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protect, in certain cases, the respectable citizen who may sometimes become technically guilty of a violation of a criminal law, but who should not be subjected to certain penalities intended to apply only to those who wilfully or maliciously violate the law. At least one state has recognized the need for such a plea and has provided for the same by statute.[72]

In view of the prevailing inconsistency in the administration of the law in the trial courts of North Carolina under the plea nolo contendere,[73] it would seem wise for the General Assembly to specifically state when and under what conditions the plea nolo contendere may be entered, and when it will not be permissible. Or, it may be better to abolish the plea altogether, and in its stead provide for a plea of guilty with a prayer for relief. Should the court grant the relief, the defendant would not be denied certain prerogatives which he may otherwise lose. Thus the desirable benefits of the plea would be preserved without leaving the way open for undeserving convicts to profit by the inadvertence of the trial courts.

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Domestic Relations—Father's Duty to Support Minor Children—Termination of Duty Upon Death of Father

The question whether the obligation of the father to provide necessary support for his minor children terminates at his death or extends to his estate was first presented in North Carolina in the case of *Elliott v. Elliott*.[1] Deceased father had been twice married, and at the time of his death was residing with his second wife and children born of that marriage, plaintiffs in this action.[2] Deceased was solvent and left a will devising the bulk of his realty[3] to the adult children of the first marriage. To the six minor children of his second marriage, including one who was then *in ventre sa mere,* deceased bequeathed the total

[72] GA. CODE ANN. §27-1408 (Cum. Supp. 1951) (The Georgia Appellate court interpreted the purpose for this statute in Wright v. State, 75 Ga. App. 764, 765, 44 S. E. 2d 569, 570 (1947), saying, "The General Assembly, no doubt, had in mind that these penalties [loss of prerogatives], in addition to the punishment provided for by law as to the respective offenses charged, would often be too drastic in specific instances; that oft times the degree of wrong surrounding the circumstances of one defendant would be so much less than that surrounding another, and yet the facts be such that no valid defense to the crime could be interposed . . . the General Assembly doubtless regarded a plea of guilty as too harsh, as applied to a person of good moral character and standing in his community, he being technically guilty of a crime, without a valid defense. . . .").

[73] *Op. cit. supra* note 1.

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[1] 235 N. C. 153, 69 S. E. 2d 224 (1952).

[2] Deceased's second wife was a party plaintiff only in the capacity of next friend to her minor children. She sought nothing for her own support.

[3] A 78 acre farm of which deceased was seized in fee.

sum of ten dollars.[4] Plaintiffs sought from the defendant executor such sums as would be reasonable and necessary for their support until they attained their majority. Defendant's demurrer was sustained by the trial court, and this was affirmed on appeal.

It has been almost universally held that there rests upon the parents, primarily the father, the obligation to support, maintain, and educate their minor children, in so far as they are of ability to do so.[5] This obligation exists as a natural and moral duty arising by virtue of the act of procreation,[6] as a principle of the common law,[7] or as a duty founded upon statutory enactment.[8] North Carolina has held[9] that it is the public policy of this state that the husband shall provide support for himself and family, and that "this duty he may not shirk, contract away, or transfer to another." Enforcement of this duty is provided for by penal statute.[10] Absolute divorce of the parents with an award of the children's custody to the mother does not terminate the duty resting on the father;[11] neither does the fact that a minor child lives separate and apart from his parents with their consent,[12] or has been wrongfully driven from the home by reason of parental misconduct or abuse.[13] Furthermore, North Carolina has extended the father's duty of support to minor children who themselves own property,[14] and to illegitimates.[15]

Except in cases of necessity, the obligation *is* terminated when the

[4] Deceased's personal property, *i.e.*, bank account, postal savings and other miscellaneous items totalled approximately $5,400.

[5] Green v. Green, 210 N. C. 147, 185 S. E. 651 (1936); *In re* Ten Hoopen, 202 N. C. 223, 162 S. E. 619 (1932); *In re* Means, 176 N. C. 307, 97 S. E. 39 (1918); Sanders v. Sanders, 167 N. C. 319, 83 S. E. 490 (1914); Howell v. Solomon, 167 N. C. 588, 83 S. E. 609 (1914); *In re* Turner, 151 N. C. 474, 66 S. E. 431 (1909); Newsome v. Bunch, 144 N. C. 15, 56 S. E. 509 (1907); Burton v. Belvin, 142 N. C. 153, 55 S. E. 71 (1906); Latham v. Ellis, 116 N. C. 30, 20 S. E. 1012 (1895); Burke v. Turner, 85 N. C. 500 (1881); Haglar v. McCombs, 66 N. C. 345 (1872); Walker v. Crowder, 37 N. C. 478 (1843); Addy v. Addy, 240 Iowa 255, 36 N. W. 2d 352 (1949); Kopak v. Polzer, 5 N. J. Super. 114, 68 A. 484, *aff'd*, 4 N. J. 327, 72 A. 2d 869 (1950); Barker v. Barker, 75 N. D. 253, 27 N. W. 2d 576 (1947); Campbell v. Campbell, 200 S. C. 67, 20 S. E. 2d 237 (1942); Madden, *Persons and Domestic Relations* §110 (1931); 39 AM. JUR., Parent and Child, §35 (1942); 67 C. J. S., Parent and Child, §15 (1950).

