school or join the military were unreasonable, and that he was not "relieved of his support obligation by excluding the child from his household because of her prior truancy and his belief that she will not abide by his strictures" *(Matter of Drago v Drago, supra, at 706).*

Guided by these principles, we find that the evidence presented at the hearing did not establish that Joseph left his father's home without cause to avoid parental control. To the contrary, during the course of a heated argument, the father told the son that he was calling the police, and warned him that if he left the house, he should not return. Here, when asked whether he would have permitted Joseph to reside with him following the altercation, the father responded, "[i]n the presence of the police he would have been allowed back in the house". Although the mother did not formally apply for a change in custody, it is clear that after the argument, the father did not want Joseph to live with him, and he effectively consented to the new custodial arrangement by executing a consent form to allow Joseph to change schools. Under these circumstances, we cannot conclude that Joseph left his father's home, or remained away from the home, against his father's will.

Although *Matter of Roe v Doe (supra)* and *Matter of Parker v Stage (supra),* which created the doctrine of constructive emancipation, involved disobedient children who withdrew from parental control without cause, an additional line of cases has developed which expands the doctrine to encompass a child of employable age who actively abandons the noncustodial parent by refusing all contact and visitation. A leading case in this area is *Cohen v Schnepf (94 AD2d 783),* wherein this Court determined that a father's application to suspend his child support obligation had been properly granted. The father had been denied access to his son for five years. The mother told the father that the son did not want to see him, and during the father's final visit with the son, the stepfather threatened to assault him if he did not leave. Moreover, the son informally used his stepfather's name until he was 18 years old, and then obtained a court order legally changing his name. The son also admitted that communications

with his father had not been successful, due in part to his own actions. In concluding that the son had emancipated himself, we noted that he had alienated his father by using his stepfather's name without the knowledge or consent of his father, by admittedly rejecting visitation, and by legally changing his name when he reached the age of 18 years.

In contrast, where it is the parent who causes a breakdown in communication with his child, or has made no serious effort to contact the child and exercise his visitation rights, the child will not be deemed to have abandoned the parent. For example, in *Lipsky v Lipsky (115 AD2d 361),* the father was a physician with a general practice in Coral Gables, Florida, and the son was a full-time student at Brockport State College in New York. Although the son Phillip had been "in regular, if uneasy, contact with his father" following his parents' divorce, "in 1976 while he was away at summer camp, the defendant suddenly moved to Florida with his second wife. He did not inform his son that he was leaving, left no forwarding address, and ceased making any support payments" *(Lipsky v Lipsky, supra, at 363).* Even after the mother discovered the father's whereabouts, no genuine relationship was reestablished between Phillip and his father. The father refused, without explanation, to attend his son's Bar Mitzvah, did not visit his son when he was ill and required hospitalization, did not invite his son to his home in Florida, and did not go to New York to see the boy. The Court concluded that the father had abandoned his son, both financially and emotionally, and could not "now contend that the estrangement between Phillip and himself relieves him of his duty to meet the boy's educational and other needs" *(Lipsky v Lipsky, supra, at 364).*

In the present case, the father similarly maintains that Joseph abandoned him because, in the wake of the argument which led to the change in custody, he never contacted him or visited him. Like the situation in *Lipsky v Lipsky (supra),* however, we find that this is a case in which the father bears the responsibility for abandoning his son. The record is virtually devoid of any evidence to demonstrate that the father made a serious effort to visit or establish a relationship with Joseph after he left his home. Indeed, the only evidence that the father ever attempted to see or speak with Joseph was his unelaborated statement that he "tried numerous times" to maintain regular contact. However, this bald assertion falls far short of establishing that Joseph refused to see or speak with his father. In contrast, Joseph testified that he still loved his father, and that, to the best of his knowledge, his father had never attempted to contact him. Under these circumstances, we find that the father failed to meet his burden of establishing that Joseph emancipated himself by abandoning the parent-child relationship. Consequently, the estrangement between father and son does not relieve the father of his support obligation.

IV

Since the addition of Joseph to the mother's household constituted a material change in circumstances which was not anticipated by the parties' stipulation of settlement, we further agree that modification of the father's support obligation was appropriate *(see, Riseley v Riseley, 173 AD2d 1103; Matter of Aiken v Aiken, 115 AD2d 919; see generally, Matter of Brescia v Fitts, 56 NY2d 132, 138-140).* However, in considering the propriety of the Family Court's child support award, we note that, although the instant modification proceeding was commenced prior to the enactment of the Child Support Standards Act (hereinafter CSSA), the order appealed from was entered September 12, 1990, nearly one year after the Act went into effect *(see,* Family Ct Act *§ 413*). In view of the paramount interests of children in need of support and because the support guidelines set forth by the statute represent important public policy, we have recognized that the CSSA " 'should be applied to matters which commenced prior to the effective date of the act but which have not yet been finally decided, as here' " *(Matter of Fetherston v Fetherston, 172 AD2d 831, 834; see also, Matter of Borgio v Borgio, 186 AD2d 131).* Moreover, the CSSA was amended, effective July 25, 1990, to make application of the guidelines mandatory rather than permissive with respect to modification applications *(see, Matter of Howard v Howard, 186 AD2d 132; Matter of Pedersen v Pedersen, 176 AD2d 729).* Since the order appealed from was issued after the effective date of the 1990 amendment, the Family Court should have relied upon the CSSA guidelines in modifying the father's support obligation for the parties' two unemancipated children. We therefore remit the matter to the Family Court for a hearing and determination of an appropriate award of child support in accordance with the provisions of the Child Support Standards Act *(see, Matter of Fetherston v Fetherston, supra; Matter of Borgio v Borgio, supra).*

We additionally find, under the circumstances of this case, that the Family Court properly denied the father's application for a downward modification of his spousal maintenance obligation. It is well settled that a party seeking to modify the maintenance provisions of a judgment of divorce in which the terms of a stipulation of settlement have not been merged must establish that the continued enforcement of the maintenance provisions would create an "extreme hardship" (Domestic Relations Law *§ 236* [B] [9] [b]; *Lewis v Lewis, 183 AD2d 875; Wells v Wells, 130 AD2d 487).* Since the hearing record establishes that the father's business income has steadily increased, we cannot

conclude that enforcement of the spousal maintenance provision of the stipulation of settlement would create extreme hardship.

Finally, we decline to address the petitioner mother's request for certain affirmative relief since, as a general rule, relief on appeal may not be afforded to a nonappealing party *(see, Hecht v City of New York, 60 NY2d 57; Matter of Prete v Prete, 193 AD2d 804; Stimmel v Stimmel, 163 AD2d 381, 383).*

Accordingly, the order entered September 12, 1990 is modified, by adding a provision sustaining the objection to the amount of child support awarded and vacating the provision of the order dated March 1, 1990 which awarded child support, and as so modified, the order entered September 12, 1990 is affirmed insofar as appealed from, without costs or disbursements, and the matter is remitted to the Family Court, Nassau County, for a new determination as to child support in accordance with the Child Support Standards Act (Family Ct Act *§ 413*), and for a determination of arrears, if any. Pending a new determination as to child support, the appellant shall continue to make child support payments to the extent required by the order appealed from.

CONCUR BY COPERTINO, J.

Copertino, J., concurs in the result only, with the following memorandum: Joseph C. is not emancipated, and his father thus is obligated to support him until the age of 21 years (Family Ct Act *§ 413*; *Matter of Roe v Doe, 29 NY2d 188).* However, this conclusion should be based not on any finding of fault on the father's part, but rather on the grounds that Joseph is not self-supporting and that his father effectively consented to and approved a change of living arrangements *(see, Matter of Henry v Boyd, 99 AD2d 382, affd 65 NY2d 645; Matter of Monroe County Dept. of Social Servs. v San Filippo, 178 AD2d 1011).* When he signed the change of residence form which permitted his son's transfer to West Hempstead High School, the father placed his son in the same position as his unemancipated daughter, Alexandra. In my view, the record allows for no more. The majority opinion strains to establish the father as the true cause of Joseph's exit from his home and thus liable for his son's support, and I cannot endorse that position.

Two key factors are cited by the Court as proof that the father bears the responsibility for what happened to the relationship and that it was he who deliberately kept Joseph away. The first is the testimony of the father regarding the events which led to Joseph's departure. The father testified that as Joseph was leaving the house during the course of their argument he said, "you go out that door, do not come back". This was not a statement that he wanted his son to leave, but rather one warning of consequences if he *did* leave. It was undoubtedly a threat intended to keep Joseph at home under conditions the father found acceptable, but the choice to leave or stay remained Joseph's. Thus, the statement hardly constitutes proof of a direction to leave from a father who no longer wanted his son to live with him. I am similarly unpersuaded that the testimony concerning police intervention is worthy of the weight attributed to it. The father testified that he would have allowed Joseph back in the house only in the presence of the police. Clearly, this referred to no more than his feelings in the immediate aftermath of the emotional confrontation during which he felt threatened and which led him to call the police in the first place. It was not a policy statement which had a life beyond the events of that night. As the excerpt of testimony cited by the Court indicates, Joseph was in fact allowed back in when the police arrived. In short, the issue for the father was protection during a heated dispute. There is no testimony from which one might reasonably conclude that he meant that he would take his son back only if "forced" to do so by the police, which is implied by the majority opinion.

The second basis advanced for the conclusion that the father was responsible for the break and abandoned his son is the absence of proof that the father made efforts to visit or establish a relationship with his son after the events previously discussed. I find this alleged lack of contact to be of little import. True, there is no hard proof that either father or son tried to repair the damage. However, I would point out that Joseph, unlike his father, admitted that he failed to do so, while his father stated he made attempts. Unlike the case where the child is very young, we are speaking here of a high school student who is capable of thinking and acting on his own, and we cannot assume that he was any less capable of picking up a telephone than was his father. Without any indication from this young man that he wanted to see him, his father cannot be expected to make repeated attempts to force himself on his reluctant offspring. I find this case wholly distinct from one such as *Lipsky v Lipsky (115 AD2d 361),* which is cited by the Court. There, a 12-year-old boy, away from home in summer camp, suddenly found his father gone with no forwarding address given and his support terminated. That was abandonment. This is not.

As noted previously, I agree that Joseph is not self-supporting. However, I also feel constrained to mention that in this area as well the Court is too quick to find fault with the father. Specifically, in discussing how Joseph dissipated and squandered the proceeds of his personal injury settlement, the majority opinion described Joseph's testimony

that his father signed the necessary authorization enabling him to receive the money without offering any advice or instruction about how to use it--the implication being that he should have done so. Given the state of affairs between the two, an intimate chat on the subject would have been anomalous indeed, and the chances of Joseph listening to any advice from his father would seem to render the giving of any such advice an exercise in futility. Moreover, Joseph was 18 years of age, old enough to vote (US Const 26th Amend)--thereby affecting the destiny of all of us--and to enter into binding contracts *(see,* General Obligations Law *§ 3-101*). In short, he was an adult in the eyes of the law. I can find no reason to pay heed to Joseph's implied and thoroughly disingenuous suggestion that his father should have provided some guidance when he previously had made clear that guidance (as opposed to the cash) was about the last thing he wanted from him. As with contact between them generally, Joseph admitted that he himself made no attempt to speak with his father on the subject.

I would point out that Joseph appears to have been less than forthright in his description of the 1986 altercation with his father. Notwithstanding the fact that this was the key event in their break, Joseph testified that he could not recall what caused the heated quarrel. Combined with his mother's testimony that as of the date of the hearing, he remained a "very troubled young man [who] has difficulty focusing his energies in a constructive way and is angry", I hesitate to place much credence in his version of events.

Accordingly, I agree with the Court that the father is obligated to support Joseph, but not for the reasons set forth in the majority opinion. I concur fully with the Court's determinations with regard to the application of the Child Support Standards Act to a modified child support obligation, the father's application for downward modification of spousal maintenance, and the mother's request for affirmative relief.

Bracken, J. P., and Balletta, J., concur with Eiber, J.; Copertino, J., concurs in the result only in a separate memorandum.

Ordered that the order entered September 12, 1990 is modified, by adding a provision sustaining the objection to the amount of child support awarded and vacating the provision of the order dated March 1, 1990, which awarded child support; as so modified, the order entered September 12, 1990 is affirmed, insofar as appealed from, without costs or disbursements, and the matter is remitted to the Family Court, Nassau County, for a new determination as to child support in accordance with the Child Support Standards Act (Family Ct Act *§ 413*), and for a determination of arrears, if any; and it is further,

Ordered that pending a new determination as to child support, the appellant shall continue to make child support payments to the extent required by the order appealed from.

NORTH CAROLINA

CHAPTER 7B. JUVENILE CODE

DIVISION IV. PARENTAL AUTHORITY; EMANCIPATION

ARTICLE 35. EMANCIPATION

§ 7B-3500. Who may petition.

Any juvenile who is 16 years of age or older and who has resided in the same county in North Carolina or on federal territory within the boundaries of North Carolina for six months next preceding the filing of the petition may petition the court in that county for a judicial decree of emancipation.

§ 7B-3501. Petition.

The petition shall be signed and verified by the petitioner and shall contain the following information:

(1) The full name of the petitioner and the petitioner's birth date, and state and county of birth;

(2) A certified copy of the petitioner's birth certificate;

(3) The name and last known address of the parent, guardian, or custodian;

(4) The petitioner's address and length of residence at that address;

(5) The petitioner's reasons for requesting emancipation**;** and

(6) The petitioner's plan for meeting the petitioner's needs and living expenses which plan may include a statement of employment and wages earned that is verified by the petitioner's employer.

§ 7B-3502. Summons.

A copy of the filed petition along with a summons shall be served upon the petitioner's parent, guardian, or custodian who shall be named as respondents. The summons shall include the time and place of the hearing and shall notify the respondents to file written answer within 30 days after service of the summons and petition. In the event that personal service cannot be obtained, service shall be in accordance with G.S. 1A-1, Rule 4(j).

§ 7B-3503. Hearing.

The court, sitting without a jury, shall permit all parties to present evidence and to cross-examine witnesses. The petitioner has the burden of showing by a preponderance of the evidence that emancipation is in the petitioner's best interests. Upon finding that reasonable cause exists, the court may order the juvenile to be examined by a psychiatrist, a licensed clinical psychologist, a physician, or any other expert to evaluate the juvenile's mental or physical condition. The court may continue the hearing and order investigation by a court counselor or by the county department of social services to substantiate allegations of the petitioner or respondents.

No husband-wife or physician-patient privilege shall be grounds for excluding any evidence in the hearing.

§ 7B-3504. Considerations for emancipation.

In determining the best interests of the petitioner and the need for emancipation**,** the court shall review the following considerations:

(1) The parental need for the earnings of the petitioner;

(2) The petitioner's ability to function as an adult;

(3) The petitioner's need to contract as an adult or to marry;

(4) The employment status of the petitioner and the stability of the petitioner's living arrangements;

(5) The extent of family discord which may threaten reconciliation of the petitioner with the petitioner's family;

(6) The petitioner's rejection of parental supervision or support; and

(7) The quality of parental supervision or support.

§ 7B-3505. Final decree of emancipation.

After reviewing the considerations for emancipation**,** the court may enter a decree of emancipation if the court determines:

(1) That all parties are properly before the court or were duly served and failed to appear and that time for filing an answer has expired;

(2) That the petitioner has shown a proper and lawful plan for adequately providing for the petitioner's needs and living expenses;

(3) That the petitioner is knowingly seeking emancipation and fully understands the ramifications of the act; and

(4) That emancipation is in the best interests of the petitioner.

The decree shall set out the court's findings.

If the court determines that the criteria in subdivisions (1) through (4) are not met, the court shall order the proceeding dismissed.

§ 7B-3506. Costs of court.

The court may tax the costs of the proceeding to any party or may, for good cause, order the costs remitted. The clerk may collect costs for furnishing to the petitioner a certificate of emancipation which shall recite the name of the petitioner and the fact of the petitioner's emancipation by court decree and shall have the seal of the clerk affixed thereon.

§ 7B-3507. Legal effect of final decree.

As of entry of the final decree of emancipation:

(1) The petitioner has the same right to make contracts and conveyances, to sue and to be sued, and to transact business as if the petitioner were an adult.

(2) The parent, guardian, or custodian is relieved of all legal duties and obligations owed to the petitioner and is divested of all rights with respect to the petitioner.

(3) The decree is irrevocable.

Notwithstanding any other provision of this section, a decree of emancipation shall not alter the application of G.S. 14-326.1 or the petitioner's right to inherit property by intestate succession.

§ 7B-3508. Appeals.

