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WHAT CONSTITUTES EMANCIPATION OF A CHILD

The purpose of this discussion is, as the title suggests, to determine the general law in regard to the doctrine of emancipation. This paper will not attempt to treat this broad subject in detail, but will attempt to set out the elements necessary to constitute emancipation as a matter of law, and to examine representative factual situations from which emancipation may or may not be implied.

Definition

"Emancipation," in its most literal sense, means "releasing," or "setting free."[1] Used in a legal sense, "emancipation" means the relinquishment by a parent of control and authority over his child, conferring on the child the right to his earnings and extinguishing the parent's legal duty to maintain and support the child.[2] Emancipation of children by their parents, as known and applied today, was entirely unknown to the common law.[3] Under the Roman law, a child was formally enfranchised by his father in an imaginary sale, but Justinian substituted for this the more simple proceeding of manumission by a magistrate.[4] In England a child remained, under almost all circumstances, unemancipated, and it was held by Lord Kenyon that there can be emancipation of a child only if he marries and so becomes himself the head of a family or contracts some other relation so as to wholly and permanently exclude the parental control.[5] In the United States, however, the doctrine of emancipation has been applied with greater liberality.

How Emancipation May Be Effected

Emancipation may be effected by the consent of the parent, either written or oral, express or implied, or by operation of law, but can never be accomplished by an act of the child alone.[6] For purposes of this discussion, the two methods of effecting an emancipation (*i. e.*, by consent of the parent and by operation of law) will be considered separately.

1. By consent of the parent.

The consent of the parent to an emancipation of a minor child may

1. Porter v. Powell, 79 Iowa 151, 44 N.W. 295 (1890).
2. Rounds Bros. v. McDaniel, 133 Ky. 669, 118 S.W. 956 (1909), 134 Am. St. Rep. 482, 19 Ann. Cas. 326.
3. 39 Am. Jur., *Parent and Child*, § 64 (1942).
4. Shouler, Domestic Relations, § 267 (5th Ed. 1895).
5. *Ibid;* Rex v. Roach, 6 T.R. 247 (1795); Rex v. Wilmington, 5 B.&ALD. 525 (1822).
6. Parker v. Parker, S.C. , 94 S.E. 2d 13 (1956).

be express, as by voluntary agreement of the parent and child, or it may be implied from such acts as import consent, and it may be absolute, complete, or partial.[7] Where there is a written agreement to that effect, little difficulty is encountered in proving the emancipation. But most cases in which an express emancipation is alleged involve oral agreements. It has been held to be an express emancipation where the parent freely and voluntarily agreed with his child, who was able to take care of and provide for himself, that he might leave home, earn his own living, and do as he pleased with his time and earnings.[8] In a recent case it was held that a parent's making of an oral contract with his son to the effect that if the son would remain on the farm and render service to the parents the farm would be devised to him constituted sufficient evidence of the emancipation of the son, as respects recovery for services rendered during the son's minority.[9]

A complete emancipation is generally defined as an entire surrender of all the rights to the care, custody, and earnings of the child, as well as a renunciation of parental duties.[10] In determining whether there has been a partial or complete emancipation, the test to be applied is that of the preservation or destruction of the parental and filial relations.[11] A severance of the filial relationship occurs when the child is placed in a new relationship inconsistent with his former relation as a part of his parent's family,[12] or, as was stated by a New York court, when "the child is thrown upon his own resources and is free to act upon his own responsibility and in accordance with his own desires."[13] Thus, a nineteen year old son, who formerly worked away from home and gave his wages to his mother, who in return gave him room, clothing and spending money, and who later worked in his parents' store on the same basis, was held not emancipated.[14] But it is not necessary that the child leave home or work away from home in order to sever the filial tie. Where a son lived at his father's home, paid room and board, bought his own clothes, and made no accounting to his father of his funds, it was held that a finding of emancipation was fully sustained by the evidence.[15]

