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Duty of Continued Child Support Past the Age of Majority

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NOTE: DUTY OF CONTINUED CHILD SUPPORT PAST THE AGE OF MAJORITY

Appellant George Elkins, a divorced father, on his own volition stopped paying court-ordered child support and medical payments when his son Mark reached the statutory age of majority.[1] Appellee Jackie Elkins, who had been awarded custody and support payments from the appellant in the divorce decree, filed a petition for contempt against the appellant for nonsupport and requested the court to order the appellant to continue his support for as long as his son remained in college[2] because Mark was a diagnosed dyslexic.[3] It was appellee's contention that because of his learning disability her son would be unable to support himself without a college education.[4] Opposing the petition, the appellant produced evidence that Mark was not physically impaired, was continuing to participate in high school sports, and had actually held previous summer jobs.[5]

The court ordered the appellant to continue support payments until Mark had completed high school.[6] The court specifically retained jurisdiction pending Mark's acceptance by college. When Mark presented evidence of that acceptance, the court modified its order to require appellant to continue the weekly child support for as long as Mark remained in college and was satisfactorily pursuing his study of forestry. It was further required that the appellant be responsible for Mark's medical expenses during this period.[7] From this modified court order, the father appealed, and the Arkansas Supreme Court affirmed. *Elkins v. Elkins,* 262 Ark. 63, 553 S.W.2d 34 (1977).

It has long been recognized in Arkansas case law that the dissolution of a marriage through a divorce proceeding, with the subsequent award of custody of children of the marriage to the mother, does not relieve the father of the obligation to support his children.[8]

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1. Ark. Stat. Ann. § 57-103 (Cum. Supp. 1977) provides in part that "[a]ll persons of the age of eighteen (18) years shall be considered to have reached the age of majority and be of full age for all purposes, and until the age of eighteen (18) is attained, they shall be considered minors."

2. Elkins v. Elkins, 262 Ark. 63, 64, 553 S.W.2d 34, 34 (1977).

3. Dyslexia is a medical label for an impairment in the ability to read due to a brain dysfunction. *Id.* at 65, 553 S.W.2d at 35.

4. *Id.* at 66, 553 S.W.2d at 35.

5. *Id.* at 65, 553 S.W.2d at 34.

6. *Id.* at 64, 553 S.W.2d at 34.

7. *Id.* at 64-65, 553 S.W.2d at 34.

8. Reiter v. Reiter, 225 Ark. 157, 278 S.W.2d 644 (1955); Holt v. Holt, 42 Ark. 495 (1883).

This guideline of continued obligation applies even if the father is granted the divorce but the mother retains custody of the children.[9] However, there are no statutorily established guidelines as to the duration and extent of the support obligation or upon whom that obligation falls.[10] Instead, the court is given considerable discretion by the statutes to determine what is reasonable in ordering child support.[11]

Although there is no statutorily established age limit after which a divorced parent's duty to support children automatically ceases,[12] the general rule established in Arkansas case law, as in the majority of other states,[13] is that the duty to support will terminate when the child reaches the statutory age of majority. This general rule was first recognized in *Missouri Pacific Railroad v. Foreman,*[14] which involved an appeal regarding the amount of jury-awarded damages for the benefit of the widow and minor children of a farmer killed as a result of the negligent operation of a train. The Arkansas Supreme Court held that the damages were too high under the circumstances and stated, "Ordinarily, there is no legal obligation on the part of a parent to contribute to the maintenance and support of his children after they become of age."[15]

In *Worthington v. Worthington*[16] the central issue of the father's appeal was his continued liability to support his adult daughter as ordered in a chancery decree. This case involved an alleged implied contract for the father to continue support until the daughter was

9. Shue v. Shue, 162 Ark. 216, 258 S.W. 128 (1924).

10. In this day of gender nondiscrimination, fathers may be awarded custody of the children, and mothers can be required to pay child support if the disparity in parental incomes warrants it. Barnhard v. Barnhard, 252 Ark. 167, 477 S.W.2d 845 (1972).