Any petitioner, parent, guardian, or custodian who is a party to a proceeding under this Article may appeal from any order of disposition to the Court of Appeals provided that notice of appeal is given in open court at the time of the hearing or in writing within 10 days after entry of the order. Entry of an order shall be treated in the same manner as entry of a judgment under G.S. 1A-1, Rule 58 of the North Carolina Rules of Civil Procedure. Pending disposition of an appeal, the court may enter a temporary order affecting the custody or placement of the petitioner as the court finds to be in the best interests of the petitioner or the State.

§ 7B-3509. Application of common law.

A married juvenile is emancipated by this Article. All other common-law provisions for emancipation are superseded by this Article.

NORTH DAKOTA

TITLE 14. DOMESTIC RELATIONS AND PERSONS

CHAPTER 14-10. MINORS

§ 14-10-01. Minors defined.

Minors are persons under eighteen years of age. In this code, unless otherwise specified, the term "child" means "minor". Age must be calculated from the first minute of the day on which persons are born to the same minute of the corresponding day completing the period of minority.

§ 14-10-02. Adults defined.

All persons eighteen years of age and over are adults.

§ 14-10-03. Minor or person of unsound mind liable for wrongs.

A minor or a person of unsound mind of whatever degree is liable civilly for a wrong done by the minor or person of unsound mind in like manner as any other person.

§ 14-10-04. Minor's rights of action.

A minor may enforce the minor's rights by civil action or other legal proceedings in the same manner as an adult, except that a guardian ad litem must be appointed to conduct the same.

§ 14-10-05. Assignment of children prohibited -- Penalty.

No person, other than the parents, may assume the permanent care and custody of a child, unless authorized so to do by an order or decree of a court having jurisdiction, except that a parent, upon giving written notice to the department of human services, may place that person's own child in the home of the child's grandparent, uncle, or aunt for adoption or guardianship by the person receiving the child. The child must be considered abandoned if proceedings for the adoption or guardianship of the child are not initiated by such relative within one year following the date of notice of placement. No parent may assign or otherwise transfer the parent's rights or duties with respect to the care and custody of the parent's child. Any such transfer or assignment, written or otherwise, is void. This section does not affect the right of the parent to consent in writing to the legal adoption of the parent's child, but such written consent does not operate to transfer any right in the child in the absence of a decree by a court having jurisdiction. Any person who violates the provisions of this section is guilty of a class A misdemeanor.

§ 14-10-06. Unlawful to encourage or contribute to the deprivation or delinquency of minor – Penalty.

1. Any person who by any act willfully encourages, causes, or contributes to the delinquency or deprivation of any minor is guilty of a class A misdemeanor.

2. Any person who by any act willfully encourages, causes, or contributes to the deprivation of a child less than sixteen years of age by causing that child to engage in sexual conduct as defined under section 12.1-27.2-01, in any play, motion picture, photograph, dance, or other visual representation is guilty of a class C felony.

§ 14-10-07. Marriage of minors under supervision of juvenile court may be annulled – Penalty.

A minor, while under the supervision or custody of the juvenile court or the superintendent of the North Dakota youth correctional center, may not marry without the order of the juvenile court or of the superintendent of the North Dakota youth correctional center, as the case may be. Any such marriage made without such order is subject to annulment in a proceeding brought in district court by the state's attorney or by any person authorized by law to bring such annulment action. A person knowingly aiding, abetting, or encouraging such marriage is guilty of a class A misdemeanor.

§ 14-10-08. Person to whom child confided substituting other child – Penalty.

Every person to whom an infant has been confided for nursing, education, or any other purpose, who, with intent to deceive any parent or guardian of such child, substitutes or produces to such parent or guardian another child in the place of the one so confided, is guilty of a class C felony.

§ 14-10-09. Minor's disability to delegate power and to contract relating to real property.

A minor cannot give a delegation of power. A person under the age of eighteen may not make a contract relating to real property or any interest therein or relating to any personal property not in that person's immediate possession or control.

§ 14-10-10. Contracts of minor.

Unless otherwise provided by the laws of this state, a minor may make any contract other than contracts specified in section 14-10-09 in the same manner as an adult, subject only to the minor's power of disaffirmance.

§ 14-10-11. Minor's contracts – Disaffirmation.

In all cases other than those specified in sections 14-10-12 and 14-10-13, the contract of a minor may be disaffirmed by the minor personally, either before the minor's majority or within one year's time afterwards, or in case of the minor's death within that period, by the minor's heirs or personal representatives.

§ 14-10-12. Minor cannot disaffirm contracts for necessaries.

A minor cannot disaffirm a contract, otherwise valid, to pay the reasonable value of things necessary for the minor's support or that of the minor's family, if such contract is entered into by the minor when not under the care of a parent, guardian, or conservator able to provide for such minor or the minor's family.

§ 14-10-13. Minor may not disaffirm statutory contracts.

A minor cannot disaffirm an obligation, otherwise valid, entered into by the minor under the express authority or direction of a statute.

§ 14-10-14. Undertaking by minors for release on bail.

A minor is capable of entering a binding undertaking for the purpose of securing the minor's release on bail in the same manner and with the same effect as if the minor were an adult.

§ 14-10-17. Minors -- Treatment for sexually transmitted disease -- Drug abuse – Alcoholism.

Any person of the age of fourteen years or older may contract for and receive examination, care, or treatment for sexually transmitted disease, alcoholism, or drug abuse without permission, authority, or consent of a parent or guardian.

§ 14-10-17.1. Minor's emergency care.

Any minor may contract for and receive emergency examination, care, or treatment in a life threatening situation without permission, authority, or consent of a parent or guardian.

OHIO

**LOUVERNA POWELL, N.K.A. TOMER, PLAINTIFF-APPELLEE, V.
EARL FRANK POWELL, DEFENDANT-APPELLANT**

Case No. 95 CA 1680

Court of Appeals of Ohio, Fourth Appellate District, Athens County

111 Ohio App. 3d 418; 676 N.E.2d 556; 1996 Ohio App. LEXIS 2339

May 30, 1996, FILED

OPINION BY PETER B. ABELE

DECISION AND JUDGMENT ENTRY

ABELE, P.J.

This is an appeal from a judgment entered by the Athens County Common Pleas Court. The court found that Earl Frank Powell, defendant below and appellant herein, had failed to prove that his son, Jason, is emancipated. As a result, the court further found that appellant owes delinquent child support and must continue to pay child support in the future to Louverna Powell, n.k.a. Tomer, plaintiff below and appellee herein. Appellee is Jason's mother and custodial parent.

Appellant assigns the following errors:

FIRST ASSIGNMENT OF ERROR:

"CREDIT TOWARD COURT ORDERED CHILD SUPPORT SHOULD BE GIVEN TO THE OBLIGOR WHEN SOCIAL SECURITY BENEFITS ARE BEING PAID DIRECTLY TO A DEFENDANT WHO IS NOW AN ADULT."

SECOND ASSIGNMENT OF ERROR:

"THE EMANCIPATION OF A MINOR CHILD COMPETENT TO SUPPORT HIMSELF DISCHARGES A PARENT FROM AN OBLIGATION FOR SUPPORT."

Appellant and appellee were married on February 23, 1962. On June 5, 1974, the couple bore a son, Jason Scott Powell. Jason was born with spina bifida. When appellant and appellee divorced in July 1979, appellee was awarded custody of Jason. The divorce decree required appellant to pay child support to appellee. The order read in pertinent part as follows:

"[Appellant] shall pay child support * * *; said support payments to continue for Jason Scott Powell until he reaches the age of eighteen (18), becomes emancipated or sooner dies and to continue thereafter for so long as he is certified to be a disabled person by competent medical authority."

Jason turned eighteen years old on June 5, 1992 and graduated from high school in June 1993. Appellant made no payments after Jason graduated from high school.

On July 20, 1993, the Athens County Child Support Enforcement Agency (CSEA) filed a motion asking the trial court to determine whether Jason was emancipated and to determine if appellant owed any child support or arrearage. On December 14, 1993, the court appointed a doctor to perform a medical evaluation of Jason. The doctor filed his findings with the court on January 31, 1994. After an evidentiary hearing, the referee filed her report on February 16, 1995. Appellant filed objections to the report on May 4, 1995.

In its June 14, 1995 judgment entry, the trial court adopted the referee's report with some modifications. Specifically, the court found that the doctor's evaluation of Jason, combined with his being qualified for Supplemental Security Income (SSI), constitutes certification by a medical authority that Jason is a disabled person.

Thus, the court found that appellant failed to prove that Jason is emancipated. The court further found that appellant's duty to pay support was continuous from June 1993 to the present. Accordingly, the court ordered appellant to resume making his monthly child support payments and to also pay delinquent support dating back to June 1993. Appellant filed a timely notice of appeal.

I

In his first assignment of error, appellant asserts that the trial court abused its discretion because the court did not give appellant credit for Jason's SSI benefits when calculating the amount of child support owed by appellant. Appellant argues that the trial court should have off-set the benefits that Jason receives from SSI against the arrearage and the monthly payments owed by appellant. n1

> n1 Specifically, appellant argues that *R.C. 3109.05(A)(1)* requires the court to consider "the financial resources and earning ability of the child" when determining child support. Appellant contends that Jason's benefits constitute financial resources and that the trial court did not consider the benefits when it made its decision.

R.C. 3105(B) gives courts continuing jurisdiction "to modify all matters pertaining to the allocation of parental rights and responsibilities for the care of the children, to the designation of a residential parent and legal custodian of the children, to child support, and to visitation." In *Booth v. Booth (1989), 44 Ohio St. 3d 142, 541 N.E.2d 1028,* the court noted that an abuse of discretion standard applies to child support appeals:

"* * * We believe that common sense and fundamental fairness compel the application of the 'abuse of discretion' standard in reviewing matters concerning child support and visitation rights. As this court has held many times, an "'abuse of discretion" *** implies that the court's attitude is unreasonable, arbitrary or unconscionable. * * *'"

Id., 44 Ohio St. at 144, 541 N.E.2d at 1030. An abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *In re Jane Doe 1 (1991), 57 Ohio St. 3d 135, 566 N.E.2d 1181; Blakemore v. Blakemore (1983), 5 Ohio St. 3d 217, 450 N.E.2d 1140.* When applying an abuse of discretion standard, a reviewing court is not free to merely substitute its judgment for that of the trial court. *In re Jane Doe 1, supra; Berk v. Matthews (1990), 53 Ohio St. 3d 161, 559 N.E.2d 1301; Buckles v. Buckles (1988), 46 Ohio App. 3d 102, 546 N.E.2d 950.*

In addressing whether appellant is in fact entitled to such a set-off, we note that under the statutory guidelines, a court may consider the financial resources and earning ability of the child. *R.C. 3113.215(B)(3)(f)*. *R.C. 3113.215(B)* provides in pertinent part as follows:

***(3) The court, in accordance with divisions (B)(1) and (2)(c) of this section, may deviate from the amount of support that otherwise would result from the use of the schedule and the applicable worksheet in division (E) of this section, through line 24, or in division (F) of this section, through line 23, in cases in which the application of the schedule and the applicable worksheet in division (E) of this section, through line 24, or in division (F) of this section, through line 23, would be unjust or inappropriate and would not be in the best interest of the child. In determining whether that amount would be unjust or inappropriate and would not be in the best interest of the child, the court may consider any of the following factors and criteria:

***(f) The financial resources and the earning ability of the child;

***(Emphasis added.)

Furthermore, regarding the treatment typically given SSI benefits, we note that in a pre-guideline case, *Oatley v. Oatley (1977), 57 Ohio App. 2d 226, 387 N.E.2d 245,* the court held that Social Security benefits that a handicapped child receives under the Supplemental Security Income program neither alter the father's obligation for support nor constitute a change of circumstances warranting a modification of the support order. In Oatley, the court stated:

"We find that plaintiff is misinterpreting the relationship between his support obligation and the supplemental security income. The supplemental income payments are intended to insure a minimum level of income for persons who are over age 65, or blind, or disabled, who do not have sufficient income and resources to maintain a standard of living at the established federal minimum income level. *** The supplemental security income payments are intended to supplement other income, not substitute for it. The amount of supplemental security income received is modified as the amount of the recipient's other income changes, not vice versa."

Id., 57 Ohio App. 2d 227-228, 387 N.E.2d 246.

Other courts have followed the reasoning in *Oatley, supra,* finding payments made directly to the child based on the obligor's work history and earnings should be credited to the support obligation, while payments based on need and intended to supplement, not replace, income from other sources is not credited. *Compher v. Nickolich (1987), 1987 Ohio App. LEXIS 6075; Justice v. Justice (1987), 1987 Ohio App. LEXIS 7663; Adkins v. Adkins, 1989 Ohio App. LEXIS 1416,* (1989), unreported.

This court has reached this result in the past. In *Wickline v. Wickline, 1994 Ohio App. LEXIS 1604,* (March 31, 1994), Jackson App. No. 718, unreported, the appellee had custody of one of the couple's daughters. The daughter suffered viral encephalitis when only six months old. Due to her handicap, the child received Social Security payments. Appellant argued that the Social Security benefits should be treated as income to the appellee. The trial court disagreed with appellant. Citing *Oatley, supra,* we rejected the appellant's challenge of the court's decision. n2

> n2 In Wickline, our court also emphasized that under *R.C. 3113.215(A)(2)*, supplemental security income is not included when computing the gross income of the parent.

We note that the Fifth District reached a similar result in *Justice v. Justice (June 24, 1987), 1987 Ohio App. LEXIS 7663.* The appellant in Justice was ordered to pay support for his two mentally retarded children pursuant to a decree of divorce. Sometime after the divorce, the children began receiving supplemental social security benefits. The appellant filed a motion in the trial court to terminate or modify his child support payment, arguing that the SSI benefits created a substantial modification of circumstances entitling him to a modification of the child support payments. The trial court disagreed relying upon *Oatley, supra.* The Fifth District affirmed the trial court's ruling.

After our review of the record in the case sub judice, we find that the trial court did not abuse its discretion. The trial court's judgment that Jason's SSI benefits should not be set-off against appellant's child support obligation is not unreasonable, arbitrary or unconscionable. Certainly a court may consider a child's financial resources and earning ability when determining an appropriate child support award. A court is not, however, required to include the child's financial resources when determining child support. All cases should be evaluated in view of their unique facts and circumstances. In the case at bar, we will not substitute our judgment for that of the trial court. The facts adduced below do not support the conclusion that the child support award is inequitable or results in a windfall.

Accordingly, based upon the foregoing reasons, we overrule appellant's first assignment of error.

II

In his second assignment of error, appellant argues that the court's finding that appellant failed to prove that Jason is emancipated is against the manifest weight of the evidence. Appellant asserts that the evidence presented at the hearing shows that Jason is able to work and to support himself, that he possesses an intellect capable of meeting college curriculum demands, and that his current unemployment is due primarily to appellee's over-protection.

When reviewing evidence presented at trial, an appellate court must not re-weigh the evidence. In *C.E. Morris v. Foley Construction Co. (1978), 54 Ohio St. 2d 279, 376 N.E.2d 578,* syllabus, the Ohio Supreme Court held:

"Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence."

See, also, *Vogel v. Wells (1991), 57 Ohio St. 3d 91, 566 N.E.2d 154; Ross v. Ross (1980), 64 Ohio St. 2d 203, 414 N.E.2d 426.* An appellate court should not substitute its judgment for that of the trial court when there exists competent, credible evidence going to all the essential elements of the case. In *Seasons Coal Co. v. Cleveland (1984), 10 Ohio St. 3d 77, 80, 461 N.E.2d 1273, 1276,* the court wrote:

"The underlying rationale of giving deference to the findings of the trial court rests with the knowledge that the trial judge is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony."

In the case sub judice, we find the record contains sufficient competent, credible evidence to support the trial court's finding. When making its decision, the trial court cited to the doctor's evaluation of Jason and to appellee's testimony. The court noted that the doctor felt that Jason will require lifelong assistance and close observation as well as ongoing individualized care from a team of specialists. The court noted that appellee testified that she believes Jason's physical and mental condition make him unemployable. Finally, the court specifically stated that while appellant gave examples of jobs one may perform while sitting down for an extended period, appellant offered no proof that Jason could perform these jobs or that an employer would hire Jason for them.

In *Omohundro v. Omohundro (1982), 8 Ohio App. 3d 318, 457 N.E.2d 324,* the court wrote:

"The meaning of the term 'emancipation' was discussed by this court in the case of *Pappas v. Pappas (1974), 1974 Ohio App. LEXIS 3427,* wherein it is stated:

'The emancipation of a child may be effected in many ways: marriage, entering the armed services, leaving home, becoming employed and self-subsisting, or in any other manner in which the parent authorizes or occasions the child to remove himself from parental subjugation, control and care. See 59 American Jurisprudence 2d, Parent and Child, Section 93.'"

