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Article 11

College Education Held a "Necessary" in Alimony Decree

the *pseudohomosexual* and *latent* homosexual may not fall within the traditional categories and, hence, many suits grounded upon such behavior must fail unless a new ground for annulment is created, viz., homosexual activity per se. Homosexuality is regarded by many jurisdictions as an infamous indignity to the marriage partner, which makes the marriage so revolting that it becomes impossible for the other party to discharge the marital duties, and defeats the entire purpose of the marital relation.[23]

If New York is willing to accept the proposition that homosexual activity is so revolting as to defeat the whole purpose of the marital relation, and is willing to apply this rationale to suits for annulment, then homosexual activity per se might be considered a basis for annulling the marriage. This approach may be feasible in view of New York's strict divorce laws which do not provide any escape from the marriage for a party suffering such indignities. However, if New York does recognize homosexual activity per se as a ground for annulment on the theory that it defeats the purpose of the marital relation, it will then have to deal with the additional problems of defining and classifying those types and degrees of homosexual activity which do in fact make marriage unworkable.

[23] See authorities cited note 11 *supra*. Much of the sexual satisfaction of male and female homosexuals involves behavior that violates sodomy and crime-against-nature statutes. PLOSCOWE, *op. cit. supra* note 14, at 195-208.

College Education Held a "Necessary" in Alimony Decree

Petitioner sought modification of a prior support order to include payment for her son's college education. The Family Court of New York, in ordering the father to pay an additional fifteen dollars a week during the school year, *held* that a father's duty to educate his children includes the providing of a college education if the child exhibits "special aptitude" and the father has the ability to pay. *Weingast v. Weingast,* 255 N.Y.S.2d 341 (Family Ct. 1964).

A father, whether or not he has custody of his children, is required to provide them with "necessaries."[1] While some degree of education was deemed a "necessary" at common law,[2] one of the earliest reported cases in this country, *Middlebury College v. Chandler,*[3] held that a college education is not a "necessary." The court in that case denied a student's claim that his father's estate was liable for tuition in his stead, on the ground that his father would have been liable for his "necessaries."

Eighty years later, in the leading case of *Esteb v. Esteb,*[4] the Washington Supreme Court deemed a college education, under the facts and circumstances involved, a "necessary," and ordered a divorced

[1] 39 AM. JUR. *Parent & Child* § 41 (1942).

[2] BLACKSTONE, COMMENTARIES 450 (American ed. 1847).

[3] 16 Vt. 683, 42 Am. Dec. 537 (1844).

[4] 138 Wash. 174, 244 Pac. 264 (1926).

father to pay his minor child's college expenses. In reaching its decision, the court emphasized the special aptitude of the child[5] and the financial ability of the father.[6] In distinguishing *Middlebury,* the court observed that "conditions have changed greatly in almost a century. . . ."[7]

The *Esteb* case has been accepted by many jurisdictions.[8] For example, in *Jackman v. Short,*[9] the Oregon Supreme Court ordered support for a college education. However, the court did not require a "special aptitude" but instead emphasized the "attitude, character, desire for learning and well directed ambition" of the child.[10]

In New York, it is uncertain whether a college education should be deemed a "necessary." In 1930, the appellate division refused to order college support for a "child" over twenty-one.[11] While reaffirming the position taken in *Middlebury, i.e.,* that college is not a "necessary," the court did admit, however, that there might be exceptions.[12]

Recently the appellate division, although not expressly overruling *Halsted v. Halsted,* has illustrated the falsity of the view that college is never a "necessary," and has indicated that the question is one which is within the discretion of the trial court.[13] One clear limitation which has been placed upon this discretion is that the financial ability of the father must be considered.[14]

In the absence of further clear guides to their exercise of discretion, and in view of the strong dictum in *Halsted* ostensibly establishing a general rule that college is not a "necessary," the lower courts have been divided as to what facts and circumstances are required to sustain an award for college support.[15]

In the instant case, the Family Court stated that a father normally has no duty to provide a college education for his children. However, the Court noted that it possessed the power to order such support, and expressed the view that children of broken homes are entitled to special consideration.[16]

The Court indicated that the extent of education to be considered a "necessary" is a question of fact to be determined in each individual case. Judge Golding, who penned the Court's opinion in this case, reasoned that, under the facts and circumstances involved herein, the father should pay part of the cost of his son's college