11. Ark. Stat. Ann. § 34-1211 (Repl. 1962) provides in part that "[w]hen a decree shall be entered, the court shall make such order touching the alimony for the wife and care of the children, if there be any, as from the circumstances of the parties and the nature of the case shall be reasonable." Aside from Ark. Stat. Ann. § 34-1213 (Repl. 1962), which allows the court to make "proper" alterations in support orders on the application of either party, the quoted statute is the only one dealing with the establishment of child support following a divorce or separation proceeding.

12. In the absence of a specified termination point, such as a birthday, in the support order, a divorced father is not allowed to terminate his support payments on his own volition. Only the court has the authority to modify, extend, or terminate a decree for child support. Thompson v. Thompson, 254 Ark. 881, 496 S.W.2d 425 (1973); Jerry v. Jerry, 235 Ark. 589, 361 S.W.2d 92 (1962).

13. An annotation concerning parental obligation to support adult children cites cases from thirty-six states, the District of Columbia, Canada, and England, recognizing the general rule that there is no obligation to support a post-majority child. Annot., 1 A.L.R.2d 910 (1948).

14. 196 Ark. 636, 119 S.W.2d 747 (1938).

15. *Id.* at 651, 119 S.W.2d at 754.

16. 207 Ark. 185, 179 S.W.2d 648 (1944).

employed and self-supporting. After the daughter reached the age of majority and had finished two years of college, the father obtained a job for her, but she refused it and demanded support until she finished college. The chancellor decreed that the father had to continue support. In overruling this decree, the Arkansas Supreme Court noted that the daughter was a normal person in every respect and that all legal obligation to support her had ceased when she reached the age of majority, unless a contract to the contrary existed.[17] Finding such a contract, the court held that the daughter's refusal to take the offered job made it impossible for the father to perform his promise. Therefore, the contract could be rescinded.[18] Similarly, in *Childers v. Childers*[19] the court considered a father's appeal of the alimony and child support provision incorporated in a divorce decree and held that the father would be relieved of any legal obligation to support his daughter after she reached the age of eighteen.[20]

The court again addressed the issue of whether a divorced father is obligated to pay for a college education for a daughter who had reached the age of majority in *Riegler v. Riegler,*[21] in which a chancellor's decree continuing child support until college graduation was in part overruled. The Arkansas Supreme Court concluded that there was no legal obligation to assist the daughter financially while she attended college, relying upon the chancellor's findings that the eighteen year old girl was without physical or mental infirmities, that she was not in any other way abnormal, and that no contract was involved.[22] It also noted the chancellor's reasoning that a college education is very important in modern society and that, if the father is financially able, the child should be provided with support adequate to maintain her usual custom of living, which in this case included at least some college.[23] According to the court, the child's normality was the prevailing factor, and the chancellor's reasoning was rejected.

As with most general principles, the rule regarding termination

17. *Id.* at 188, 179 S.W.2d at 649.

18. The court also noted that it would be "fine" if the father would pay for his daughter's college education but that this sacrifice could only be voluntary and result from continued parental love rather than from a court order enforcing unassumed legal obligations. *Id.* at 190, 179 S.W.2d at 650.

19. 229 Ark. 11, 313 S.W.2d 75 (1958).

20. *Id.* at 14, 313 S.W.2d at 77 (citing Worthington v. Worthington, 207 Ark. 185, 179 S.W.2d 648 (1944)).

21. 259 Ark. 203, 532 S.W.2d 734 (1976).

22. *Id.* at 210-11, 532 S.W.2d at 738.

23. *Id.* at 211, 532 S.W.2d at 739.

of parental obligation for child support at the age of majority has an exception. First recognized by the court in *Upchurch v. Upchurch,*[24] the exception requires the divorced parent to continue support of "adult" children[25] if circumstances exist which make continuation necessary. Determination of necessity is within the court's discretion.[26] In *Upchurch* this exception was stated as dictum, as the court declined to rule on whether the self-supporting son or the adult daughter had any right to support from the divorced father. Instead, the court affirmed the chancellor's denial of alimony for the wife and held that the children were not barred from instituting a suit against their father, with the outcome of that suit to be dependent upon all the facts and circumstances.