8 Ohio App. 3d at 320, 457 N.E.2d at 326.

Whether a child is emancipated, so as to relieve a parent from the obligation of support, depends upon the particular facts and circumstances of each individual case. Id.; *In re Owens (1994), 96 Ohio App. 3d 429, 645 N.E.2d 130.* The party seeking relief from a support order bears the burden of proving that the child is emancipated. *Bagyi v. Miller (1965), 3 Ohio App. 2d 371, 210 N.E.2d 887;* Daniels v. Daniels (Jan. 17, 1985), Montgomery App. No. 8897, unreported, citing *Schirtzinger v. Schirtzinger (1952), 95 Ohio App. 31, 117 N.E.2d 42.*

We note that the rules of law governing emancipation do not point to specific facts or a bright-line standard. Rather, the unique facts and circumstances of each case must be evaluated. In the case at bar, based upon the evidence adduced below, we find that the trial court's judgment is supported by sufficient competent, credible evidence.

Accordingly, based upon the foregoing reasons, we overrule appellant's assignment of error.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Athens County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Stephenson, J. & Harsha, J.: Concur in Judgment & Opinion

For the Court

BY: Peter B. Abele

Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 12, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

OKLAHOMA[5]

TITLE 10. CHILDREN

CHAPTER 4. PROCEEDINGS TO CONFER RIGHTS OF MAJORITY

§ 91. Authority of district courts.

The district courts shall have authority to confer upon minors the rights of majority concerning contracts, and to authorize and empower any person, under the age of eighteen (18) years, to transact business in general, or any business specified, with the same effect as if such act or thing were done by a person above that age; and every act done by a person so authorized shall have the same force and effect in law as if done by persons at the age of majority.

§ 92. Procedure to confer rights of majority--Petition--Jurisdiction and venue—Decree.

Any minor desiring to obtain the rights of majority for the purpose named in Section 91 of this title may, by his next friend, file a verified petition in the district court of the county in which such minor shall reside, or, if the minor is a nonresident of the State of Oklahoma, said verified petition shall be filed in the county in Oklahoma where said minor owns real estate, setting forth the age of the minor petitioner and that said petitioner is then and has been a bona fide resident of such county for at least one (1) year next before the filing of the petition, or that said minor is a nonresident owning property within the State of Oklahoma, and the cause for which the petitioner seeks to obtain the rights of majority. The petition should state whether or not the parents of the minor are living, and if living, their names and addresses; whether or not a guardian has been appointed for the minor and, if a guardian has been appointed, the guardian's name and address; who has legal custody of the minor and, if the person having legal custody is not a parent or the guardian, the name and address of the person who has custody. And the district court being satisfied that the said petitioner is a person of sound mind and able to transact his affairs, and that the interests of the petitioner will be thereby promoted, may, in its discretion, order and decree that the petitioner be empowered to exercise the rights of majority for all purposes mentioned in this act.

§ 93. Notice of hearing of petition to be given by certified mail and by publication in newspaper.

When the petition mentioned in 10 O.S.1971, § 92, is filed the court shall fix a day for the hearing thereof, which day shall be not less than fifteen (15) nor more than thirty (30) days from the date of the filing of the petition. Notice of the hearing of the petition shall be sent by certified mail, return receipt requested, delivery restricted to addressee only, to the parents of the minor, if living, to the guardian of the minor, if one has been appointed, or to the person who has custody of the minor if such person is other than parent or guardian of the minor, and if both of the minor's parents are dead, the court may order that notice be sent by certified mail, return receipt requested, delivery restricted to addressee only, to other relatives of the minor; provided, however, that no notice shall be sent to a person who endorses on the petition that notice of the day of the hearing is waived. Notice of the hearing shall be given by publication in some newspaper printed in the county where such petition is filed, and if there be none, then in some legal newspaper having a general circulation in the county one time, at least ten (10) days prior to the day set for the hearing of the said petition. Before the court may enter an order conferring majority rights in the hearing provided for herein, proof must be presented to the court at said hearing that notice was given to all persons entitled thereto as provided herein.

§ 94. Costs.

The costs of the proceedings under this article shall be paid by the minor petitioner.

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[5] Limited to contracts and conducting business in the state.

OREGON

TITLE 34. HUMAN SERVICES; JUVENILE CODE; CORRECTIONS

CHAPTER 419B. JUVENILE CODE: DEPENDENCY

JUVENILE COURT

EMANCIPATION OF MINOR

419B.550. Definitions for ORS 419B.550 to 419B.558.

As used in ORS 419B.550 to 419B.558:

(1) "Domicile" of a minor means the legal residence or domicile of the custodial parent or guardian.

(2) "Emancipation" means conferral of certain rights of majority upon a minor, as enumerated in ORS 419B.552.

(3) "Minor" means a person under the age of 18 years.

(4) "Parent" means legal guardian or custodian, natural parent or adoptive parent if the minor has been legally adopted.

(5) Notwithstanding subsection (1) of this section, if a minor is subject to the jurisdiction of the juvenile court pursuant to ORS 419B.100 or 419C.005, the domicile of that minor shall be that of the court which has jurisdiction.

419B.552. Application for emancipation decree; effect of decree.

(1) A juvenile court, upon the written application of a minor who is domiciled within the jurisdiction of such court, is authorized to enter a decree of emancipation in the manner provided in ORS 419B.558. A decree of emancipation shall serve only to:

(a) Recognize the minor as an adult for the purposes of contracting and conveying, establishing a residence, suing and being sued, and recognize the minor as an adult for purposes of the criminal laws of this state.

(b) Terminate as to the parent and child relationship the provisions of ORS 109.010 until the child reaches the age of majority.

(c) Terminate as to the parent and child relationship the provisions of ORS 109.053, 109.100, 419B.373, 419B.400, 419B.402, 419B.404, 419B.406, 419B.408, 419C.550, 419C.590, 419C.592, 419C.595, 419C.597 and 419C.600.

(2) A decree of emancipation shall not affect any age Nqualification for purchasing alcoholic liquor, the requirements for obtaining a marriage license, nor the minor's status under ORS 109.510.

419B.555. Hearing; notice to parent; duty to advise minor of liabilities of emancipated person; filing fee.

(1) The juvenile court shall conduct a preliminary hearing on the minor's application for emancipation within 10 days of the date on which it is filed or as soon as possible thereafter. At the time of the preliminary hearing, the court may issue a temporary custody decree, stay any pending proceedings or enter any other temporary order appropriate to the circumstances. No action of the court pursuant to this subsection may be extended beyond the date set for a final hearing.

(2) The final hearing shall be held no later than 60 days or as soon as possible after the date on which the application is filed.

(3) Notice to the parent or parents of the applicant shall be made pursuant to ORS 419B.265 (1), 419B.268 and 419B.271.

(4) At the preliminary hearing, the court shall advise the minor of the civil and criminal rights and civil and criminal liabilities of an emancipated minor. This advice shall be recited in the decree of emancipation.

(5) The hearing mentioned in subsection (2) of this section may be waived by the minor and parent or parents.

(6) A uniform filing fee of $ 70 shall be charged and collected by the court for each application for emancipation. In addition, the court shall collect any other fees required by law.

419B.558. Conditions for issuance of decree; copy to applicant; issuance of license or identification card by Department of Transportation; emancipated person subject to adult criminal jurisdiction.

(1) The juvenile court in its discretion may enter a decree of emancipation where the minor is at least 16 years of age and the court finds that the best interests of the minor will be served by emancipation. In making its determination, the court shall take into consideration the following factors:

(a) Whether the parent of the minor consents to the proposed emancipation;

(b) Whether the minor has been living away from the family home and is substantially able to be self-maintained and self-supported without parental guidance and supervision; and

(c) Whether the minor can demonstrate to the satisfaction of the court that the minor is sufficiently mature and knowledgeable to manage the minor's affairs without parental assistance.

(2) Upon entry of a decree of emancipation by the court, the applicant shall be given a copy of the decree. The decree shall instruct that the applicant obtain an Oregon driver's license or an Oregon identification card through the Department of Transportation and that the Department of Transportation make a notation of the minor's emancipated status on the license or identification card.

(3) An emancipated minor shall be subject to the jurisdiction of the adult courts for all criminal offenses.

PENNSYLVANIA

BERKS COUNTY CHILDREN AND YOUTH SERVICES V. MARGARET ROWAN, APPELLANT. BERKS COUNTY CHILDREN AND YOUTH SERVICES V. NOEL M. ROWAN, APPELLANT

No. 03266 Philadelphia 1992, No. 03267 Philadelphia 1992

Superior Court of Pennsylvania

428 Pa. Super. 448; 631 A.2d 615; 1993 Pa. Super. LEXIS 2486

April 13, 1993, Argued

August 6, 1993, Filed

OPINION BY CERCONE

These are the consolidated appeals of the orders of the Court of Common Pleas of Berks County, dated August 24, 1992, which required the appellants to pay support for their dependent minor child while in the custody and care of the Berks County Children and Youth Services (BCCYS). This matter presents us with an issue of first impression: whether a minor child who is married, but separated from her husband and presently declared dependent by the lower court, is emancipated thereby relieving her parents from the duty to support her. We hold that, under the facts of this case, the minor child is not emancipated and her parents are responsible for her support.

The facts of this case were aptly set forth by the trial judge in his opinion to this Court:

M.D. is the adopted daughter of [appellants]. She was born on October 9, 1975. In February 1991, M.D. expressed a desire to marry J.S., then age eighteen. The parents were amenable to the marriage but since M.D. was a fifteen year old minor, application was made to the court for permission to marry pursuant to *23 Pa.C.S.A. § 1304*. The court granted permission and M.D. and J.S. were married on February 17, 1991.

On June 17, 1991, M.D. contacted [appellee], Berks County Children and Youth Services, because she had run away from her husband's home. She did not want to return to J.S.'s home and she had no other place to reside. On June 18, 1991, [appellee] filed a juvenile petition indicating that M.D. had no place to live, was a truant, and had been referred to the juvenile probation office. [Appellee] recommended that the child be declared a dependent child and that it be granted temporary custody for placement purposes; that the child obtain drug and alcohol evaluations and obtain any recommended treatment; and that the child and [appellants] cooperate with the placement facility and [appellee]. The judge presiding in the case issued an order on June 27, 1991, declaring M.D. to be a dependent child and transferring custody to [appellee].

On November 12, 1992, J.S. filed a divorce action against M.D. which is currently pending .... [Appellee] has filed complaints in support against [appellants], as the parent[s], to pay the total cost of $ 7,054.00 for M.D.'s placement in care facilities from June 17, 1991, through August 29, 1991.

[Appellants] contend that M.D. became legally emancipated upon her marriage to J.S. so her parents are no longer legally obligated to support her.

The Domestic Relations Hearing Officer concluded that M.D.'s marriage did not affect her parents' duty of support. [Appellants] filed exceptions to this recommendation.

After argument and review of the briefs and record, the court dismissed the exceptions and adopted the recommendation as the order of the court. [Appellants] appeal this order.

Lower court opinions (Nos. 91-1987-00, 91-1988-00), 11/18/92 at 1-3. n1 Our Supreme Court explained our scope of review in child support matters as follows:

Our scope of review in support matters is well settled. Absent an abuse of discretion, we will not disturb on appeal a properly entered support order. An abuse of discretion "is not merely an error of judgment, but if in reaching a conclusion the law is overridden or misapplied, or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will, as shown by the evidence or the record, discretion is abused."

Oeler by Gross v. Oeler, 527 Pa. 532, 537, 594 A.2d 649, 651 (1991).

> n1 The certified record in this case contains no transcript of the proceedings in this matter. Rule of Appellate Procedure 1923 provides the means for supplementing the certified record with a statement of the evidence when no transcripts of the proceedings are available. Rule 1923 requires the statement to be submitted to the lower court for approval and for its inclusion in the certified record. Pa.R.A.P. Rule 1923, 42 Pa.C.S.A.
>
> In the present case, the parties have enclosed an agreed upon statement of facts, dated January 4, 1993, in the reproduced record. Although the reproduced record was served upon the lower court on January 8, 1993, the trial court did not approve or include the statement in the certified record as required by Rule 1923. Indeed, since the certified record was transmitted to this Court on December 2, 1992, the trial judge would have been unable to include this statement in the certified record.
>
> Because both parties have agreed to the stipulated facts in the reproduced record, we shall regard as done that which ought to have been done and deem the statement to be properly filed. *See McCormick v. Northeastern Bank, 522 Pa. 251, 254 n. 1, 561 A.2d 328, 330 n. 1 (1989)* (appeal considered on the merits despite failure to reduce trial court order to a judgment). Accordingly, we will rely on the agreed upon statement for those facts in the trial court's opinion and for our discussion of the issue on appeal.

Appellants contend that their daughter's marriage constitutes legal emancipation thereby relieving them of their obligation of support. We cannot agree. Our analysis begins with the pertinent statutes in the Pennsylvania Domestic Relations Code. Liability for support is governed by section 4321 of the Code and provides:

Subject to the provisions of this chapter:

(1) Married persons are liable for the support of each other according to their respective abilities to provide support as provided by law.

(2) Parents are liable for the support of their children who are *unemancipated* and 18 years of age or younger.

(3) Parents may be liable for the support of their children who are 18 years of age or older.

23 Pa.C.S.A. § 4321. The Code further provides as to emancipated children:

(a) Emancipated child. -- A court shall not order either or both parents to pay for the support of a child if the child is *emancipated*.

23 Pa.C.S.A. § 4323. The term "emancipated" is not defined within the Code. Past appellate court decisions of this Commonwealth, however, have discussed the term, as well as the nature of a parent's duty to support a minor child, in a variety of circumstances.

Emancipation is a question of fact to be determined by the circumstances presented in each case. *Maurer v. Maurer, 382 Pa.Super. 468, 475, 555 A.2d 1294, 1297-98 (1989), allocatur denied*, *522 Pa. 596, 562 A.2d 320 (1989).* Nonetheless, a parent has a clear and stringent obligation to support a child aged eighteen or less. *Sutliff v. Sutliff, 339 Pa.Super. 523, 547, 489 A.2d 764, 776 (1985).* Marriage is not a conclusive factor in determining whether a child is emancipated, but is a factor to be considered under the totality of the circumstances. *Marino by Marino v. Marino, 411 Pa.Super. 424, 437-38, 601 A.2d 1240, 1247 (1992).* Further, emancipation is not necessarily a permanent status and the mere fact that a child was once emancipated does not foreclose the divestiture of emancipation when circumstances change. *Maurer, 382 Pa.Super. at 477, 555 A.2d at 1299.* Accordingly, we decline to hold, as the appellants urge, that a minor, once married, remains emancipated *as a matter of law*. Our determination then must focus on whether M.D., who is married but separated and awaiting a final decree of divorce, is emancipated as a factual matter. Because there are no appellate cases in this Commonwealth which discuss the emancipation involving the marriage of a minor child, we look to those cases which discuss emancipation generally.

In *Trosky v. Mann, 398 Pa.Super. 369, 581 A.2d 177 (1990),* a case with a similar procedural posture, the Children's Home of Reading sought support reimbursement from the adoptive father of a sixteen year-old minor. The minor

boy was destructive; he committed various criminal acts, and used alcohol as well as other controlled substances. Eventually, the boy ran away and was later located at a youth center in New Jersey. The father then had the minor committed to a rehabilitation center for treatment of his alcohol and drug dependency. Upon return, he was placed in the Children's Home of Reading. At all times, the minor renounced his status as son of his parents and showed no interest in returning to their home. Moreover, the parents attempted to have the child declare his emancipation in return for regaining possession of his personal belongings. *Id. at 370-72, 581 A.2d at 178-79.*

The Children's Home of Reading sought reimbursement from the parents for amounts expended for the minor's care. However, the father refused to pay, claiming that the child was emancipated. In holding that the minor was not emancipated, we reasoned:

[T]he actions of the minor-child are not consistent with the presence of "emancipation" -- he could not support himself, he sought refuge with a private placement service while recovering from his dysfunction (drug addiction), one of the factors which prompted him to leave his home unilaterally.

Id. at 377, 581 A.2d at 182. Because we found the duty to support a minor child with the necessities of life was nearly absolute, we held that the parents were liable for the support of the minor child despite both the child's and parents' intent to extinguish filial bonds. *Id. at 378, 581 A.2d at 182.*

Other cases of this Court have discussed emancipation in the context of support for secondary education. n2 In *Marino by Marino v. Marino, 411 Pa.Super. 424, 601 A.2d 1240 (1992),* we found that a twenty-one year-old student (no longer a minor) was emancipated and could not receive support for college from his father because the son had no real interest in pursuing higher education, and because the son had moved to Arizona to live with his girlfriend. Our panel held that under the facts of that case, the son had emancipated himself. The son was twenty-one years of age and had demonstrated an interest in conducting his own financial affairs. Also, he moved to Arizona to live with his girlfriend in a quasi-marital relationship. Although we declined to declare a child's marriage or quasi-marital status a conclusive factor in determining whether a child is emancipated, we deemed it a factor to be considered under the totality of the circumstances. *Id. at 437-38, 601 A.2d at 1247.* Thus, given his age and desire to be on his own living with his paramour, the Court had no difficulty in finding that the son was emancipated and not entitled to educational support.