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[5] *Id.* at 175-76, 244 Pac. at 264-65.
[6] *Id.* at 185, 244 Pac. at 268.
[7] *Id.* at 182, 244 Pac. at 267.
[8] See Ogle v. Ogle, 275 Ala. 483, 156 So. 2d 345 (1963); Maitzen v. Maitzen, 24 Ill. App. 32, 163 N.E.2d 840 (1959); Hart v. Hart, 239 Iowa 142, 30 N.W.2d 748 (1948); Titus v. Titus, 311 Mich. 434, 18 N.W.2d 883 (1945); Pass v. Pass, 238 Miss. 449, 118 So. 2d 769 (1960); Mitchell v. Mitchell, 170 Ohio St. 507, 166 N.E.2d 396 (1960); Jackman v. Short, 165 Ore. 626, 109 P.2d 860 (1941); Commonwealth v. Sommerville, 200 Pa. Super. 640, 190 A.2d 182 (1963); Atchley v. Atchley, 29 Tenn. App. 124, 194 S.W.2d 252 (1945); Barris v. Craig, 202 Va. 229, 117 S.E.2d 63 (1960).
[9] 165 Ore. 626, 109 P.2d 860 (1941).
[10] *Id.* at 656, 109 P.2d at 872.
[11] Halsted v. Halsted, 228 App. Div. 298, 239 N.Y. Supp. 422 (2d Dep't 1930).
[12] *Id.* at 299, 239 N.Y. Supp. at 424.
[13] See Matthews v. Matthews, 14 App. Div. 2d 546, 217 N.Y.S.2d 736 (2d Dep't 1960) (memorandum decision).
[14] See Bernstein v. Bernstein, 282 App. Div. 30, 121 N.Y.S.2d 818 (4th Dep't 1953) (per curiam).
[15] See Grishaver v. Grishaver, 225 N.Y.S.2d 924 (Sup. Ct. 1961); O'Brien v. Springer, 202 Misc. 210, 107 N.Y.S.2d 631 (Sup. Ct. 1951); Cohen v. Cohen, 193 Misc. 106, 82 N.Y.S.2d 513 (Sup. Ct. 1948). *Compare* Herbert v. Herbert, 198 Misc. 515, 98 N.Y.S.2d 846 (Dom. Rel. Ct. 1950) *with* Samson v. Schoen, 204 Misc. 603, 121 N.Y.S.2d 489 (Dom. Rel. Ct. 1953).
[16] 255 N.Y.S.2d 341, 344 (Family Ct. 1964).

education. In accordance with this decision, the father was ordered to pay approximately $540 per year out of a total cost to the student of about $1,478.[17]

As the basis of its decision, the Court emphasized the child's special aptitude, *i.e.,* that he had scored in the top ten per cent of those taking the College Board examinations and had received a $400 work grant from the university.[18] Great reliance was also placed on the fact that the father earned in excess of $12,000 a year, and had stated that he was not opposed to his son attending college.[19] Thus, the Court indicated that the prime factors to be considered were the financial ability of the father and the "special aptitude" of the child. This view is in accord with precedent found in many other jurisdictions.[20]

Almost all cases, in New York and in other jurisdictions, which have allowed support for a child in college, are in agreement that the financial ability of the father is of primary importance.[21] In addition, the instant case is in agreement with the *Esteb* rule that the child should possess "special aptitude." It does not appear, however, that the latter requirement should be necessary. The better rule would seem to be the one established by the *Jackman* case, where the court looked to the desire and capability of the child, rather than to any "special aptitude." The *Esteb* rule had its origin in cases decided in a period when college education was a rare occurrence.[22] Today a college education has become commonplace and the *sine qua non* for obtaining better employment. For this reason, it appears that by ordering support for highly qualified students (those in a good position to obtain scholarships and loans) and refusing such support to children who are capable of college work (although not exceptional), the courts are, in effect, protecting the strong and ignoring the weak.

An interesting problem, which the instant case leaves unanswered, is whether or not the payments will cease when the student attains his majority. It appears that they will cease in the usual case.[23] The family court has authority to order support for the child only until he attains the age of twenty-one, absent "exceptional circumstances."[24] In addition to this limitation upon its subject matter jurisdiction, the family court, by ordering college support for a student beyond the age of twenty-one, would appear to be extending the "exception" to such support referred to by the appellate division in its *Halsted* opinion. Nevertheless, the termination of support could result in serious consequences for a student entering his junior or senior year of college with no other financial resources.

This case also leaves unresolved the question of what type of college education a father is obliged to provide. There is substantial variation between the nominal fees of most state universities and the high fees of some private institutions. In the prin-

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[17] *Id.* at 343.
[18] *Ibid.*
[19] *Ibid.*
[20] See cases cited note 8, *supra.*
[21] *Ibid.* Herbert v. Herbert, *supra* note 15.
[22] See Middlebury College v. Chandler, 16 Vt. 683, 42 Am. Dec. 537 (1844).
[23] N.Y. FAMILY CT. ACT § 443(b). "An order of support under this section may not run beyond the child's minority. The court may, however, extend the duration of such an order beyond the child's minority if the child suffers physical or mental disabilities or if there are other exceptional circumstances that warrant such extension."
[24] *Ibid.*

cipal case, for example, the child was boarding at a private university. The Court did not directly discuss this problem, but by its order suggested an apparent solution. The father was not ordered to pay the entire cost of college for his son, but instead was ordered to pay part of the cost. The amount of the father's required payments was based more on his ability to pay than on the cost of the education selected by the child. Such a solution, which bases the amount of support for college on the father's income, might be more practical than attempting to lay down any definite rules as to the type of college education to be provided and appears to coincide with the "station in life" doctrine of support.[25]

The *Weingast* decision has raised many questions and has left the law of New York on this subject unsettled. However, the rule adopted by the Family Court manifests the trend which, similar to that in other jurisdictions, indicates a more liberal view with respect to the necessity of a college education in today's highly complex and mechanized society.

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[25] 39 AM. JUR. *Parent & Child* § 48 (1942).