In Arkansas, as in a substantial minority of the other states,[27] a persuasive circumstance justifying post-majority continued support is the existence of a mentally or physically disabling condition which would make it difficult for the child to be self-supporting. In *Eskridge v. Eskridge*[28] the court affirmed a chancellor's decree refusing to reduce the amount of child support that a divorced father was required to provide for his twenty-three year old son.[29] The son had been physically injured at birth, had never been able to work productively, and was unable to help himself or his mother. The court made particular reference to the testimony of a doctor who had advised the boy to give up his job in a drugstore because it was detrimental to his health.[30]

The *Upchurch* exception was again invoked when the court in *Petty v. Petty*[31] reversed a chancellor's elimination of child support for an epileptic eighteen year old daughter. That adult child had suffered from grand mal epilepsy since the age of two and had been on daily medication since that time to prevent convulsions. In addition, there was testimony that the girl occasionally lost control of members of her body and was unable to drive a car, as evidenced

24. 196 Ark. 324, 117 S.W.2d 339 (1938).

25. The phrase "adult children" is used by the court to refer to persons eighteen or older.

26. Upchurch v. Upchurch, 196 Ark. 324, 326, 117 S.W.2d 339, 340 (1938).

27. Twenty-one states recognize that "[w]here a child is of weak body or mind, unable to care for itself after coming of age, . . . the parental rights and duties remain thereafter practically unchanged, and . . . the parent's duty to support the child continues as before." Annot., 1 A.L.R.2d 910, 921 (1948).

28. 216 Ark. 592, 226 S.W.2d 811 (1950).

29. In 1950 Ark. Stat. Ann. § 57-103 (1947) specified that for males the age of majority was twenty-one. This law was amended in 1975 to make the age of majority eighteen for males as well as females. *Id.* (Cum. Supp. 1977).

30. Eskridge v. Eskridge, 216 Ark. 592, 593, 226 S.W.2d 811, 812 (1950).

31. 252 Ark. 1032, 482 S.W.2d 119 (1972).

by several previous accidents.[32] The appellee father maintained that the girl was not disabled, only handicapped. The chancellor agreed and ruled that the daughter was not disabled, though her college tuition was being paid by the Arkansas Rehabilitation Services.[33] In reversing, the Arkansas Supreme Court stated that the chancellor's ruling of nondisability was in error and found that the daughter was unable to earn a living and needed specialized education, as recognized by the state in paying her tuition. The court specifically pointed out that there was little difference between being disabled and being handicapped, in terms of capacity for self-support.[34]

The only departure the court has allowed from the requirement of a debilitating condition was in *Matthews v. Matthews*,[35] wherein a father was required to continue support of his normal eighteen year old daughter for an additional six months until she completed high school. The court characterized this exception as only a "slight extension" of the father's minimum duty and noted that a high school diploma was of "inestimable value" to a young person seeking to support herself.[36] The court also assumed from the evidence that the daughter would have had to drop out of high school if the extension was not affirmed, since the father offered no evidence to the contrary.

This extension of the general rule's exception makes it apparent that the court's primary focus has been the adult child's capacity for self-support. If there is evidence that the child will be unable to provide for himself because of a physically handicapping condition or the disadvantage of not having a high school diploma, the court will require continued support. These exceptions seem to be directed not only toward protecting the welfare of the disabled child, but also toward protecting the public's interest in not having to support a child whose parents are financially able to do so.[37] In case

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32. *Id.* at 1034, 482 S.W.2d at 120.