> n2 We are cognizant of our Supreme Court's decision in *Blue v. Blue, 532 Pa. 521, 616 A.2d 628 (1992)* which abrogated any parental duty to provide support to a child for secondary education. However, the decision in *Blue* does not invalidate the rationale of those cases in the context of emancipation of children seeking educational support.

In the case of *Maurer v. Maurer, supra,* a father sought to terminate his support obligation to his nineteen year-old son who, upon being released from his commitment in the Army, enrolled in a vocational school. The trial court granted the father's petition, finding that the child was not seeking a college degree and could support himself, as evidenced by his induction into the Army. A panel of this Court reversed the trial court finding that the child was not emancipated. We held that the critical test in determining emancipation in the situation where a child seeks support for education expenses is whether the child is dependent on his parents for support or is independent of such needs. *Maurer, 382 Pa.Super. at 475, 555 A.2d at 1297.* Further, we discussed the concept of emancipation and determined that such status depends on the type of disability from which the minor child is burdened. Thus, there are situations in which a child may be considered emancipated and others in which he may not be considered emancipated. *Id. at 477, 555 A.2d at 1297* (quoting H.H. Clark, Jr., The Law of Domestic Relations in the United States (2nd Edition 1987), pp. 323-26).

Based on the facts in *Maurer*, we found that the child was not emancipated. The child had sincere and reasonable intentions for acquiring additional training which required his parents to provide assistance to him. Moreover, even though the child may have been emancipated upon his induction into the Army, he became unemancipated upon release from his military commitment. *Id. at 477, 555 A.2d at 1298-99.* Also in *Griffin v. Griffin, 384 Pa.Super. 188, 558 A.2d 75 (1989), allocatur denied*, *524 Pa. 621, 571 A.2d 383 (1989),* we affirmed the award of educational support to a twenty-one year-old child, holding that she was not emancipated solely because she had a child of her own. We reasoned that the father had not argued that she was married or had left the family home in order to live independently. *Id. at 197-200, 558 A.2d at 80-81.*

It is important to note that while our decisions in *Maurer, Marino* and *Griffin* reaffirm well-settled law that emancipation is to be decided as a factual question, they provide little guidance in the present matter. The Courts of this Commonwealth have applied different and less stringent standards to questions concerning educational support

than they have applied in the context of support for the necessities of life. *Marino, 411 Pa.Super. at 431, 601 A.2d at 1244.* Thus, our decision must focus on the unique facts of this case as it relates to support for the essential needs of life.

Following our past precedents we find that a minor's marriage weighs heavily in favor of a finding of emancipation. As our caselaw bears out, however, there are varying circumstances which we must consider in determining whether a child is emancipated. These include, but are not limited to, the child's age, marital status, ability to support himself or herself, and desire to live independently of his or her parents. Finally, even though a child may once have been emancipated, we are not precluded from finding that a child is not permanently emancipated. *Maurer, supra.*

In the present case M.D.'s marriage to J.S. weighs heavily in favor of a finding that she was emancipated during the marriage. During the marriage, the spouses rely on one another for support. Moreover, the marriage evidences a desire to live independently from the control of M.D.'s parents. Regardless of whether M.D. was emancipated from her parents while married and residing with her husband however, it is evident from the record that M.D. left the marriage and subsequently had no means to provide for herself. Furthermore, J.S. has no means with which to support M.D. and, because of her age, it is unlikely that M.D. will be able to support herself. For this reason, M.D. contacted the Berks County Children and Youth Services. Thus, M.D.'s age coupled with her inability to provide for herself sustains the trial court's finding that she was unemancipated during that period of time for which BCCYS seeks reimbursement. *Trosky v. Mann, supra.* The circumstances here are even more compelling than those in *Trosky*. In that case, the parents and the child maintained a hostile attitude toward each other. Here, there is no evidence that the parents lack filial bonds with M.D. n3

> n3 Appellants also rely upon pertinent sections of the Pennsylvania Code concerning eligibility for public assistance in support of their argument that M.D. is emancipated. Those provisions deem a minor who has been married to be emancipated thereby entitling him or her to public assistance. 55 Pa.Code § 145.62. However, "[t]he definition and concept of emancipation in the context of children in need of public assistance is not relevant or applicable to those children who can be supported by their parents." *Maurer, 382 Pa.Super. at 475, 555 A.2d at 1298.* Appellants' argument in this regard is baseless.

In effect, this case rests upon the factual finding that M.D. is a dependent in need of the necessities of life, i.e., food, clothing and shelter, whose immediate hope is to obtain help either from a public-funded program or from her parents. The cost of providing these necessities should not be charged to the public where the parents of the minor are able to provide for the child's needs. Accordingly, the learned trial judge, the Honorable Arthur E. Grim, did not abuse his discretion in finding that M.D. was unemancipated and by ordering appellants to reimburse BCCYS for sums expended on behalf of M.D. pursuant to *23 Pa.C.S.A. § 4321(2)*. n4

> n4 We reserve for another day the question of whether the parents' support obligation under *23 Pa.C.S.A. § 4321(2)* is relieved because of the spousal support obligation set forth in subsection (1) of section 4321. *See generally Marino, 411 Pa.Super. at 438 n. 10, 601 A.2d at 1247 n. 10* (in dicta the court stated that under section 4321 of the Domestic Relations Code married persons become emancipated from their parents as support rights exist between spouses). Appellants never raised this issue; but merely raised the issue of M.D.'s emancipation. Moreover, M.D.'s husband, J.S., has no means or assets with which to support M.D.

Order affirmed.

DISSENT BY CIRILLO

I respectfully dissent. I disagree with the majority's conclusion that the minor child, under the facts of this case, is not emancipated and her parents are responsible for her support.

As the majority correctly points out, we may only reverse a support order when the trial court abuses its discretion *Oeler by Gross v. Oeler, 527 Pa. 532, 537, 594 A.2d 649, 651 (1991).* This is such a case. The legislature has left for our determination the meaning and parameters of the word "emancipated" as used in *23 Pa.C.S.A. § 4323*. Emancipation is a question of fact to be determined by the totality of circumstances encountered in each case. *Marino by Marino v. Marino, 411 Pa.Super. 424, 601 A.2d 1240 (1992).* In the instant case, I feel that the majority has stretched the meaning beyond reasonable bounds.

The facts of this case clearly indicate that M.D. is emancipated from her parents. M.D. and J.S. are a young couple who fell in love. Because M.D. was a minor, application for marriage was made before the Court of Common Pleas of Berks County. After an appearance by M.D., J.S., and their parents, an order was issued authorizing the issuance

of a marriage license. M.D. and J.S. resided together as a married couple for nine months until J.S. filed for divorce. They are, however, currently married. However brief, their relationship still carries all the incidents and benefits of marriage. M.D.'s conduct certainly illustrates a contempt for acting in a mature and adult fashion. *Marino, supra, 411 Pa.Super. at 439 n. 12, 601 A.2d at 1248 n. 12.* Her actions indicate not only to her parents, but to the world that she intends to be treated as an adult. Indeed, the law affords certain protections to minors. However, M.D. decided to forego such protections in exchange for the benefits and advantages of married life. When the need to protect the minor no longer exists, then the protection should be terminated. *See Maurer v. Maurer, 382 Pa.Super. 468, 555 A.2d 1294 (1989).* The support rights claimed under *23 Pa.C.S.A. § 4322* should therefore be denied. Section 4321 of the Domestic Relations Code fortifies this position by appearing to indicate that a couple become emancipated from their parents after marriage because support rights come from the spouses. *Marino, supra, 411 Pa.Super. at 438 n. 10, 601 A.2d at 1247 n. 10; See also Krakovsky v. Krakovsky, 400 Pa.Super. 260, 583 A.2d 485 (1990).*

This attitude towards marriage emanates from Biblical times:

"Therefore shall a man leave his father and his mother, and shall cleave unto his wife: and they shall be one flesh."

Genesis 2:24.

While I recognize that marriage is not a dispositive factor in determining emancipation as a matter of law, it is nonetheless a factor which must be considered and weighed appropriately. *Marino, supra.* I respectfully suggest that the majority has not considered and weighed this couples' marriage sufficiently.

In light of the foregoing reasons and concerns, I would reverse the trial court's decision.

RHODE ISLAND

JEAN SIRAVO V. WILLIAM SIRAVO

No. 78-126-Appeal

Supreme Court of Rhode Island

424 A.2d 1047; 1981 R.I. LEXIS 1017

January 16, 1981

OPINION BY BEVILACQUA

The respondent William Siravo appeals from two decrees entered by a justice of the Family Court. n1 The first decree was entered on April 10, 1978 and the second on April 17, 1978.

> n1 Although a number of petitions, motions and objections were filed by both William and Jean, we shall refer to Jean as the petitioner and William as the respondent throughout this opinion.

In the first decree, the Family Court justice found that respondent had failed to pay child support for his daughter Nancy, alimony to the petitioner Jean Siravo, and counsel fees for petitioner's representation in the original divorce proceeding. n2 Additionally, the justice found that respondent was in contempt of an earlier decree ordering him to make these payments and, therefore, respondent would be required to pay counsel fees for the current litigation. n3 Finally, the April 10 decree denied respondent's petition to amend the original decree of divorce which outlined respondent's obligations with respect to alimony and support.

> n2 These unpaid sums included $ 1,620 for Nancy's support, $ 1,140 for alimony and $ 986.95 for counsel fees. A final decree of divorce dissolving the marriage between petitioner and respondent had been entered on August 15, 1975. This decree required respondent to make support and alimony payments of $ 60 per week for each obligation.

> n3 To purge himself of contempt, the decree required respondent to resume regular alimony and support payments, to begin diminishing the arrearage at the rate of $ 15 per week, and to pay petitioner's counsel $ 100 per month until this debt was satisfied.

The respondent immediately requested a stay of the April 10 order and announced his intention to appeal to this court. The petitioner then moved for an allowance of counsel fees for herself and her daughter to defend against the anticipated appeal. In his second decree, the Family Court justice denied respondent's request for a stay, denied petitioner's motion for counsel fees for herself, but granted counsel fees for Nancy. Because of certain jurisdictional questions involved, a complete review of the facts and travel of this case is appropriate.

Nancy Siravo turned eighteen on August 24, 1977. The final decree of divorce ordered respondent to make payments "until said minor child shall have become emancipated." Believing that emancipation occurred at age eighteen, respondent discontinued making support payments. Two months later, respondent ceased payment of alimony to petitioner. Having stopped these payments, respondent filed a petition to amend the final decree of divorce on November 10, 1977. n4 The respondent followed this petition with a voluntary petition for bankruptcy filed in the United States Bankruptcy Court for the District of Rhode Island on February 3, 1978. n5 In the meantime, respondent's petition to amend and a motion to adjudge respondent in contempt, previously filed by petitioner, were consolidated and argued before a Family Court justice on February 6, 1978.

> n4 A subsequent petition for modification concerning Nancy's support payments was filed on February 17, 1978.

> n5 The respondent included petitioner and her attorney as creditors in his bankruptcy petition.

At the February 6 hearing, respondent testified he had no income as evidenced by his petition for bankruptcy and argued that he was no longer under an obligation to support Nancy because she was now "emancipated." The petitioner attempted to dispute respondent's purported inability to pay and offered testimony in an attempt to demonstrate Nancy's continued dependency on petitioner and respondent for support. n6 It was the testimony given during this hearing, and during a second hearing held on March 13, 1978, that the Family Court justice used as a basis for the decrees of April 10 and 17 which gave rise to this appeal.

n6 The petitioner testified that Nancy attended the University of Rhode Island returning home on weekends and school vacations.

In reaching his decision, the Family Court justice made a number of determinations. The justice found that the parties intended support for Nancy to be terminated when she was emancipated in fact and not necessarily when she attained the age of majority. According to the justice below, emancipation did not occur automatically at eighteen. By examining the facts, the justice found that Nancy was not emancipated because she lived with petitioner, attended college, did not work, and could not support herself independently.

With respect to the petition for bankruptcy, the lower court ruled that such a petition did not have the effect of discharging respondent from child support, alimony, or counsel fee obligations. In this case, the justice held that the counsel fees were comparable to alimony because they affected the petitioner's maintenance. n7 Nor was respondent relieved of liability for arrearages in the opinion of the Family Court.

n7 General Laws 1956 (1969 Reenactment) § 15-5-16 (1980 Supp.) defines alimony "[as] payments for the support or maintenance of either the husband or the wife." This definition does not include payment of fees to a third party attorney. Furthermore, counsel fees are specifically distinguished from alimony by use of the disjunctive 'or' in § 15-5-16. Therefore, the Family Court justice, whose authority in this area is derived from the above statute, erred when he determined that counsel fees were comparable to alimony and therefore not dischargeable.

Subsequently, the Bankruptcy Court discharged respondent of all listed debts including alimony. n8 This had the effect of leaving respondent in contempt of court for nonpayment of moneys, some of which had been discharged by respondent's petition in bankruptcy.

n8 *Siravo v. Siravo*, No. Bk. 78-37 (D. R.I. April 17, 1979). Although deciding previously that *11 U.S.C.A. § 35*(a)(7) was constitutionally defective, *In re Wasserman, 3 Bankr. Ct. Dec. 467 (D. R.I. 1977),* the Bankruptcy Court apparently withheld decision on the *Siravo* case until after release of the United States Supreme Court's decision in *Orr v. Orr, 440 U.S. 268, 99 S. Ct. 1102, 59 L. Ed. 2d 306 (1979).*

I

The first issue before the court is whether, in light of respondent's filing of a petition in bankruptcy, the Family Court justice erred in not staying the contempt proceedings against respondent for his failure to pay his former wife's alimony and attorney fees, and his failure to make child support payments.

Under Rule 401(a) of the Federal Bankruptcy Code, a court may automatically stay, with certain limited exceptions, all actions on unsecured debts against a bankrupt. n9 One exception to the automatic stay rule is the alimony and child support provisions of Section 17(a)(7) of the Bankruptcy Act. n10 On July 18, 1977, the Bankruptcy Court for the District of Rhode Island held that the portion of section 17(a)(7) dealing with the dischargeability of alimony created an unconstitutional gender-based classification. *In re Wasserman, 3 Bankr. Ct. Dec. 467 (D. R.I. 1977).* n11 Basing its finding on this decision, the same court ruled two years later that respondent's alimony arrearage had been discharged.

n9 "Rule 401. Petition as Automatic Stay of Certain Actions on Unsecured Debts.

(a) *Stay of Actions*. -- The filing of a petition shall operate as a stay of the commencement or continuation of any action against the bankrupt, or, the enforcement of any judgment against him, if the action or judgment is founded on an unsecured provable debt other than one not dischargeable under clause (1), (5), (6), or (7) of § 17(a) of the Act."

n10 *11 U.S.C.A. § 35*(a)(7), amended by the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 523 (a)(5)(now codified at *11 U.S.C.A. § 523* (a)(5)(1979)).

n11 In making this determination, the court determined only that alimony arrearages were dischargeable. The bankruptcy judge, in his ruling, did not address the issue of dischargeability of future payments. *Siravo v. Siravo*, No. Bk. 78-37 (D. R.I. April 17, 1979).

By statute, Congress has vested the federal bankruptcy courts with exclusive jurisdiction in all matters pertaining to bankruptcy. n12 Consequently, a finding that an exception to Rule 401(a) is unconstitutional by a federal bankruptcy judge should not be challenged in state court. This ruling becomes the law of the jurisdiction in which it is rendered unless it is either reversed by a higher federal court or the statute is subsequently revised. n13 In Rhode Island, at the time this action arose, alimony payments were improperly included as an exception to the automatic stay provisions of Rule 401. Therefore, when respondent filed his petition for bankruptcy on February 3, 1978, the Family Court should have recognized that an automatic stay was in effect as to the contempt proceedings that arose from the nonpayment of alimony. n14 Thus, we conclude that respondent should not have been found in contempt for failure to pay alimony arrearages including counsel fees. Moreover, because the alimony arrearage and petitioner's attorney fees were found to be dischargeable by the federal bankruptcy judge, we reject the decree of the Family Court justice to the extent it is inconsistent with the discharge order. It appears that petitioner's only recourse in this unique case would be an appeal within the federal court system.

n12 *28 U.S.C.A. § 1334* (1976).

n13 The successor to § 17(a) of the Bankruptcy Act, codified at *11 U.S.C.A. § 523*(a)(5) prohibits the discharge of an individual debtor from any debt: "to a spouse, former spouse *** for alimony to, maintenance for, or support of such spouse." This subsequent revision complies with the criteria set forth in *In re Wasserman, supra.* Therefore, it appears that generally alimony is no longer dischargeable.

n14 This automatic stay did not apply to that portion of the contempt proceedings which were brought against William for failure to make child support payments. The constitutional validity of excepting child support payments from discharge was upheld in *Wasserman*.

