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Family Law - Parent and Child - Extent of Parent's Obligation To Provide Psychiatric Care for Major Child

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In the instant case the court, relying on the *Viley* dictum, held that the mortgagor could recover, from the mortgagee, property sold through executory process, where there had been insufficient authentic evidence and where the mortgagee still owned the property and was responsible for and had knowledge of the deficiency, although no fraud was found. It is unclear from the opinion whether the mortgagee-adjudicatee must have instigated the sale or have had knowledge of defects in order for the sale to be subject to annulment by the mortgagor. The court did not indicate that prompt action to rescind is necessary. Apparently annulment is available so long as the adjudicatee at the sale convoked by executory process remains the owner of the property.

Under the instant case, a mortgagor is not limited to injunction or suspensive appeal when attacking a sale of his property by executory process. This holding would establish another safeguard against abuse of this expeditious remedy, yet its result would not seem to pose any substantial problem to title examiners involving sales by executory process since recovery is available only where the property has not passed out of the hands of the mortgagee-adjudicatee. This seems justifiable because executory process is a harsh, ex parte remedy and should be restricted to situations where the formal requirements for protecting the rights of mortgagors are clearly satisfied.

Bert K. Robinson

FAMILY LAW — PARENT AND CHILD — EXTENT OF PARENT'S OBLIGATION TO PROVIDE PSYCHIATRIC CARE FOR MAJOR CHILD

Plaintiff sued his father for support in the amount of $1750.00 per month needed to defray the cost of necessary hospitalization and psychiatric care. Expert testimony was to the effect that treatment in a state hospital would be inadequate but that with treatment in a private hospital plaintiff had a "50-50 chance of surviving." Defendant father testified that his income was $1,140.00 per month and that his assets exclusive of his business, his residence, and the cash value of his insurance had a total appraised value of less than $13,000.00. The trial court awarded $450.00 per month, and the plaintiff appealed, seeking to have the award increased to the $1750.00 per month requested. Upon appeal to the Fourth Circuit, *held,* affirmed.

Under the circumstances the law does not contemplate that a parent is obliged to liquidate his assets and place himself in hopeless financial condition to provide psychiatric treatment for a major child. *Elchinger v. Elchinger*, 135 So.2d 347 (La. App. 4th Cir. 1961).

Article 229[1] of the Louisiana Civil Code requires a parent to support his child. This obligation, referred to ordinarily as alimony or maintenance, requires the parent to provide "what is necessary for the nourishment, lodging and support of the person who claims it."[2] The courts have held that these provisions extend the requirement of support to any needy descendant regardless of age.[3] Article 231[4] provides that the alimony is to be awarded on the basis of the needs of the obligee and of the obligor's ability to pay. Apparently, one's ability to pay has been determined in past decisions by looking only to his current income. Thus, where the current income of the parent could easily sustain the expense in question, courts have awarded alimony, in cases involving minors, to defray the cost of ballet and violin lessons,[5] private school tuition,[6] and expensive clothes,[7] in addition to the basic necessities of food and lodging. The Code

1. LA. CIVIL CODE art. 229 (1870).

2. *Id.* art. 230. In 2 WEST'S LSA—CIVIL CODE 188 (1952), in a comment of history and text of former codes, it is noted that "to maintain" used in Article 229 should have been translated from the French as "to give alimony to."

3. Tolley v. Karcher, 196 La. 685, 200 So. 4 (1941). The court held that both the mother and major child of a destitute middle-aged woman were responsible for her support. Out of an income of $100 per month, the son was ordered to pay $2.50 weekly in alimony. Out of an income of $232 a month, the mother was ordered to pay $10.00 weekly in alimony. This is in accord with early French jurisprudence recognizing the obligation to support a major child. [1813] Sirey Recueil General I. 350. In other American jurisdictions there is no common law obligation to support a major child, although the obligation frequently exists under statute. See CONN. GEN. STAT. ch. 116, § 550b (1951); ILL. ANN. STAT. ch. 68, § 62 (1955); MINN. STAT. ANN. ch. 261, § .01 (1959); N.D. REV. CODE ch. 14, § 09-12 (1960); WIS. STAT. ANN. ch. 52, § .01 (1957). The language of the Illinois statute is representative: "Both husband and wife are severally liable for the support of any child or children under 18 years of age, or 18 years of age or over whenever such child is unable to maintain himself and is likley to become a public charge." ILL. ANN. STAT. ch. 68, § 52 (1955). The statutory obligation usually extends to the needs of the physically or mentally incapacitated major child. See Perla v. Perla, 58 So.2d 689 (Fla. 1952); Crain v. Mallone, 139 Ky. 125, 113 S.W. 67 (1908); Wells v. Wells, 227 N.C. 614, 44 S.E.2d 31 (1947); Rowell v. Vershire, 62 Vt. 405, 19 Atl. 990 (1890). See Note, 11 DRAKE L. REV. 60 (1961), and Annot., 1 A.L.R.2d 910 (1948) for a general discussion of the obligation to support a major child.

4. See Holman v. Holman, 219 La. 138, 151, 52 So.2d 524, 528 (1951): "It must also be remembered that the jurisprudence shows decisions of this kind are controlled by the facts and circumstances of the individual case and that they are never the same."