[6] 1 Bl. Comm. 446.

[7] Dunbar v. Dunbar, 190 U. S. 340 (1903); Wells v. Wells, 227 N. C. 614, 44 S. E. 2d 31 (1947); 39 AM. JUR., Parent and Child, §35 (1942).

[8] Yarborough v. Yarborough, 290 U. S. 202 (1933); Funeral Home v. Julian, 176 Tenn. 534, 144 S. W. 2d 755 (1940); 39 AM. JUR., Parent and Child, §35 (1942).

[9] Ritchie v. White, 225 N. C. 450, 35 S. E. 2d 414 (1945).

[10] N. C. GEN. STAT. §14-322 (Supp. 1951) ". . . or if any father or mother shall willfully abandon his or her child or children, whether natural or adopted, without providing adequate support for such child or children, he or she shall be guilty of a misdemeanor. . . ."

[11] Green v. Green, 210 N. C. 147, 185 S. E. 651 (1936).

[12] Hunycutt v. Thompson, 159 N. C. 30, 74 S. E. 628 (1912).

[13] Hunycutt v. Thompson, 159 N. C. 30, 74 S. E. 628 (1912).

[14] Haglar v. McCombs, 66 N. C. 345 (1872).

[15] Green v. Green, 210 N. C. 147, 185 S. E. 651 (1936); Burton v. Belvin, 142 N. C. 153, 55 S. E. 71 (1906); Kimborough v. Davis, 16 N. C. 72 (1827).

child attains his majority, which date was arbitrarily set at the completion of the twenty-first year by common law, a rule now adhered to by a majority of the states.[16] Physical or mental affliction rendering one unable to provide support for himself will constitute such necessity, and will extend the parental obligation beyond the age of the child's majority for so long as the necessity continues.[17]

There being no statutory provision covering the problem in the *Elliott* case, resort was had to the common law, for so much of the latter as has not been "abrogated, repealed, or become obsolete" is in full force and effect in this state.[18] In resolving the issue in favor of the defendant, the court relied principally upon four decisions from other jurisdictions as evincing the common law rule that the obligation of the father to support his minor children terminates at his death.[19] Although at slight variance with the North Carolina case factually,[20]

[16] Wells v. Wells, 227 N. C. 614, 44 S. E. 2d 31 (1947). (Note, however, that N. C. GEN. STAT. §14-322 (Supp. 1951) requires support only until the eighteenth year, and that the relief sought in the *Elliott* case was such sum as would be reasonable for the support of the children until they reached their eighteenth birthday.); Jones v. Jones, 72 F. 2d 829 (D. C. Cir. 1934); Scott v. Scott, 304 Ill. 267, 136 N. E. 659 (1922); Banco De Sonora v. Casualty Co., 124 Iowa 576, 100 N. W. 532 (1904); Sternlieb v. Securities Corp., 263 N. Y. 245, 188 N. E. 726 (1934); Springstun v. Springstun, 131 Wash. 109, 229 Pac. 14 (1924). All the cases recognize that the rule was one of convenience and necessity rather than a substantive rule of law.

[17] Wells v. Wells, 227 N. C. 614, 44 S. E. 2d 31 (1947) (The duty resting on parents, and primarily on the father, to support their offspring arises by virtue of the inability of children to care for themselves; if the children are physically or mentally defective the inability remains even after they attain their majority, as does the duty of the parents to support them.) Note, 26 N. C. L. REV. 202 (1948); Zakrocki v. Zakrocki, 115 Ind. App. 518, 60 N. E. 2d 157 (1945); Prosser v. Prosser, 159 Kan. 651, 157 P. 2d 544 (1945); Breuer v. Dowden, 207 Ky. 12, 268 S. W. 541 (1925); *In re* Mangan's Will, —— Misc. ——, 83 N. Y. S. 2d 393 (1948); Rowell v. Town of Vershire, 62 Vt. 405, 19 Atl. 990 (1890); Van Tinker v. Van Tinker, 38 Wash. 2d 390, 229 P. 2d 333 (1951); Schultz v. Tractor Co., 111 Wash. 351, 190 Pac. 1007 (1920); 39 AM. JUR., Parent and Child, §69 (1942).