II

Since the contempt proceedings for nonpayment of child support were not automatically stayed, we must now determine whether respondent, who was required to support his daughter until she became emancipated, properly ceased making support payments when she became eighteen years old, and whether respondent should be required to pay her counsel fees.

In the past we have stated that a father's responsibility for the support of his children terminates once they reach the age of majority absent some exceptional circumstances or express agreement between the parties to the contrary. *Calcagno v. Calcagno, 120 R.I. 723, 391 A.2d 79, 82 (1978); Bouchard v. Bouchard, 119 R.I. 656, 382 A.2d 810, 813 (1978); Tuttle v. Tuttle, 86 R.I. 421, 423, 135 A.2d 841, 842 (1975).* Most Family Court decrees are not self-terminating but remain valid and effective until amended or terminated by an order of the court. *Calcagno v. Calcagno, supra; Bouchard v. Bouchard, supra; Ciallella v. Ciallella, 80 R.I. 320, 325, 103 A.2d 77, 79 (1954).* However, as in the present case, some decrees are self-terminating upon the occurrence of a particular event. In this case, the emancipation of Nancy Siravo was such an event.

"'Emancipation' *** means the freeing of the child from the custody of the parent and from the obligation to render services to him." *Vaupel v. Bellach, 261 Iowa 376, 379, 154 N.W.2d 149, 150 (1967).* And emancipation has the effect of severing the legal rights and liabilities of the parents. *Fitzgerald v. Valdez, 77 N.M. 769, 427 P.2d 655 (1967).* Although a child may become emancipated prior to the attainment of majority, emancipation has been found to occur automatically when a child becomes an adult. *Turner v. Turner, 441 S.W.2d 105, 108 (Ky. App. 1969); but see id. 106, 108* (support obligation not terminated where language of agreement called for support payments until child self-supporting *or* emancipated). The only exception to this automatic emancipation rule occurs when infirmity of the body or mind renders the child unable to take care of itself. *Fitzgerald v. Valdez, supra.*

General Laws 1956 (1969 Reenactment) § 15-12-1 (1980 Supp.) lowered the age of majority from twenty-one to eighteen years of age. In reviewing the statute's effect on child support decrees, we determined recently that minority is a status with no fixed, vested or accrued rights in future support. Alternatively, we found that minority is a status created by law and subject to change by legislative enactment. *Calcagno v. Calcagno, supra.* A second consequence of § 15-12-1 was that it also lowered to eighteen the age at which a child is considered to be legally emancipated.

On August 24, 1977, Nancy Jean Siravo attained the age of eighteen and was therefore legally emancipated. The decree ordering child support *until* emancipation had been complied with and was then terminated. The respondent properly ceased making support payments; he was no longer legally responsible for the support of his newly emancipated daughter. We reach this conclusion notwithstanding the fact that Nancy attended college and lived at home on the weekends. Under the language of this particular support arrangement and in the absence of an agreement to the contrary, respondent was not legally obligated to support his daughter or pay for her college education where she had reached majority and was not physically or mentally handicapped. *Riegler v. Riegler, 259 Ark. 203, 532 S.W.2d 734 (1976).* Furthermore, it has been recognized that "[ordinarily] a child is emancipated at [the age of majority] even though [she] continues to live with [her] parents." *Colantoni v. Colantoni, 220 Pa. Super. 46, 50, 281 A.2d 662, 664 (1971).*

Therefore, we hold that the trial justice erred in finding respondent in contempt for ceasing to make child support payments. Additionally, because we find the contempt order invalid, respondent should not be required to pay the attorney's fees incurred by his emancipated daughter. *See Pires v. Pires, 102 R.I. 23, 27, 227 A.2d 477, 479 (1967)* (on appeal counsel fees awarded only when expressly authorized by statute, necessary or pursuant to a *valid* contempt order).

III

The final issue to be decided is whether the trial justice erred in denying William's petition to amend the final decree regarding child support and alimony payments.

Our determination that Nancy was emancipated at age eighteen renders moot the question of whether the child support provisions of the final decree should have been amended. We shall focus our attention solely upon the alimony provisions.

The respondent testified that he was both unemployed and ineligible to collect unemployment. He testified further that he had closed both his businesses and had filed a personal bankruptcy petition three days before the February 6, 1978 hearing. The record reveals that this portion of respondent's testimony was not disputed by petitioner.

In *Masse v. Masse, 112 R.I. 599, 313 A.2d 642 (1974),* we stated that "[where] positive and uncontroverted testimony, though not inherently improbable, self-contradictory, lacking in credence, or unworthy of belief, was completely ignored by the trial justice [, this] oversight deprives his factual determinations of the great weight to which they might otherwise be entitled *** and it requires us to accept that testimony as conclusive." *Id. at 602, 313 A.2d at 644-45.* "[Positive] uncontroverted testimony [, however,] may be rejected if it contains inherent improbabilities or contradictions, which alone, or in connection with other circumstances, tend to contradict it." *Laganiere v. Bonte Spinning Co., 103 R.I. 191, 194, 236 A.2d 256, 258 (1967).*

The Family Court justice chose to disbelieve the respondent's uncontroverted testimony as to his net worth. Moreover, the justice totally ignored the fact that the respondent had filed a personal bankruptcy petition and that any nonexempt assets he may have had would be distributed among his creditors. "[A] trier of fact who disregards a witness's positive testimony because in his judgment it lacks credibility should clearly state, even though briefly, the reasons which underlie his rejection." *Laganiere, 103 R.I. at 195, 236 A.2d at 258.* Under these circumstances, we believe that the trial justice committed error by failing to state his reasons for rejecting respondent's testimony regarding his net worth.

The respondent's appeal is sustained, and the case is remanded to the Family Court for further proceedings consistent with this opinion.

SOUTH CAROLINA

CLAUDE W. TIMMERMAN, RESPONDENT V. CHARLIE M. BROWN, APPELLANT

No. 20374

Supreme Court of South Carolina

268 S.C. 303; 233 S.E.2d 106; 1977 S.C. LEXIS 418

March 3, 1977

OPINION BY GREGORY

Brown appeals from an order of the family court making him pay medical expenses incurred by his daughter. At issue is whether the daughter was emancipated. Finding she was, we reverse.

Barbara Brown lived with her father near Greenwood, South Carolina, until August of 1974. Brown paid the tuition and fees for her to enroll as a boarding student at Lander College in the fall of 1974, but she dropped out before the end of the semester. She announced to her father, both orally and by letter, that she did not intend to return to his home and was going to make her own way. Brown agreed with her decision and did not attempt in any way to make her return to his home.

After living for two weeks with three other young people, she moved in with the Timmermans (an aunt and uncle), near Greenwood, South Carolina. The uncle is the respondent in this action. She worked briefly and then enrolled at Piedmont Technical College. Barbara became 18 years old in March, 1975, and incurred the medical expenses in September of 1975.

From 1970 to late 1974 Brown received $ 125.00 per month social security payments on behalf of Barbara. Barbara thereafter received these payments directly. The trial judge found that she is entitled to receive them while attending Piedmont Technical College.

Although living in close proximity, father and daughter did not see, or attempt to see, each other from the fall of 1974 until the time of the hearing in the fall of 1975.

Appellant argues that: (1) Barbara became emancipated by leaving home, he concurring, with the announced intention of not returning; and (2) he, Brown, is absolved from paying the expenses by Act Number 15 of the 1975 Acts (ratifying the constitutional amendment, Article 17, Section 14).

Emancipation of a minor child is effected primarily by agreement of the parent, although acts of the child are to be considered. *Parker v. Parker, 230 S.C. 28, 94 S.E. (2d) 12 (1956); see also* 59 Am. Jur. (2d), Parent and Child, § § 93, 95. Whether a child has been emancipated depends on the facts and circumstances of each case. *Parker v. Parker, supra.*

We find the father and daughter in this case agreed to Barbara leaving home, and effected her complete emancipation. Therefore, Brown is not responsible for his daughter's expenses and debts. *Parker v. Parker, supra.*

Because of our conclusion that Barbara was emancipated, we do not reach appellant's second argument.

Reversed.

SOUTH DAKOTA

TITLE 25. DOMESTIC RELATIONS

CHAPTER 25-5. PARENT AND CHILD

§ 25-5-19. Emancipation by express agreement -- Approval of circuit court.

Emancipation is express when it is by agreement of both parents if living, and if not, the surviving parent and the child. Any such express agreement of emancipation shall be presented to the circuit court of the county in which the child resides for approval. The court shall issue a declaration of emancipation if it finds the emancipation would not be contrary to the child's best interest. The declaration of emancipation and a copy of the agreement shall be filed by the clerk of courts.

§ 25-5-21. Duty of emancipated child to parent.

The legal duty of an emancipated child to his parent is the same as that of a child who has reached his majority.

§ 25-5-24. Emancipated minor defined.

Any person under the age of eighteen years who:

(1) Has entered into a valid marriage, whether or not such marriage was terminated by dissolution; or

(2) Is on active duty with any of the armed forces of the United States of America; or

(3) Has received a declaration of emancipation pursuant to § 25-5-26; is an emancipated minor.

§ 25-5-25. Age of majority for certain purposes -- Parent or guardian liability.

An emancipated minor shall be considered as being over the age of majority for the following purposes:

(1) For the purpose of consenting to medical, chiropractic, optometric, dental or psychiatric care, without parental consent, knowledge or liability;

(2) For the purpose of his capacity to enter into a binding contract;

(3) For the purpose of his capacity to sue and be sued in his own name;

(4) For the purpose of his right to support by his parents;

(5) For purposes of the rights of his parents to his earnings, and to control him;

(6) For the purpose of establishing his own residence;

(7) For the purpose of buying or selling real property;

(8) For the purpose of ending all vicarious liability of the minor's parents or guardian for the minor's torts; and

(9) For the purpose of enrolling in any school or college.

Nothing in this section may be construed to relieve the minor's parents or guardian from any liability for the torts of an emancipated minor if the liability arises out of an agency relationship, out of the operation of a motor vehicle as provided in § 25-5-15 or some other principle of law other than the parent-child relationship.

§ 25-5-26. Petition for emancipation – Procedure.

A minor may petition the circuit court of the county in which he resides for a declaration of emancipation. The petition shall be verified and shall set forth with specificity all of the following:

(1) That he is at least sixteen years of age;

(2) That he willingly lives separate and apart from his parents or guardian with the consent or acquiescence of his parents or guardian;

(3) That he is managing his own financial affairs;

(4) That the source of his income is not derived from any activity declared to be a crime by the laws of the State of South Dakota or the laws of the United States.

Before the petition is heard, such notice as the court deems reasonable shall be given to the minor's parents, guardian or other person entitled to the custody of the minor, or proof made to the court that their addresses are unknown, or that for other reasons such notice cannot be given. If a minor is a ward or dependent child of the state, notice shall be given to the appropriate state agency.

The court shall sustain the petition if it finds that the minor is a person that fulfills the requirements of this section and that emancipation would not be contrary to his best interest.

If the petition is sustained, the court shall forthwith issue a declaration of emancipation, which shall be filed by the clerk of court.

If the petition is denied, the minor may appeal to the Supreme Court.

If the petition is sustained, the parents or guardian may appeal to the Supreme Court if they have appeared in the proceeding and opposed the granting of the petition.

A declaration is conclusive evidence that the minor is emancipated.

§ 25-5-27. Rescission of declaration of emancipation.

A minor declared emancipated under §§ 25-5-26 or 25-5-19 or his conservator may petition the circuit court of the county in which he resides to rescind the declaration.

Before the petition is heard, such notice as the court deems reasonable shall be given to the minor's parents or guardian or proof made to the court that their addresses are unknown, or that for other reasons such notice cannot be given. However, no liability may accrue to any parent or guardian not given actual notice, as a result of rescission of the declaration of emancipation, until such parent or guardian is given actual notice.

The court shall sustain the petition and rescind the declaration of emancipation if it finds that the minor is indigent and has no means of support.

If the petition is sustained, the court shall forthwith issue a court order rescinding the declaration of emancipation granted under § 25-5-26, which shall be filed by the clerk of court.

Rescission of the declaration of emancipation does not alter any contractual obligations or rights or any property rights or interests which arose during the period that the declaration was in effect.

§ 25-5-28. Declaration obtained by fraud voidable – Proceedings.

A declaration of emancipation obtained by fraud or by the withholding of material information is voidable. The voiding of any such declaration pursuant to this section does not alter any contractual obligations or rights or any property rights or interests which arose during the period that the declaration was in effect.

A proceeding under this section may be commenced by any person or by any public or private agency. Notice of the commencement of such a proceeding and of any order declaring the declaration of emancipation to be void shall be consistent with the requirements of § 25-5-27.

TENNESSEE

SONDRA A. MORGAN, PETITIONER-APPELLANT V. GENE A. MORGAN, RESPONDENT-APPELLEE

Court of Appeals of Tennessee, Eastern Section

1988 Tenn. App. LEXIS 792

December 7, 1988, Filed

OPINION BY GODDARD

This case is brought under the Uniform Reciprocal Enforcement of Support Act, Title 36, Chapter 5, Part 2 of the Tennessee Code Annotated. Tennessee, through the Chancery Court for Grainger County, was the rendering State, Florida the initiating State, and Tennessee also the responding State. The Circuit Court for Grainger County found that the Respondent's daughter, for whom support was sought, had been emancipated as of June 1986, and as a result dismissed the complaint.

The Petitioner appeals, contending the evidence preponderates against the Trial Court's finding.

The facts as set out in the brief of the Petitioner are accepted by the Respondent, with one addition, hereinafter noted:

The trial of this case was held on December 7, 1987, before the Honorable William R. Holt, Jr., Judge of the Circuit Court of Grainger County, Tennessee.

The petitioner introduced into evidence the Decree of Divorce between the parties entered in the Grainger County Chancery Court nunc pro tunc as of November 29, 1984. The decree provided that the defendant was to pay $ 25.00 per week in child support, but that the defendant would not be required to pay such support for any time during which the child resided with him. The petitioner testified that the defendant was $ 1,900.00 in arrears on the child support as of January 8, 1987.

The petitioner also testified that her daughter, Christy Annette Morgan, turned seventeen in June of 1987. She testified that her daughter had an illegitimate child on July 12, 1985, who was twenty-nine months old at the time of trial. The petitioner testified that her daughter, Christy, attended school throughout her pregnancy and for one additional year following the birth of her illegitimate child. She also testified that her daughter had obtained a GED, the equivalent of a high school diploma, and had gone to work part time at McDonald's in July of 1986. Finally, the petitioner testified that her daughter earned only $ 200.00 every other week, which was insufficient to pay for both the needs of herself and her illegitimate child. The petitioner indicated that she had to provide auto insurance, health insurance, clothing expenses, medical expenses, room, and board for her daughter.

On cross examination, the petitioner testified that her daughter earned $ 4.20 per hour at McDonald's and that she worked approximately 40 hours per week. She stated that she did not charge her daughter rent for living with her. The petitioner testified that she was not sure how much child support she had received from the defendant in 1986, but that she had some calendars at home on which she had recorded the dates and amounts of the payments received. The court agreed to allow the petitioner to file these calendars as a late filed exhibit to her testimony.

Mr. Gene A Morgan, the defendant, was called as the only witness for the defense. Mr. Morgan testified that he had made 49 weekly payments in 1985 and 31 weekly payments in 1986. Various money order receipts and cancelled checks were entered into evidence in support of his testimony. The defendant testified that he stopped paying child support when his daughter was no longer attending high school. He also stated that he continued to pay child support even after his daughter got pregnant and had her own child.

The addition the Respondent suggests is the fact that he is in construction work, which is seasonal, and earned less than $ 6000 in 1987.

Tennessee law relative to emancipation is correctly set out with appropriate citations in Tennessee Jurisprudence under Parent and Child § 18, as follows:

§ 18. Generally.--Emancipation may result from an agreement, or it may occur by operation of law, and generally the emancipation of a child leaves the child, as far as the parent is concerned, free to act on the child's own responsibility and in accordance with his own will and pleasure, with the same independence as though he had attained majority. Emancipation of a child may be express, as by voluntary agreement of the parent and child, or implied from such acts and conduct as import consent, and it may be conditional or absolute, complete or partial.

"Complete emancipation" works a severance of the legal filial relation as completely as if the child were of age. Such an act ought not lightly to be inferred from a given state of facts, where the father is blameless in conduct toward the child. It is not revocable at the father's instance. The fact that the son lives in the family of the father does not establish that he is not emancipated, since there may be complete emancipation even though the minor continues to live with his parents, and that is true even though the child continues to assist the parent in the parent's work.