5. Wilson v. Wilson, 129 So.2d 61 (La. App. 3d Cir. 1961).

6. Williams v. Barnette, 226 La. 635, 76 So.2d 912 (1954).

7. Wilmot v. Wilmot, 223 La. 221, 65 So.2d 321 (1953).

contains a specific provision regarding alimony for the care of insane ascendants and descendants: "They are . . . bound to render reciprocally all the services which their situation can require, if they should become insane."[8] Although this indicates that the obligation to support might be more onerous when it involves care for the insane, the courts have apparently have not treated it as such.[9]

The instant case illustrates the perennial problem of fixing a just award in support cases. The defendant father admitted his obligation of support and admitted that his son was afflicted with a serious mental illness. With the legal liability to maintain his son admitted, the court then determined the father's ability to pay the support requested and refused to grant an award which could not be met out of current income even though there was evidence of luxury assets which could have been liquidated, presumably without injury to the father's business position. This is not inconsistent with a prior case decided on the basis of Article 231 in which the award was not set high enough to necessitate liquidation of assets where the obligor could not pay it out of current income.[10] The court in the instant case was not called upon to decide the broad question of whether parents are obligated to provide medical or psychiatric care for their

8. LA. CIVIL CODE art. 229 (1870). This express provision requiring services to the insane first appeared in the Code of 1825, although an article providing a cause for disinherison of parents by their children for refusal to care for them when insane did exist in the Code of 1808. See LA. CIVIL CODE art. 245 (1825); LA. CIVIL CODE art. 132, p. 36 (1808). In considering what services were considered by the codifers we should realize that the treatment of the mentally ill at that time involved primarily custodial care. In France, it was not until 1792 that Pinel removed the chains of the mentally ill in the notorious Bicetre hospital. See DEUTSCH, THE MENTALLY ILL IN AMERICA 40 *passim* (1927). However. Louisianians were not unfamiliar with hospital care of the insane, as demonstrated by the Act of March 11, 1820, which authorized the administrators of Charity Hospital of New Orleans to erect a separate building "in order to receive and attend such persons as may have fallen into the state of insanity."

9. St. Vincent v. Sanford, Gunby's Dec. (La. App. 2d Cir. 1885). Here the court held that "the father is bound for the *reasonable expenses* of caring for his insane son, even after he has attained his majority, and without any contract to that effect." (Emphasis added.) This attention to the circumstances of the obligor is found in the statute requiring reimbursement to the state for care of an insane relative in a state institution, such reimbursement to be "in accordance with the ability to pay." LA. R.S. 28:144 (1950). For representative statutes of other states, see ILL. ANN. STAT. ch. 91 1/2, § 1-19 (1960); MICH.. COMP. LAWS § 330.21 (1948); N.Y. UNCONSOL. LAWS § 7302 (McKinney 1961); WIS. STAT. ANN. ch. 52, § .01 (1957).

10. Barcelo v. Barcelo, 175 La. 398, 143 So. 354 (1932). Here the court awarded $15 per month to plaintiff suing her grandfather who had net revenue of $100 per month for his and his wife's support. This was obtained from rental property and the court said: "The law does not contemplate that, in order to comply with the requirements of article 229 of the Code, an aged and feeble grandparent must dispose of property which is his or her only source of revenue." *Id.* at 402, 143 So. at 355.

children as part of their general obligation to support but it is strongly implied.[11]

Current income seems to have become the accepted criterion for determining the ability to pay alimony. In some instances, current income has been adequate to meet a substantial award without looking to luxury assets; in those instances, the courts have granted awards consistent with the standard of living of the parties.[12] In many cases where the obligor has had moderate income and no luxury assets, the payment of the award may have served to reduce drastically his standard of living. The instant case indicates that even where the amount requested has been to cover expenses necessary to life and health, such as food, lodging, and medical care, the courts do not seem inclined to set the award so high as to force the parent to liquidate even luxury assets. This is justified where the amount requested is higher than current income of an obligor living on a bare subsistence level. It is perhaps less justified where the award is more than the current income of an obligor owning valuable luxury assets. It is submitted that where the award is to cover those basic necessities, *e.g.*, food, lodging, and medical care, the court might consider the existence of luxury assets in determining ability to pay.

Leila Obier Cutshaw

FEDERAL JURISDICTION — WORKMEN'S COMPENSATION SUITS FILED ORIGINALLY IN FEDERAL COURTS — AMOUNT IN CONTROVERSY

Defendant filed a workmen's compensation claim with the Texas Industrial Accident Board against his employer's insurer,

11. Other jurisdictions have so held. Matthews v. State, 126 So.2d 245 (Miss. App. 1961); Osborn v. Weatherford, 27 Ala. App. 258, 170 So. 95 (1936). See 54 C.J.S. *Maintenance* 904 (1948). French commentators were of the opinion that the alimony obligation included expenses occasioned by sickness. See 1 PLANIOL, CIVIL LAW TREATISE (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) no. 681 (1959). See also 2 BAUDRY-LACANTINERIE ET HOUQUES-FOURCADE, TRAITÉ THEORIQUE ET PRATIQUE DE DROIT CIVIL no 2077 (2d ed. 1900); 9 AUBRY ET RAU, DROIT CIVIL FRANCAIS n° 553 (6th ed. 1953). In defining the obligation to support, *Las Siete Partidas* provided for "all other things necessary for them, and without which men can not live" but does not mention care of the insane specifically. Tit. XIX, Law 2. Spanish writers also include medical care in the obligation to support, again according to ability to pay. 4 VALVERDE Y VALVERDE, DERECHO CIVIL ESPAÑOL 537 (1926).

12. Williams v. Barnette, 226 La. 635, 76 So.2d 912 (1954); Wilmot v. Wilmot, 223 La. 221, 65 So.2d 321 (1953); Wilson v. Wilson, 129 So.2d 61 (La. App. 3d Cir. 1961).