33. *Id.*

34. The court stated,

> Webster's Third New International Dictionary defines "disabled" as *inter alia*, "incapacitated by or as if by illness, injury or wounds: Crippled". The word "handicapped" is defined *inter alia*, "A disadvantage that makes achievement unusually difficult. A physical disability that limits the capacity to work". It is at once apparent that there is a similarity in these definitions, though the word "disabled" denotes a greater inability to function in a normal manner, but there is nothing in our cases indicating that a disabled person is entitled, after becoming an adult, to continued financial aid from the father, while one who is only handicapped, is not entitled to such aid.

Id. at 1035-36, 482 S.W.2d at 121.

35. 245 Ark. 1, 430 S.W.2d 864 (1968).

36. *Id.* at 3, 430 S.W.2d at 865.

37. The dual duty toward the child and the public has a longer history than the general

law prior to *Elkins,* however, in no instance had the court required a divorced parent to provide support for an adult child's college education in the absence of a preponderance of the evidence indicating the inability of the child to support himself without that education.[38]

Writing for the majority in *Elkins,* Justice Roy recognized the general rule that parental obligation for child support normally ceases when the child reaches the age of majority. However, the court also recognized the established exception to that rule, citing the child support statute regarding reasonableness of the decree[39] and the *Upchurch* dictum that support obligations will continue post-majority if there are circumstances that make it necessary.[40] Noting that a determination of the presence of exceptional circumstances must be made from the facts of each case,[41] the court affirmed the chancellor's ruling that child support should continue post-majority for as long as the Elkins' son remained in college on the grounds that he would find it difficult to support himself without that education because of his dyslexia.[42] The court made particular reference to the lack of distinction between a handicap and a disability that it had specified in the *Petty* decision[43] and reaffirmed its position that a handicapped adult child should continue to receive support so as to avoid becoming a burden on society.[44] In addition, the court invoked its established principle that it would not reverse a chancellor unless the latter's findings were against the preponderance of the evidence and held that the chancellor's ruling was amply supported by such a preponderance.[45]

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rule and its exception. "The duty of parents to provide for their minor children is a principle of natural law, and this obligation to support the children begotten by them is grounded, not only on the duty of a father to his child, but also to the public." Johnson v. Mitchell, 164 Ark. 1, 3, 260 S.W. 710, 711 (1924).

38. *See* Riegler v. Riegler, 259 Ark. 203, 210, 532 S.W.2d 734, 738 (1976) (distinguishing Matthews v. Matthews, 245 Ark. 1, 430 S.W.2d 864 (1968), by stating that the duty to provide support "has not been extended to an entire college education in Arkansas under such facts as appear of record in this case").

39. Ark. Stat. Ann. § 34-1211 (Repl. 1962). The relevant portion of this statute is quoted in note 11 *supra.*

40. Upchurch v. Upchurch, 196 Ark. 324, 327, 117 S.W.2d 339, 340 (1938).

41. Elkins v. Elkins, 262 Ark. 63, 68, 553 S.W.2d 34, 36 (1977).

42. *Id.*

43. *Id.* (citing Petty v. Petty, 252 Ark. 1032, 1035-36, 482 S.W.2d 119, 121 (1972), for its definitions of "disabled" and "handicapped," the relevant language of which is quoted in note 34 *supra*).

44. Elkins v. Elkins, 262 Ark. 63, 68, 553 S.W.2d 34, 36 (1977).

45. *Id.* at 68-69, 553 S.W.2d at 36. Although acknowledging that the son was in good physical health, the court focused its attention primarily on an opinion of the son's doctor that he should be given an opportunity to go to college, the appellee's testimony that she

In the lone dissent, Justice Byrd took marked exception to the ruling of the majority that the son's dyslexia was a sufficiently disabling condition to warrant the potential continuation of support for four years or more. To support the view that the "undisputed" evidence indicated no disability, the dissent emphasized the son's testimony that he was in good physical condition and that he could perform jobs that required hard or light physical labor.[46] It also noted that the son "is capable of and does run ten miles cross-country in a day."[47] Citing the age of majority statute,[48] the dissent concluded that the son was an adult for all purposes except for the court's opinion that everyone should have a college education.[49] According to the dissent, the real problems in the case—the son's bellicose attitude and the subsequent estrangement between him and his father[50]—did not warrant court interference in the decision between the appellant and his adult son as to whether the latter should go to college.[51]