"Partial emancipation" frees a child for only a part of the period of minority, or from only a part of the parent's rights, or for some purposes, and not for others. Partial emancipation of an infant is revocable by the father.

At what age a parent will emancipate a child rests in the parent's discretion. In the absence of a statutory provision to the contrary, the intention of a parent to emancipate his child need not be evidenced by any formal or record act, but the intention to emancipate may be expressed either in writing or orally, or it may be implied from conduct or from other circumstances.

The question as to what is emancipation is a question of law, while the question of whether there has been emancipation is one of fact.

Generally, voluntary emancipation requires the consent of the parent, express or implied, and involves an entire surrender of all the right to care, custody and the earnings of the child, as well as a renunciation of the parental duties. An agreement, either in writing or parol, must be proven to support a voluntary emancipation of a minor, and proof thereof may be established by circumstances clearly showing a relinquishment by the parent of all parental responsibility and control. In absence of a formal agreement for voluntary emancipation of a minor, proof must show conduct wholly inconsistent with retention by the parent of any degree of parental responsibility or control, and the mere relinquishment of the right to the minor's earnings is not enough to establish emancipation.

Emancipation does not enlarge the minor's capacity to contract but simply precludes the father from asserting his claim to the wages of his child.

The marriage of a minor child, either with or without the consent of the parents, fully emancipates the child from parental authority and from the duty of support and deprives the parent of the right to the child's earnings, even though the child may later be divorced while still a minor.

In Fiedler v. Potter, 180 Tenn. 176, 172 S.W.2d 1007 (1943), the Supreme Court points out that the question of voluntary emancipation of a minor is one which must be determined upon the peculiar facts and circumstances of each case.

In the case at bar we are not in a position to say under its peculiar facts set out below that the evidence preponderates against the Trial Court's determination that the daughter, insofar as he is concerned, has been emancipated:

(1) She has conceived and given birth to a child.

(2) She has quit school.

(3) She has earned a GED diploma.

(4) She is working full time and earning more than her father.

(5) She lives apart from her father.

(6) The father stopped making support payments and has made no claim on her wages.

In reaching this conclusion we have not overlooked the daughter's contention that she is unable on her present salary to support herself and her minor child. This may very well be true, but the situation would be the same had the child been born in wedlock and she later divorced the father. Without question her marriage would have worked an

emancipation. We do observe in this connection, however, that there is no evidence that the father of her child is unknown, deceased, or unable to provide support, which is his duty rather than that of the Respondent grandfather.

For the foregoing reasons the Trial Court is affirmed and the cause remanded for collection of costs below. Costs of appeal are adjudged against the Petitioner.

TEXAS

FAMILY CODE

TITLE 2. CHILD IN RELATION TO THE FAMILY

SUBTITLE A. LIMITATIONS OF MINORITY

CHAPTER 31. REMOVAL OF DISABILITIES OF MINORITY

§ 31.001. Requirements.

(a) A minor may petition to have the disabilities of minority removed for limited or general purposes if the minor is:

(1) a resident of this state;

(2) 17 years of age, or at least 16 years of age and living separate and apart from the minor's parents, managing conservator, or guardian; and

(3) self-supporting and managing the minor's own financial affairs.

(b) A minor may file suit under this chapter in the minor's own name. The minor need not be represented by next friend.

§ 31.002. Requisites of Petition; Verification.

(a) The petition for removal of disabilities of minority must state:

(1) the name, age, and place of residence of the petitioner;

(2) the name and place of residence of each living parent;

(3) the name and place of residence of the guardian of the person and the guardian of the estate, if any;

(4) the name and place of residence of the managing conservator, if any;

(5) the reasons why removal would be in the best interest of the minor; and

(6) the purposes for which removal is requested.

(b) A parent of the petitioner must verify the petition, except that if a managing conservator or guardian of the person has been appointed, the petition must be verified by that person. If the person who is to verify the petition is unavailable or that person's whereabouts are unknown, the guardian ad litem shall verify the petition.

§ 31.003. Venue.

The petitioner shall file the petition in the county in which the petitioner resides.

§ 31.004. Guardian Ad Litem.

The court shall appoint a guardian ad litem to represent the interest of the petitioner at the hearing.

§ 31.005. Order.

The court by order, or the Texas Supreme Court by rule or order, may remove the disabilities of minority of a minor, including any restriction imposed by Chapter 32, if the court or the Texas Supreme Court finds the removal to be in the best interest of the petitioner. The order or rule must state the limited or general purposes for which disabilities are removed.

§ 31.006. Effect of General Removal.

Except for specific constitutional and statutory age requirements, a minor whose disabilities are removed for general purposes has the capacity of an adult, including the capacity to contract. Except as provided by federal law, all educational rights accorded to the parent of a student, including the right to make education decisions under Section 151.003(a)(10), transfer to the minor whose disabilities are removed for general purposes.

§ 31.007. Registration of Order of Another State or Nation.

(a) A nonresident minor who has had the disabilities of minority removed in the state of the minor's residence may file a certified copy of the order removing disabilities in the deed records of any county in this state.

(b) When a certified copy of the order of a court of another state or nation is filed, the minor has the capacity of an adult, except as provided by Section 31.006 and by the terms of the order.

UTAH

STATE OF UTAH, IN THE INTEREST OF R.R., PLAINTIFF AND APPELLEE V. C.R. AND R.R., DEFENDANTS AND APPELLANTS. STATE OF UTAH, IN THE INTEREST OF R.D.H., PLAINTIFF AND APPELLEE V. K.G., DEFENDANT AND APPELLANT

Case Nos. 890058-CA, 890173-CA

Court of Appeals of Utah

797 P.2d 459; 142 Utah Adv. Rep. 16; 1990 Utah App. LEXIS 133

August 30, 1990, Filed

OPINION BY JACKSON

In these consolidated cases, the parents of two minor boys appeal from juvenile court orders requiring them to pay the State for support furnished the two boys after they were adjudicated as within the juvenile court's jurisdiction and while they were in the temporary custody of state agencies. Because we conclude that the juvenile court erred in failing to determine whether the parents' support obligations were extinguished by the minors' emancipation through their own conduct, we vacate the orders of the juvenile court and remand for further proceedings consistent with this opinion.

In October 1984, R.R., nearly fifteen, left his parents' home and lived with various relatives. In the spring of 1985, a petition was filed with the juvenile court alleging that R.R. was a dependent child. See Utah Code Ann. § 78-3a-16(1)(c) (1987); Utah Code Ann. § 78-3a-2(20) (1987). When R.R.'s mother admitted the allegations in July 1985, the juvenile court found R.R. to be dependent within the meaning of the statute and temporarily awarded legal custody of R.R. to the Utah Department of Family Services (DFS). The juvenile court did not terminate the father and mother's parental rights pursuant to Utah Code Ann. § 78-3a-48 (1987), although the subject was raised at a May 1986 review hearing. In October 1986, the temporary order terminated and custody of R.R. was awarded to his parents, to be supervised by DFS until June 1987.

The State filed a petition against R.R.'s parents in the fall of 1988 pursuant to Utah Code Ann. § 78-3a-49 (1987), n2 seeking reimbursement of $1,159.06 in support for R.R. expended by the State during the period of January 1985 n3 through October 10, 1986. Relying on the common law doctrine of emancipation, R.R.'s parents contested the petition and claimed that their duty to support R.R. was terminated in October 1984 when he voluntarily left their home to live elsewhere and live a lifestyle of which they disapproved. According to the parents' unrefuted testimony, they never ordered R.R. to leave. They were willing to support him in their own home along with his younger siblings if he would agree to abide by their rules. R.R. left to reside elsewhere, they testified, because he refused to accept their condition that he give up his homosexual lifestyle. In response, the State argued that R.R.'s parents had not met their burden of proving emancipation because there was no evidence R.R. was financially independent or that he was able to provide his own residence. The State also argued that R.R. had not left home voluntarily because his parents had forced him to leave the household.

- - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n2 Section 78-3a-49(1) provides, in relevant part:

(1) When legal custody of a child is vested by the court in an individual or agency other than his parents or a secure youth corrections facility, the court may in the same or any subsequent proceeding inquire into the ability of the parents, a parent, or any other person who may be obligated, to support the child and to pay any other expenses of the child, including the expense of any medical, psychiatric, or psychological examination or treatment provided under order of the court. The court may, after due notice and a hearing on the matter, require the parents or other person to pay the whole or part of such support and expenses, depending on their financial resources and other demands on their funds.

n3 The record does not reflect the legal or factual basis for the State's request for reimbursement of support furnished R.R. during the six months before the court's order placing him in DFS custody.

- - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

In ruling on R.R.'s parents' objections to the State's petition, the court made no detailed findings of fact on the emancipation question. Instead, the juvenile court judge expressed his appreciation to counsel for informing him of the numerous cases applying the doctrine of emancipation in other jurisdictions, but declined to consider it as applicable in Utah, stating, "[T]he court does not wish to adopt said decisions as law in this jurisdiction." R.R.'s parents were accordingly ordered to reimburse the State in an amount based on their available resources.

R.D.H., born in February 1971, was living with two siblings and his divorced mother, appellant K.G., in the summer of 1986 when he became increasingly violent and uncontrollable, frequently beating up other family members. K.G. occasionally called the police to intervene in these episodes. R.D.H. ran away from home a few times in the fall of 1986. In January 1987, R.D.H. got into an argument with his younger brother and kicked him. When K.G. intervened, R.D.H. hit her with his fist. When K.G.'s boyfriend came to her aid, R.D.H. attacked him with a barbell. The police were summoned and eventually took R.D.H. away. An assault charge was filed and the boy was detained at a youth home for a few days, then returned to his mother's home. He stayed there until March 8, 1987, when he ran away after climbing out a bedroom window and did not return. The record does not reveal R.D.H.'s means of support or his living arrangements from March 8 until August 1987, when the assault charge and other independent criminal charges against R.D.H. were adjudicated in juvenile court. See Utah Code Ann. § 78-3a-16(1)(a) (Supp. 1990). At that time, R.D.H. was placed on probation and put into the custody of the Utah Division of Social Services.

In September 1988, the State filed a petition against K.G. pursuant to section 78-3a-49, seeking reimbursement for $ 8,287.42 expended as support for R.D.H. from August 1987 through March 1988. K.G. opposed the petition based on the common law doctrine of emancipation, claiming that R.D.H.'s violent conduct and voluntary departure from her home had resulted in a termination of her duty to support him during the period when support was supplied by the State. Once again, in cursory findings and conclusions, the juvenile court declined to apply the doctrine of emancipation, concluding it "is not statutory, nor is it founded upon clear case law of the State of Utah. . . ." The court ordered K.G. to reimburse the State in an amount based on her financial resources and obligations.

The basic issue presented in these appeals is whether the juvenile court erroneously concluded that the doctrine of emancipation is not a part of the law in Utah. This ruling involves a question of law, which we review for correctness with no deference to the lower court's determination. E.g., Berube v. Fashion Centre, Ltd., 771 P.2d 1033, 1039 (Utah 1989); Brinkerhoff v. Schwendiman, 790 P.2d 587, 589 (Utah Ct. App. 1990).

In American law, judicial emancipation refers to the nonstatutory termination of certain rights and obligations of the parent-child relationship during the child's minority. Katz, Schroeder & Sidman, Emancipating Our Children -- Coming of Legal Age in America, 7 Fam. L.Q. 211, 214 (1973) (hereinafter Katz).

As a result of statutory and common law developments, the American parent is generally held responsible for his child's financial support, health, education, morality, and for instilling in him respect for people and authority. To facilitate the performance of these obligations, the parent is vested with the custody and control of the child, including the requisite disciplinary authority. And, under a heritage of the past, the parent is also entitled to the child's services, and, by derivation, to his or her earnings. When a child is adjudicated a fully emancipated minor, these reciprocal rights and responsibilities are extinguished and are no longer legally enforceable: the emancipated child is thus legally treated as an adult.

Katz, 7 Fam. L.Q. at 214-15 (footnotes omitted). Although apparently undeveloped at English common law, see In re Sonnenberg, 256 Minn. 571, 575, 99 N.W.2d 444, 447 (1959), the doctrine of emancipation has been described as a "basic tenet of family law" in this country, applied by American courts since the early nineteenth century. n4 Katz, 7 Fam. L.Q. at 211 & n.1. Some of the earliest pertinent reported decisions applied the doctrine of emancipation in common law actions by a third party to recover from parents for "necessaries" furnished minors who had voluntarily left home, although in some cases the party urging emancipation failed to establish adequate facts in support of it. E.g., Cooper v. McNamara, 92 Iowa 243, 60 N.W. 522 (1894) (recognizing doctrine but affirming award to third party against parent for board provided minor who had left parent's home and who earned his own living, because no emancipation found); Brosius v. Barker, 154 Mo. App. 657, 136 S.W. 18 (1911) (affirming judgment for defendant father, where jury found minor, who moved out west and received medical treatment from plaintiff, to be emancipated); Wallace v. Cox, 136 Tenn. 69, 188 S.W. 611 (1916) (no emancipation where minor's refusal to move to next county with father and her employment away from home before obtaining medical treatment were regarded as temporary). In several nineteenth century decisions, the fact that a minor voluntarily abandoned the parent's home

to pursue a life free from parental control was alone considered sufficient to support a finding of emancipation that terminated the parent's duty of support. As a result, third parties who subsequently furnished necessaries to the minor could not recover from the parent, even in the absence of evidence that the minor was either capable of self-support or had actually supported himself. E.g., Hunt v. Thompson, 4 Ill. 179 (1841); Angel v. McLellan, 16 Mass. 28 (1819); Weeks v. Merrow, 40 Me. 151 (1855); see also Ramsey v. Ramsey, 121 Ind. 215, 23 N.E. 69 (1889). n5

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n4 For example, in 1818 the Supreme Judicial Court of Massachusetts used the emancipation doctrine to protect a minor's right to retain compensation paid for his labor:

But where the father has discharged himself of the obligation to support the child, or has obliged the child to support himself, there is no principle, but that of slavery, which will continue his right to receive the earnings of the child's labor. . . . [T]he law will imply an emancipation of the son . . . .

Nightingale v. Withington, 15 Mass. 272, 274 S. 75 (15 Tyng) (1818).

n5 The cases are collected in Annotation, Parent's Obligation to Support Unmarried Minor Child Who Refuses to Live with Parent, 98 A.L.R.3d 334 (1980), and Annotation, What Voluntary Acts of Child, Other than Marriage or Entry into Military Service, Terminate Parent's Obligation to Support, 32 A.L.R.3d 1055 (1970).

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As the cases relied upon below by the parties amply demonstrate, the doctrine of emancipation continues to be an accepted part of the common law in this country. Regardless of whether courts ultimately determine that there have been actual emancipations, they nonetheless apply the doctrine in actions by divorced custodial parents seeking enforcement of support orders against former spouses who claim that their children should be judicially found to be emancipated, e.g., Napolitano v. Napolitano, 732 P.2d 245 (Colo. Ct. App. 1986); In re Marriage of Donahoe, 114 Ill.App.3d 470, 448 N.E.2d 1030, 70 Ill. Dec. 152 (1983); Biermann v. Biermann, 584 S.W.2d 106 (Mo. Ct. App. 1979); Fevig v. Fevig, 90 N.M. 51, 559 P.2d 839 (1977); Niesen v. Niesen, 38 Wis. 2d 599, 157 N.W.2d 660 (1968), in actions by minors to recover support directly from a parent, e.g., Roe v. Doe, 29 N.Y.2d 188, 324 N.Y.S.2d 71, 272 N.E.2d 567 (1971) (duty of support terminated by daughter's actions in voluntarily abandoning father's home to avoid parental control); Debra R. v. Sidney R., 85 Misc. 2d 914, 380 N.Y.S.2d 579 (Fam. Ct. 1976) (dismissing petition for support where minor on public assistance had emancipated herself by voluntarily leaving parent's home without justification), and in common law actions for necessaries furnished minors by third parties, e.g., Ison v. Florida Sanitarium and Benevolent Assoc., 302 So.2d 200 (Fla. Ct. App. 1974).