[18] N. C. GEN. STAT. §4-1 (1943); e.g., Finance Corp. v. Quinn, 232 N. C. 407, 61 S. E. 2d 192 (1950); Ionic Lodge v. Masons, 232 N. C. 648, 62 S. E. 2d 73 (1950); Henson v. Thomas, 231 N. C. 173, 56 S. E. 2d 432 (1949); Scholtens v. Scholtens, 230 N. C. 149, 52 S. E. 2d 350 (1949); State v. Sullivan, 229 N. C. 251, 49 S. E. 2d 458 (1948); Moche v. Leno, 227 N. C. 159, 41 S. E. 2d 369 (1947).

[19] Blades v. Szatai, 151 Md. 644, 135 Atl. 841 (1927); Rice v. Andrews, 127 Misc. 826, 217 N. Y. Supp. 528 (1926); Silberman v. Brown, 34 Ohio Ops. 295, 72 N. E. 2d 267 (1946); Robinson v. Robinson, 131 W. Va. 160, 50 S. E. 2d 455 (1948), noted in 62 HARV. L. REV. 1079 (1949), 24 NOTRE DAME LAW. 563 (1949). See also, Taylor v. George, 34 Cal. 552, 212 P. 2d 505 (1949); Guinta v. Lo Re, 159 Fla. 448, 31 So. 2d 704 (1947), noted in 19 MISS. L. J. 249 (1948); Oetter v. Sandlin's Adm'x., 262 Ky. 355, 90 S. W. 2d 350 (1936); Gardine v. Cottey, 360 Mo. 681, 230 S. W. 2d 731 (1950); Carey v. Carey, 163 Tenn. 486, 43 S. W. 2d 498 (1931); Cissna v. Beaton, 2 Wash. 2d 491, 98 P. 2d 651 (1940); *In re* Skorczyrski's Will, 256 Wis. 300, 41 N. W. 2d 301 (1950); Madden, *Persons and Domestic Relations*, §115 (1931).

[20] Each of the four cases involved a minor child or children of divorced parents; in the instant case the parents were married and living together at the time of the father's death.

the cases are in essence the same, each deciding the identical issue presented by the *Elliott* case. The rationale of the decisions is that no child has a vested right in the estate of his father, and that under the laws regarding testamentary disposition a father may expressly disinherit his child by will, whether the latter be a minor or not;[21] that the obligation of the father is a personal one and does not constitute a debt of the parent, and that upon death the father loses his correlative right to the companionship and services of his child.[22] The result reached by these decisions has been severely criticized;[23] other states, largely on the basis of court order or contract, have held otherwise.[24] Nevertheless, in view of the almost absolute right of testamentary disposition given the owner of property by the legislature,[25] it would appear that the result is consonant with the soundest principles of logic. It would seem illogical indeed to undermine the right of testamentary disposition by holding that the obligation of the father to support his minor children extends beyond his death, or that, in effect, a father cannot disinherit his child.

In view of the sharp conflict on the issue in other jurisdictions, it is well that the North Carolina Supreme Court has had occasion to declare the law applicable in this state. On the basis of the common law rule which still prevails, and irrespective of desirability, or lack of same, the decision seems well grounded.

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[21] Blades v. Szatai, 151 Md. 644, 135 Atl. 841 (1927); Robinson v. Robinson, 131 W. Va. 160, 50 S. E. 2d 455 (1948).

[22] Rice v. Andrews, 127 Misc. 826, 217 N. Y. Supp. 528 (1926).

[23] Robinson v. Robinson, 131 W. Va. 160, 50 S. E. 2d 455 (1948) (dissenting opinion); Madden, *Persons and Domestic Relations*, §115 (1931), wherein the author says, in referring to laws of testamentary disposition which allow a father to disinherit a child and leave the latter to become a public charge, "That is carrying the testamentary capacity to absurd lengths, and statutes should make it impossible."

[24] *In re* Van Arsdale's Will, 190 Misc. 968, 75 N. Y. S. 2d 487 (1947) (contract for support independent of divorce decree); *In re* Stoner's Estate, 358 Pa. 252, 56 A. 2d 250 (1948) (valid claims for support have the same effect as other debts of decedent, and as such shall be ascertained and recovered in the same manner); Stone v. Bagley, 75 Wash. 184, 130 Pac. 820 (1913) (property settlement between divorced parents providing for the support of a minor child survives the death of the father and continues in force throughout the child's minority); Edelman v. Edelman, 65 Wyo. 271, 203 P. 2d 952 (1949) (father's estate is liable for payments ordered by divorce decree to be paid for support of minor children).

[25] Pullen v. Commissioners, 66 N. C. 361 (1872) (the right to inherit real property and the right to devise same is a positive creation of law and not a natural right). At least one jurisdiction takes the opposite view. Nunnemacher v. State, 129 Wis. 190, 108 N. W. 627 (1906). As to limitations on the right see N. C. GEN. STAT. §§30-1 (dissent from will by widow); 30-2 (effect of such dissent); and 30-15 (widow's year's allowance) (1943).