In holding that the preponderance of the evidence supported the chancellor's ruling, the *Elkins* majority opinion seemed to apply the established exception that extends parental obligation for child support. This is evident from the court's strong reliance on *Petty*. However, even in *Petty* the concern of the court had focused on whether the adult child was able to provide for herself so as to protect the child's interests while preventing her from becoming a burden upon society.

Therefore, it seems that the dissent in *Elkins* had ample reason to point to the undisputed evidence that the son was not disabled by his dyslexia, at least not to the extent of being unable to support himself. That evidence included the son's own testimony regarding his physical capabilities, which received comment by both the majority and the dissenting opinion; his testimony that he had worked for the county road department at ten cents per hour above the minimum wage; and the fact that no previous employer had in-

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thought her son would be unable to support himself without further schooling, and the son's testimony that he had been unable to obtain a job that paid well. The court also gave deference to the chancellor's assessment of the son's condition while he was on the witness stand, saying that it "would be much superior to ours from the cold record." *Id.*

46. *Id.* at 69, 553 S.W.2d at 37 (Byrd, J., dissenting).

47. *Id.*

48. *Id.* at 69-70, 553 S.W.2d at 37. The current version of the statute is quoted in note 1 *supra*.

49. Elkins v. Elkins, 262 Ark. 63, 70, 553 S.W.2d 34, 37 (1977) (Byrd, J., dissenting).

50. *Id.* at 69, 553 S.W.2d at 37.

51. *Id.* at 70, 553 S.W.2d at 37.

quired about his learning disability.[52] The son was able to drive a car, unlike the epileptic daughter in *Petty*, and he had already obtained a high school diploma prior to the final extension of the support order, unlike the normal adult daughter in *Matthews*. Furthermore, the son had not been advised by his doctor to quit any of the summer jobs that he held, a primary factor in the court's requiring continued support for the physically infirm son in *Eskridge*. Since the *Elkins* court had before it in the trial record direct evidence that the "handicapped" adult son was able to do physical work, it could have easily concluded, as did the dissent, that the preponderance of the evidence did not support the chancellor's ruling that the son was unable to support himself without a college education.[53] Consequently, a determination of the actual controlling factors or considerations is left to conjecture.

Two such speculations could presage developing trends in the area of support for adult children. It may be that the court chose to focus on the presence in the record of the label "handicap" as automatically establishing a prima facie case of disability without requiring convincing evidence of actual incapacity to work.[54] But being dyslexic does not mean an individual is so physically handicapped that he is incapable of supporting himself in some form of compensated work without obtaining specialized, institutional education.[55] Nevertheless, because of the *Elkins* decision a petitioner on behalf of an adult child may be reasonably assured of having af-

52. Abstract and Brief of Appellant at 20-21, Elkins v. Elkins, 262 Ark. 63, 553 S.W.2d 34 (1977).

53. According to published statistics, the son might have earned as much or more income in manual labor occupations not requiring a college education as in his chosen field of forestry. As a forester with a B.A. degree, he could expect to start within a range of $8500 to $9500 per year. U.S. Bureau of Labor Statistics, Dep't of Labor, Bull. No. 1875, Occupational Outlook Handbook (1976). As a truckdriver's helper in Little Rock, Arkansas, he could expect an annual wage in the neighborhood of $8500, and as a truckdriver, $11,500. U.S. Bureau of Labor Statistics, Dep't of Labor, Bull. No. 1917, Union Wages and Hours; Local Truckdrivers and Helpers, July 1, 1975, Table 8 (1976).