There are also modern cases applying the doctrine in statutorily authorized actions by state agencies against parents to recover public assistance provided to minor children. For example, in Parker v. Stage, 43 N.Y.2d 128, 400 N.Y.S.2d 794, 371 N.E.2d 513 (1977), the New York Court of Appeals affirmed a lower court's dismissal of the Department of Social Services' statutory action against a parent for payment of support to a minor who had obtained public assistance from the Department. The lower court had determined that the minor had emancipated herself by leaving the parent's home to live with her lover. The appellate court examined the New York reimbursement statute, which parallels our own section 78-3a-49 in that it gives the trial court discretion to order repayment of support provided by a state agency, and concluded that, in light of the daughter's actual emancipation by her own conduct, the lower court had properly exercised its discretion under the statute by refusing to compel the parent to pay support. See id., 371 N.E.2d at 514-16. In a more recent case, State Dep't of Human Resources v. McGraw, 68 Or. App. 834, 683 P.2d 154, rev. denied, 298 Or. 238, 691 P.2d 482 (1984), the Court of Appeals of Oregon considered a statute requiring parents to repay public assistance provided their dependent children. The court refused to construe the statute as applicable in circumstances where the minor, who had left her parent's home without good cause, was "dependent" only in the sense that virtually every child is economically dependent on parents or others. Id., 683 P.2d at 156; but see State ex rel. Lacey v. Hargrove, 89 Or. App. 17, 747 P.2d 366 n.1 (1987) (dictum suggesting McGraw ruling abrogated by legislative enactment of Uniform Reciprocal Enforcement of Support Act).

In the instant cases, the juvenile court believed that the doctrine of emancipation is not presently part of Utah law because it has not been expressly adopted in a statute or a Utah appellate court opinion. In light of Utah Code Ann. § 68-3-1 (1986), the trial court's conclusion of law is incorrect. That section, a part of Utah's statutes since statehood in 1898, n6 provides:

The common law of England so far as it is not repugnant to, or in conflict with, the constitution or laws of the United States, or the constitution or laws of this state . . . is hereby adopted, and shall be the rule of decision in all courts of this state.

(Emphasis added). This provision has been interpreted as the Utah legislature's adoption at statehood of the common law as it had been developed by the state courts of last resort in this country, not just as it was in England at a fixed point in time. Cahoon v. Pelton, 9 Utah 2d 224, 342 P.2d 94, 98 (1959); Hatch v. Hatch, 46 Utah 116, 148 P. 1096, 1100 (1916).

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n6 1898 Utah Revised Statutes § 2488; 1933 Utah Revised Statutes § 88-2-1.

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We hold that the common law doctrine of emancipation is, by virtue of section 68-3-1, a part of the law of this jurisdiction constituting the rule of decision in Utah courts, unless it conflicts with the statutes or constitutions of the United States or of Utah. Since the final orders appealed from are based on an erroneous legal conclusion to the contrary, we vacate the orders in both cases and remand them to the juvenile court for further proceedings.

On remand, the trial court should first articulate, based on its review of the decisions of courts of other states, what factors are relevant to a determination of whether emancipation has occurred. n7 Second, the court must determine, based on the subsidiary factual findings it makes on the evidence in the record, whether appellants in each case established that their sons were actually emancipated, and that appellants' obligations to support were thereby terminated, before and during the time the state agencies provided support to the minors. Finally, if the trial court assumes or finds actual emancipation during the relevant time periods, it must also determine as a matter of law whether application of the doctrine of emancipation in either case would be inappropriate because it would conflict with any Utah law, such as section 78-3a-49 or Utah Code Ann. §§ 78-45-3, -4, -4.3 (1987). n8 See Hansen v. Utah State Retirement Bd., 652 P.2d 1332, 1337 (Utah 1982) (where common law and statute conflict, former must yield).

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n7 See, for example, the factors noted in Napolitano v. Napolitano, 732 P.2d 245, 246 (Colo. Ct. App. 1986).

n8 Subsections -3 and -4 set forth both parents' duties to support their child. Section 78-45-4.3(1) provides:

Notwithstanding § 78-45-2, a natural or an adoptive parent or stepparent whose minor child has become a ward of the state is not relieved of the primary obligation to support that child until he reaches the age of majority.

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We caution that our disposition of the appeals before us should not be read as an expression of our views on the merits of these issues. It is for the trial court, not for this court, to make the necessary factual and legal determinations in the first instance, however difficult or novel the questions presented may be.

VERMONT

TITLE TWELVE. COURT PROCEDURE

PART 10. OATHS AND FORMS

CHAPTER 217. EMANCIPATION OF MINORS

§ 7151. Emancipated minor; definition; criteria.

(a) As used in this chapter:

(1) "Emancipated minor" means a minor who:

(A) has entered into a valid marriage, whether or not such marriage was terminated by dissolution;

(B) is on active duty with any of the armed forces of the United States of America; or

(C) has been ordered emancipated pursuant to section 7155 of this title.

(2) "Risk of harm" means a significant danger that a child will suffer serious harm other than by accidental means, which would be likely to cause physical injury, neglect, emotional maltreatment or sexual abuse.

(b) In order to become an emancipated minor by court order under this chapter, a minor at the time of the order must be a person who:

(1) is 16 years of age or older but under the age of majority;

(2) has lived separate and apart from his or her parents, custodian, or legal guardian for three months or longer;

(3) is managing his or her own financial affairs;

(4) has demonstrated the ability to be self-sufficient in his or her financial and personal affairs, including proof of employment or his or her other means of support. "Other means of support" does not include general assistance or Aid to Needy Families with Children, or relying on the financial resources of another person who is receiving such assistance or aid;

(5) holds a high school diploma or its equivalent or is earning passing grades in an educational program approved by the court and directed towards the earning of a high school diploma or its equivalent;

(6) is not under a legal guardianship or in the custody or guardianship of the commissioner of social and rehabilitation services;

(7) is not under the supervision or in the custody of the commissioner of corrections.

§ 7152. Jurisdiction.

The probate court shall have exclusive jurisdiction over all proceedings concerning the emancipation of minors.

§ 7153. Petition; contents.

(a) A minor may petition the probate court in the probate district in which the minor resides at the time of the filing for an order of emancipation. The petition shall state:

(1) The minor's name and date of birth.

(2) The minor's address.

(3) The names and addresses, if known, of the minor's parents.

(4) The names and addresses of any guardians or custodians, including the commissioner of social and rehabilitation services, appointed for the minor, if appropriate.

(5) Specific facts in support of the emancipation criteria in section 7151(b) of this chapter.

(6) Specific facts as to the reasons why emancipation is sought.

(b) A minor may not file a petition under subsection (a) of this section unless the minor has lived in Vermont for three months or longer.

§ 7154. Hearing; parties; notice.

(a) Upon the filing of the petition, the court shall schedule a hearing.

(b) The minor's parents, guardian or other person charged with the custody of the minor shall be parties to the proceedings and shall be given an opportunity to be heard.

(c) At least 30 days prior to the hearing, notice shall be given to the minor's parents, guardian or other person charged with the custody of the minor, unless the court finds that their addresses are unknown, or that there are other reasons notice cannot be given.

(d) If the minor has been committed to the custody or guardianship of the commissioner of social and rehabilitation services, or a petition has been filed to commit the minor to the custody of the commissioner, the commissioner shall be a party to the action under this chapter.

(e) Any action under this chapter may be consolidated with any other action in the probate court involving the interest or welfare of the minor.

(f) The burden of proving facts necessary to sustain the petition shall be on the minor and shall be by a preponderance of the evidence.

§ 7155. Findings; order of emancipation.

(a) After completion of the hearing and consideration of the record, the court shall make findings and issue its order. If the court finds that the minor meets the criteria in subsection 7151(b) of this chapter and that emancipation would be in the best interests of the minor, the court shall forthwith issue an order of emancipation.

(b) At the time of the hearing under this section the court shall consider the best interest of the minor in accordance with the following criteria:

(1) emancipation will not create a risk of harm to the minor;

(2) the likelihood the minor will be able to assume adult responsibilities;

(3) the minor's adjustment to living separate and apart from his or her parents, guardian, or custodian;

(4) the opinion and recommendations of the minor's parents, guardian or custodian.

(c) In ascertaining the best interests of the minor under this section, the court shall consider the appointment of a guardian ad litem.

(d) Any order of guardianship or custody shall be vacated before the court may issue an order of emancipation. Other orders of the family or probate court may be vacated, modified or continued in this proceeding if such action is necessary to effectuate the order of emancipation. Child support orders relating to the support of the minor shall be vacated, except for the duty to make past-due payments for child support, which, under all circumstances, shall remain enforceable.

(e) The court may require an emancipated minor to report periodically to the court or to another person specified by the court, regarding the minor's compliance with the provisions of section 7151(b) of this title. Failure to report as required may result in the emancipation order being vacated upon notice to the parties.

(f) An order of emancipation shall be conclusive evidence that the minor is emancipated.

§ 7156. Effect of emancipation.

(a) The order of emancipation shall recognize the minor as an adult for all purposes that result from reaching the age of majority, including:

(1) entering into a binding contract;

(2) litigation and settlement of controversies including the ability to sue and be sued;

(3) buying or selling real property;

(4) establishing a residence except that an emancipation order may not be used for the purpose of obtaining residency and in-state tuition or benefits at the University of Vermont or the Vermont state colleges;

(5) being prosecuted as an adult under the criminal laws of the state;

(6) terminating parental support and control of the minor and their rights to the minor's income;

(7) terminating parental tort liability for minor;

(8) indicating the minor's emancipated status on driver's license or identification card issued by the state.

(b) The order of emancipation shall not affect the status of the minor in the applicability of any provision of law which requires specific age requirements under the state or federal constitution or any state or federal law including laws that prohibit the sale, purchase or consumption of intoxicating liquor to or by a person under 21 years of age.

§ 7157. Recognition of out-of-state emancipation orders.

A minor who is emancipated by the lawful procedure of another state shall retain that status in this state and shall enjoy the benefits of this chapter while in this state.

§ 7158. Order of emancipation obtained by fraud or withholding material information; voidability; effect on rights and obligations; commencement of proceeding.

(a) An order of emancipation obtained by fraud or by the withholding of material information shall be voidable. The voiding of any such order pursuant to this section shall not alter any contractual obligations or rights or any property rights or interest which arose during the period that the order was in effect. However, any such obligation, right, or interest, which benefits a person who caused or participated in the fraud or withholding of material information, may be canceled by the minor.

(b) A proceeding under this section may be commenced by any person or by any public or private agency. Notice of the commencement of the proceeding shall be consistent with the requirements of the initial hearing as required by this chapter.

§ 7159. Legislative intent; minimum expense; forms.

It is the intent of the general assembly that proceedings under this chapter shall be as simple, informal and inexpensive as possible as these terms are used in 12 V.S.A. § 5531(a), and to that end, the court administrator shall prepare and distribute to the clerks of the probate court appropriate forms for the proceedings which are suitable for use by minors appearing on their own behalf.

VIRGINIA

TITLE 16.1. COURTS NOT OF RECORD

CHAPTER 11. JUVENILE AND DOMESTIC RELATIONS DISTRICT COURTS

ARTICLE 15. EMANCIPATION OF MINORS

§ 16.1-331. Petition for emancipation.

Any minor who has reached his sixteenth birthday and is residing in this Commonwealth, or any parent or guardian of such minor, may petition the juvenile and domestic relations district court for the county or city in which either the minor or his parents or guardian resides for a determination that the minor named in the petition be emancipated. The petition shall contain, in addition to the information required by § 16.1-262, the gender of the minor and, if the petitioner is not the minor, the name of the petitioner and the relationship of the petitioner to the minor.

§ 16.1-332. Orders of court; investigation, report and appointment of counsel.

If deemed appropriate the court may (i) require the local department of welfare or social services or any other agency or person to investigate the allegations in the petition and file a report of that investigation with the court, (ii) appoint counsel for the minor's parents or guardian, or (iii) make any other orders regarding the matter which the court deems appropriate. In any case pursuant to this article the court shall appoint counsel for the minor to serve as guardian ad litem.

§ 16.1-333. Findings necessary to order that minor is emancipated.

The court may enter an order declaring the minor emancipated if, after a hearing, it is found that: (i) the minor has entered into a valid marriage, whether or not that marriage has been terminated by dissolution; or (ii) the minor is on active duty with any of the armed forces of the United States of America; or (iii) the minor willingly lives separate and apart from his parents or guardian, with the consent or acquiescence of the parents or guardian, and that the minor is or is capable of supporting himself and competently managing his own financial affairs.

§ 16.1-334. Effects of order.

An order that a minor is emancipated shall have the following effects:

1. The minor may consent to medical, dental, or psychiatric care, without parental consent, knowledge, or liability;
2. The minor may enter into a binding contract or execute a will;
3. The minor may sue and be sued in his own name;
4. The minor shall be entitled to his own earnings and shall be free of control by his parents or guardian;
5. The minor may establish his own residence;
6. The minor may buy and sell real property;
7. The minor may not thereafter be the subject of a petition under this chapter as abused, neglected, abandoned, in need of services, in need of supervision, or in violation of a juvenile curfew ordinance enacted by a local governing body;
8. The minor may enroll in any school or college, without parental consent;
9. The minor may secure a driver's license under § 46.2-334 or § 46.2-335 without parental consent;
10. The parents of the minor shall no longer be the guardians of the minor;

11. The parents of a minor shall be relieved of any obligations respecting his school attendance under Article 1 (§ 22.1-254 et seq.) of Chapter 14 of Title 22.1;

12. The parents shall be relieved of all obligation to support the minor;

13. The minor shall be emancipated for the purposes of parental liability for his acts;

14. The minor may execute releases in his own name;

15. The minor may not have a guardian ad litem appointed for him pursuant to any statute solely because he is under age eighteen; and

16. The minor may marry without parental, judicial, or other consent.

The acts done when such order is or is purported to be in effect shall be valid notwithstanding any subsequent action terminating such order or a judicial determination that the order was void ab initio.

§ 16.1-334.1. Identification card issued to minor by DMV.

When entering an emancipation order under § 16.1-333, the court shall issue to the emancipated minor a copy of the order. Upon application to the Department of Motor Vehicles and submission of the copy, the Department shall issue to the minor an identification card containing the minor's photograph, a statement that such minor is emancipated, and a listing of all effects of the emancipation order as set forth in § 16.1-334.

WASHINGTON

TITLE 13. JUVENILE COURTS AND JUVENILE OFFENDERS

CHAPTER 13.64. EMANCIPATION OF MINORS

§ 13.64.010. Declaration of emancipation.

Any minor who is sixteen years of age or older and who is a resident of this state may petition in the superior court for a declaration of emancipation.

§ 13.64.020. Petition for emancipation -- Filing fees.

(1) A petition for emancipation shall be signed and verified by the petitioner, and shall include the following information: (a) The full name of the petitioner, the petitioner's birthdate, and the state and county of birth; (b) a certified copy of the petitioner's birth certificate; (c) the name and last known address of the petitioner's parent or parents, guardian, or custodian; (d) the petitioner's present address, and length of residence at that address; (e) a declaration by the petitioner indicating that he or she has the ability to manage his or her financial affairs, including any supporting information; and (f) a declaration by the petitioner indicating that he or she has the ability to manage his or her personal, social, educational, and nonfinancial affairs, including any supporting information.

(2) Fees for this section are set under RCW 36.18.014.

§ 13.64.030. Service of petition -- Notice -- Date of hearing.

The petitioner shall serve a copy of the filed petition and notice of hearing on the petitioner's parent or parents, guardian, or custodian at least fifteen days before the emancipation hearing. No summons shall be required. Service shall be waived if proof is made to the court that the address of the parent or parents, guardian, or custodian is unavailable or unascertainable. The petitioner shall also serve notice of the hearing on the department if the petitioner is subject to dependency disposition order under RCW 13.34.130. The hearing shall be held no later than sixty days after the date on which the petition is filed.

§ 13.64.040. Hearing on petition.

(1) The hearing on the petition shall be before a judicial officer, sitting without a jury. Prior to the presentation of proof the judicial officer shall determine whether: (a) The petitioning minor understands the consequences of the petition regarding his or her legal rights and responsibilities; (b) a guardian ad litem should be appointed to investigate the allegations of the petition and file a report with the court.

(2) For the purposes of this section, the term "judicial officer" means: (a) A judge; (b) a superior court commissioner of a unified family court if the county operates a unified family court; or (c) any superior court commissioner if the county does not operate a unified family court. The term does not include a judge pro tempore.

§ 13.64.050. Emancipation decree -- Certified copy -- Notation of emancipated status.

(1) The court shall grant the petition for emancipation, except as provided in subsection (2) of this section, if the petitioner proves the following facts by clear and convincing evidence: (a) That the petitioner is sixteen years of age or older; (b) that the petitioner is a resident of the state; (c) that the petitioner has the ability to manage his or her financial affairs; and (d) that the petitioner has the ability to manage his or her personal, social, educational, and nonfinancial affairs.

(2) A parent, guardian, custodian, or in the case of a dependent minor, the department, may oppose the petition for emancipation. The court shall deny the petition unless it finds, by clear and convincing evidence, that denial of the grant of emancipation would be detrimental to the interests of the minor.

(3) Upon entry of a decree of emancipation by the court the petitioner shall be given a certified copy of the decree. The decree shall instruct the petitioner to obtain a Washington driver's license or a Washington identification

card and direct the department of licensing make a notation of the emancipated status on the license or identification card.

§ 13.64.060. Power and capacity of emancipated minor.

(1) An emancipated minor shall be considered to have the power and capacity of an adult, except as provided in subsection (2) of this section. A minor shall be considered emancipated for the purposes of, but not limited to:

(a) The termination of parental obligations of financial support, care, supervision, and any other obligation the parent may have by virtue of the parent-child relationship, including obligations imposed because of marital dissolution;

(b) The right to sue or be sued in his or her own name;

(c) The right to retain his or her own earnings;

(d) The right to establish a separate residence or domicile;

(e) The right to enter into nonvoidable contracts;

(f) The right to act autonomously, and with the power and capacity of an adult, in all business relationships, including but not limited to property transactions;

(g) The right to work, and earn a living, subject only to the health and safety regulations designed to protect those under age of majority regardless of their legal status; and

(h) The right to give informed consent for receiving health care services.

(2) An emancipated minor shall not be considered an adult for: (a) The purposes of the adult criminal laws of the state unless the decline of jurisdiction procedures contained in RCW 13.40.110 are used or the minor is tried in criminal court pursuant to *RCW 13.04.030(1)(e)(iv); (b) the criminal laws of the state when the emancipated minor is a victim and the age of the victim is an element of the offense; or (c) those specific constitutional and statutory age requirements regarding voting, use of alcoholic beverages, possession of firearms, and other health and safety regulations relevant to the minor because of the minor's age.

§ 13.64.070. Declaration of emancipation – Voidable.

A declaration of emancipation obtained by fraud is voidable. The voiding of any such declaration shall not affect any obligations, rights, or interests that arose during the period the declaration was in effect.

§ 13.64.080. Forms to initiate petition of emancipation.

The office of the administrator for the courts shall prepare and distribute to the county court clerks appropriate forms for minors seeking to initiate a petition of emancipation.

WEST VIRGINIA

CHAPTER 49. CHILD WELFARE

ARTICLE 7. GENERAL PROVISIONS

§ 49-7-27. Emancipation.

A child over the age of sixteen may petition a court to be declared emancipated. The parents or custodians shall be made respondents and, in addition to personal service thereon, there shall be publication as a Class II legal advertisement in compliance with the provisions of article three [§§ 59-3-1 et seq.], chapter fifty-nine of this Code. Upon a showing that such child can provide for his physical and financial well-being and has the ability to make decisions for himself, the court may for good cause shown declare the child emancipated. The child shall thereafter have full capacity to contract in his own right and the parents or custodians shall have no right to the custody and control of such child or duty to provide the child with care and financial support. A child over the age of sixteen years who marries shall be emancipated by operation of law. An emancipated child shall have all of the privileges, rights and duties of an adult, including the right of contract, except that such child shall remain a child as defined for the purposes of articles five and five-a [§§ 49-5-1 et seq. and 49-5A-1 et seq.] of this chapter.

WISCONSIN

NIESEN, RESPONDENT V. NIESEN, APPELLANT

[No Number In Original]

Supreme Court of Wisconsin

38 Wis. 2d 599; 157 N.W.2d 660; 1968 Wisc. LEXIS 926; 32 A.L.R.3d 1047

February 29, 1968, Argued

April 9, 1968, Decided

OPINION BY HALLOWS

The facts on the hearing were stipulated and it is claimed by the defendant the two boys by changing their surnames emancipated themselves and thus he was no longer obligated to support them. The issue might well be stated, whether minors of the age of approximately twenty and eighteen years who legally forsake their father's name and embrace the surname of their mother's second husband are entitled to the continued support of their father.

A father's duty to support his child rests upon not only moral law but legally upon the voluntary status of parenthood which the father assumed. The relationship of parent and child gives rise to certain parental rights and duties and also to rights and duties of the child. The partial or total destruction of these rights is often referred to in the law as emancipation, which in most states automatically occurs by operation of law upon the child's reaching the age of majority excepting in cases of infirmity of mind or body rendering the child incapable of taking care of himself. The act emancipating a child prior to age twenty-one is generally the act of the parent and such emancipation is concerned more with the extinguishment of parental rights and duties than with the removal of the disabilities of childhood.

While it is often said emancipation cannot be accomplished by an act of the child alone, this is not always true. Marriage and entering into military service have been held to be acts of self-emancipation. In 39 Am. Jur., *Parent and Child*, p. 704, sec. 64, it is stated as a general rule that the fact that a child has entered into a relation which is inconsistent with the idea of being in legal subjection to his father or in a sense in bondage is sufficient to effect an emancipation. Emancipation may be partial or total and limited to certain purposes. It may prevent the parent from having a right to the earnings of his child and conversely, it may free parents under some circumstances from being responsible for the debts of the child because of the removal of the general disabilities of infancy. 67 C. J. S., *Parent and Child*, p. 815, sec. 89; Annot. (1946), *What amounts to implied emancipation of minor child*, 165 A. L. R. 723. However, total or partial emancipation is personal to the parties and does not shift the responsibility to support from the father to the public.

There is no hard-and-fast rule to determine emancipation -- much depends upon the circumstances and the intent of him who has the power to effect an emancipation. The facts in the record are scanty. Peter graduated from high school in June of 1964 and then attended the University of New Mexico. His tuition of almost $ 900 was paid by his mother and her second husband. Michael Wilson attended an eastern college for the school years of 1963 and 1964. He worked during the summers of 1963 and 1964 in Milwaukee where he earned about $ 2,000. During the summer of 1963 he lived at the YMCA, the cost of which he paid himself. During the summer of 1964 he lived at the home of his aunt in Milwaukee, where his father also lived. Tuition of approximately $ 3,000 for college was paid by his mother and stepfather. During these two years the defendant gave his son Peter goods in the sum of $ 250 and a 1959 automobile worth about $ 650. There is nothing in the stipulation which shows the plaintiff-mother encouraged Peter and Michael to change their surname, and no reason given for their action.

In the present case, we must consider emancipation not in the context of a normal, modern family but against a background of a divorce and a broken home and of a father who no longer has legal custody of his minor children who are university students. While granting legal custody in a divorce action to the mother does not technically

emancipate the children from the father, it certainly affects the concept of emancipation. In such instances the emancipation doctrine does have a very substantial footing on relations existing between the child and his father. Here, the father had no legal control or custody of his sons and no right to their earnings. Such rights of control were transferred by the divorce decree to their mother and there is no claim of emancipation from her.

Considering the concept of emancipation as applicable to this issue, the majority of the court does not find an emancipation. Cases cited by the defendant are not controlling. In *Brosius v. Barker* (1911), 154 Mo. App. 657, 136 S. W. 18, the facts to support emancipation did not involve a change of surname by the child but included the leaving of home and the commencement of life completely independent from the parents. In *Straver v. Straver* (1948), 26 N. J. Misc. 218, 59 Atl. 2d 39, a divorced father sought to have his eighteen-year-old girl declared emancipated by showing she had relinquished his surname and used that of her stepfather. She had also become estranged from him and was not obedient to him. However, the court pointed out in holding there was no emancipation that the eighteen-year-old daughter was only two years old at the time of the divorce and had used her stepfather's surname for over fourteen years with her father's acquiescence. In *von Bernuth v. von Bernuth* (1909), 76 N. J. Eq. 200, 74 Atl. 252, the case turned on a refusal of the children to see their father and their unnatural hatred fostered by their mother; the reduction of support money seems to be based more on the ground of a penalty visited upon the mother than upon any doctrine of emancipation. *See also Smith v. Smith* (1964), 85 N. J. Super. 462, 205 Atl. 2d 83; *Cortina v. Cortina* (Fla. 1958), 108 So. 2d 63; Annot. (1964), *Violation of custody or visitation provision of agreement or decree as affecting child support payment provision, and vice versa*, 95 A. L. R. 2d 118.

While there are general statements in the cases that the right to support by a father who has been divorced from the mother ceases upon the child's emancipation, none of the cases are square holdings that the change of surname, even if to the stepfather's surname, is such an act of emancipation. *Codorniz v. Codorniz* (1950), 34 Cal. 2d 811, 215 Pac. 2d 32; 27B C. J. S., *Divorce*, p. 724, sec. 323. *See also Green v. Green* (Mo. 1950), 234 S. W. 2d 350; 2A Nelson, *Divorce and Annulment*, p. 73, sec. 17.14; Keezer, *Marriage and Divorce* (1959 Cum. Supp.), p. 103, sec. 731.

In Wisconsin, a person fourteen years of age or older may change his own surname on his own behalf. Sec. 296.36, Stats. The New Mexico statute, sec. 22-5-1, contains the same age provisions. There are cases, especially of a young child in school and living with his mother, who has remarried, when the use of the stepfather's surname by the child avoids not only difficulties but embarrassment to the child who is unable to explain to his playmates that he is a tragic victim of divorce. Even though the social evil of divorce is widespread, children and many adults still do not accept as convenient or natural a different surname for a child and his mother. A change of surname under such circumstances could hardly constitute emancipation or be a basis for relieving the father of his duty of support. It would seem the test in surname changing, as in many other problems involving children of divorced parents, is the welfare of the child. *See Solomon v. Solomon* (1955), 5 Ill. App. 2d 297, 125 N. E. 2d 675, and *Bruguier v. Bruguier* (1951), 12 N. J. Super. 350, 79 Atl. 2d 497.

While the majority would apply Shakespeare to the facts: "What's in a name? That which we call a rose by any other name would smell as sweet," the minority of which the author is one would hold the sweetness of the flower has disappeared. We can well understand the defendant's feeling of rejection and repudiation by his own flesh and blood. While the father's reaction is not the test of emancipation or a basis in equity to relieve him of his obligation, we see no justification or excuse for what amounts to a repudiation of the parental relationship. The surreptitious action and the choice of the stepfather's surname in place of the surname of their natural father by these boys of college age smacks of ingratitude and parental rejection. What tenuous relationship was left after the divorce upon which to rest emancipation, these mature minors destroyed and by the only overt act left for them emancipated themselves. If the minority were to apply equitable principles, it would find no basis upon which they could continue to claim the support of their rejected father. Each is of the age and mind to be self-supporting and to live his own life and to choose his own surname and identification.

As a second line of defense, the defendant claims his wife's second husband stands *in loco parentis* to his two children and therefore the defendant is free from the support obligation. A stepfather is under no obligation to support the child of his wife by a former husband so as to relieve him from support. In some cases where the stepfather takes the child into his family or under his care in such a way that he in fact intends and does place himself in the position of the father and is so accepted by the child, he may thereby assume an obligation to support such child. 39 Am. Jur., *Parent and Child*, pp. 699, 700, sec. 62. But a good Samaritan should not be saddled with the legal obligations of another and we think the law should not with alacrity conclude that a stepparent assumes parental relationships to a child. *Estate of Turer* (1965), 27 Wis. 2d 196, 133 N. W. 2d 765; *McManus v. Hinney*

(1966), 31 Wis. 2d 333, 143 N. W. 2d 1; (1967), 35 Wis. 2d 433, 151 N. W. 2d 44; 67 C. J. S., *Parent and Child*, p. 808, sec. 80.

In the present case at the time of their mother's second marriage Peter was almost seventeen years of age and Michael was eighteen. They spent most of their time away from their new home at school. Outside of some evidence that the stepfather paid for some college expenses of the boys, which might have been motivated more by his love for their mother than for them, there is not much evidence that either of these boys considered their stepfather *in loco parentis* or that he so considered himself. Taking his surname is not sufficient evidence to establish the relationship of *loco parentis*.

By the Court. -- Order affirmed.

WYOMING

TITLE 14. CHILDREN

CHAPTER 1. GENERAL PROVISIONS

ARTICLE 1. IN GENERAL

§ 14-1-101. Age of majority; rights on emancipation.

(a) Upon becoming eighteen (18) years of age, an individual reaches the age of majority and as an adult acquires all rights and responsibilities granted or imposed by statute or common law, except as otherwise provided by law.

(b) A minor may consent to health care treatment to the same extent as if he were an adult when:

(i) The minor is or was legally married;

(ii) The minor is in the active military service of the United States;

(iii) The parents or guardian of the minor cannot with reasonable diligence be located and the minor's need for health care treatment is sufficiently urgent to require immediate attention; or

(iv) The minor is living apart from his parents or guardian and is managing his own affairs regardless of his source of income; or

(v) The minor is emancipated under W.S. 14-1-201 through 14-1-206.

(c) The consent given pursuant to subsection (b) of this section is not subject to disaffirmance because of minority.

(d) Any competent adult may enter into a binding contract and shall be legally responsible therefor.

(e) A person who is at least eighteen (18) years of age may consent to donate and may donate blood.

TITLE 14. CHILDREN

CHAPTER 1. GENERAL PROVISIONS

ARTICLE 2. EMANCIPATION OF MINORS

§ 14-1-201. Definitions.

(a) As used in this article:

(i) "Emancipation" means conferral of certain rights of majority upon a minor as provided under this article and includes a minor who:

(A) Is or was married;

(B) Is in the military service of the United States; or

(C) Has received a declaration of emancipation pursuant to W.S. 14-1-203.

(ii) "Minor" means an individual under the age of majority defined by W.S. 14-1-101(a);

(iii) "Parent" means the legal guardian or custodian of the minor, his natural parent or if the minor has been legally adopted, the adoptive parent;

(iv) "This act" means W.S. 14-1-201 through 14-1-206.

§ 14-1-202. Application for emancipation decree; effect of decree.

(a) Upon written application of a minor under jurisdiction of the court and notwithstanding any other provision of law, a district court may enter a decree of emancipation in accordance with this act. In addition to W.S. 14-1-101(b), the decree shall only:

(i) Recognize the minor as an adult for purposes of:

(A) Entering into a binding contract;

(B) Suing and being sued;

(C) Buying or selling real property;

(D) Establishing a residence;

(E) The criminal laws of this state.

(ii) Terminate parental support and control of the child and their rights to his income;

(iii) Terminate parental tort liability for the minor.

§ 14-1-203. Application for emancipation decree; hearing; notice; rights and liabilities of emancipated minor; conditions for issuance of decree; filing of decree; copy to applicant.

(a) Upon written application of a minor subject to personal jurisdiction of the court, a district court may enter a decree of emancipation in accordance with this act. The application shall be verified and shall set forth with specificity all of the following facts:

(i) That he is at least seventeen (17) years of age;

(ii) That he willingly lives separate and apart from his parents;

(iii) That his parents consent to or acquiesce in the separate living arrangement;

(iv) That he is managing his own financial affairs; and

(v) That the source of his income is not derived from means declared unlawful under state or federal law or from assistance received under W.S. 42-2-104.

(b) The district court shall conduct a hearing on the minor's application for emancipation within sixty (60) days after the date of filing. Notice of the hearing shall be given to the minor and his parents by certified mail at least ten (10) days before the date set for hearing.

(c) At the hearing, the court shall advise the minor of the effect of emancipation pursuant to W.S. 14-1-202. These rights and liabilities shall be stated in the emancipation decree.

(d) The court may enter a decree of emancipation if the minor is at least seventeen (17) years of age and the court finds emancipation is in the best interests of the minor. In making a determination, the court shall consider if the:

(i) Minor's parents consent to the proposed emancipation;

(ii) Minor is living or is willing to live apart from his parents and is substantially able to provide self-maintenance and support without parental guidance and supervision;

(iii) Minor demonstrates he is sufficiently mature and knowledgeable to manage his personal affairs without parental assistance; and

(iv) Source of the minor's income is not derived from means declared unlawful under state or federal law.

(e) Upon entry of a decree of emancipation, the court shall file the decree with the county clerk of the county in which the child resides. A copy of the decree shall be issued to the minor.

(f) A declaration of emancipation shall be conclusive evidence that the minor is emancipated, but emancipation may also be proved by other evidence like any other fact.

§ 14-1-204. Third party application; procedure.

(a) Any interested third party having dealings with an apparently emancipated minor may apply to the district court where that minor is domiciled or may be found for a declaration of emancipation.

(b) The application under this section shall be made in conformity with W.S. 14-1-203(a).

(c) Proceedings under this section shall be conducted in conformity with the requirements of W.S. 14-1-203.

§ 14-1-205. Application to department of transportation for emancipated status on driver's license; fee.

(a) Upon application of an emancipated minor, the department of transportation shall indicate the minor's emancipated status on his Wyoming driver's license or if without a driver's license, on the minor's Wyoming identification card issued under W.S. 31-8-101.

(b) An applicant under this section shall pay two dollars ($2.00) to the division. The state treasurer shall deposit the fees in the manner prescribed by law for driver's license and identification card fees.

§ 14-1-206. Emancipated minor subject to adult criminal jurisdiction.

An emancipated minor is subject to jurisdiction of adult courts for all criminal offenses.