54. The mother offered no direct evidence of her son's alleged incapacity to work other than her personal belief and the doctor's general observation that the boy should be given an opportunity to go to college. Elkins v. Elkins, 262 Ark. 63, 65-66, 553 S.W.2d 34, 35 (1977). The doctor provided no medical reasons to support his opinion, nor did he make a connection between the boy's learning disability and this opinion. In contrast, the appellant offered the son's own testimony that he could do physical labor. *Id.* at 69, 553 S.W.2d at 37 (Byrd, J., dissenting).

55. Dyslexia is defined as "a level of reading ability markedly below that expected on the basis of the individual's level of over-all intelligence or ability in skills." Stedman's Medical Dictionary 432 (4th unabridged lawyers' ed. 1976). It involves "inability to read more than a few lines with understanding." *Id.* at 488 (1st ed. 1961). It would not appear to fall within the "medicolegal" definition of "disability," *viz.*, "[a] term signifying loss of function and earning power." *Id.* at 400 (4th unabridged lawyers' ed. 1976).

firmed an order requiring continued support payments for a college education from a divorced parent, provided the petitioner raises a shibboleth of any type of disability or handicap and generally alleges an incapacity for self-support without costly additional education. This extension of the duty to support a child, or its shift in focus, currently has no foreseeable limits, and divorced parents can no longer rely on the old criterion of *verified,* actual incapacity for self-support.

On the other hand, it may be that the majority's attitude "that everybody ought to have a college education"[56] is closer to the actual controlling consideration. There had been no previous decision requiring a divorced parent to provide a college education for his adult child, except when the child's incapacity for self-support was established. On the contrary, *Riegler,* only one year prior to *Elkins,* had reaffirmed the court's position that a college education was not a necessity, specifically distinguishing *Petty* on its facts. Perhaps the court in *Elkins* was trying to slip the obligation of providing a college education in through the back door by gradually diminishing and ultimately eliminating the need for special circumstances.

If the Arkansas Supreme Court is changing its position to advocate that children should go to college and that divorced parents can be rightfully ordered to provide support to make attendance possible, regardless of disability, several issues will undoubtedly arise in future litigation, as they have in other jurisdictions. These issues include whether the noncustodial parent has any right to determine or participate in the choice of institutions and course of study, as well as what constitutes reasonable expenses;[57] whether the child's ability or capacity for college work should be considered;[58] and whether the parental duty should continue past the attainment of majority by the child.[59]

In the meantime attorneys would be well advised to adopt a procedure which the Arkansas Supreme Court favorably recognized in *Thompson v. Thompson.*[60] In reaffirming its position that a chancellor's decree must specify when child support is to terminate,

56. Elkins v. Elkins, 262 Ark. 63, 70, 553 S.W.2d 34, 37 (1977) (Byrd, J., dissenting).

57. *See, e.g.,* Bateman v. Bateman, 224 Ga. 20, 159 S.E.2d 387 (1968); Esteb v. Esteb, 138 Wash. 174, 244 P. 264 (1926). The latter case is especially important on the "right" to receive a college education.

58. *See, e.g.,* Johnson v. Johnson, 346 Mich. 418, 78 N.W.2d 216 (1956).

59. *See, e.g.,* Hight v. Hight, 5 Ill. App. 3d 991, 284 N.E.2d 679 (1972) (holding that the parental duty will continue post-majority). *But see, e.g.,* West v. West, 131 Vt. 621, 312 A.2d 920 (1973). *See generally* Annot., 36 A.L.R.3d 1093 (1971); Annot., 56 A.L.R.2d 1207 (1957).

60. 254 Ark. 881, 496 S.W.2d 425 (1973).

rather than allowing a father to eliminate it unilaterally of his own volition, the court stated that "litigation such as this could be avoided by setting forth in the decree under what circumstances monthly child support and alimony payments terminate without the necessity of court intervention."[61] If counsel in the *Elkins* case had used this procedure while drafting the proposed decree for the chancellor's approval, the litigation regarding the continued support obligation might not have arisen.

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61. *Id.* at 884, 496 S.W.2d at 427.