7. Wallace v. Cox, 136 Tenn. 69, 188 S.W. 611 (1916).
8. Brosius v. Barker, 154 Mo. App. 657, 136 S.W. 18 (1911).
9. Costello v. Costello, 134 Conn. 536, 59 A. 2d 520 (1948).
10. Brosius v. Barker, note 8, *supra.*
11. Cafaro v. Cafaro, 118 N.J.L. 123, 191 A. 472 (1937).
12. Town of Plainville v. Town of Milford, 119 Conn. 380, 177 A. 138 (1935).
13. Cohen v. Delaware, L. & W. R. Co., 269 N.Y.S. 667, 150 Misc. 450 (1934).
14. Cafaro v. Cafaro, note 11, *supra.*
15. Groh v. W. O. Kahn, Inc., 223 Wisc. 662, 271 N.W. 374 (1937); (accord, Dierker v. Hess, 54 Mo. 246 (1873), where it was said that it was not necessary, in order to constitute emancipation, that the son cease to be a member of

A recent California case[16] held that where a twenty year old daughter lived at home, but did not occupy a subordinate position in the home, was gainfully employed and received her own earnings, the evidence was sufficient to constitute an emancipation. Nor does the fact, of itself, that a child lives and works away from home imply emancipation. Where a son, with his mother's consent, left home to make his own way, but later wrote affectionate and filial letters to his mother, it was held that there was no emancipation.[17]

Although there may be no express consent of the parent, such consent may be implied from the acts and conduct of the parent, where his acts or conduct are inconsistent with his claim to the further obedience or services of the child.[18]

It should be stated here that, in some cases, emancipation by the consent of the parent, either express or implied, may be revoked by the parent.[19] A gratuitous consent on the part of the parent may be revoked or renounced by the parent within a "reasonable" time; that is, before it has been acted upon by the child, or before some third party, such as an employer of the child, has obtained some interest in the emancipation.[20]

The child's taking advantage of his freedom and securing a position at good wages is such action upon the emancipation as will make it irrevocable by the parent.[21] But if the relinquishment of his rights by the parent is supported by a valuable consideration, or if the parent does not revoke within a reasonable time, the emancipation is absolute and cannot be revoked.[22] What is a "reasonable" time will depend on the circumstances of a given case. It was held

his father's household or that the emancipation be accompanied by some token or ceremonial, but that the fact that the father had relinquished his claim to the son's earnings might be established either by direct evidence or be implied from circumstances).

16. Martinez v. Southern Pacific Co., 45 Cal. 2d 244, 288 P. 2d 868 (1955).

17. Spurgeon v. Mission State Bank, 55 F. Supp. 305 (W.D. Mo. 1943).

18. See Constance v. Gosnell, 62 F. Supp. 253 (W.D. S.C. 1945), where the court held that implied emancipation may arise from conduct of the father inconsistent with his claim to the further obedience or services of his child. See also Patek v. Plankinton Packing Co., 179 Wisc. 442, 190 N.W. 921 (1922), where it was said that "implied emancipation may be inferred from such circumstances and conduct on the part of the parent as reasonably leads to the conclusion that he expects the child to provide for himself without accounting to the parent for his earnings."

19. Rounds Bros. v. McDaniel, 133 Ky. 669, 118 S.W. 956 (1909).

20. Professor Madden, in MADDEN, PERSONS AND DOMESTIC RELATIONS (1st Ed. 1931) says, at p. 414: "If the emancipation is without consideration, however, it may be revoked at any time before it is acted upon, and from the time of the revocation the parent is restored to his original rights. It is a mere gift or license, and, like any other gift or license, it may be revoked at any time before it is accepted, and acceptance is acting upon it."

21. Rounds Bros. v. McDaniel, 133 Ky. 669, 118 S.W. 956 (1909).

22. *Ibid;* Dunlap v. Dunlap, 84 N.H. 352, 150 A. 905 (1930).

in *Rounds Bros. v. McDaniel*,[23] where a minor son left home with the knowledge of his father, secured employment, and for two years received and spent his own earnings without accounting to his father, the emancipation was absolute and could not be revoked by the father as he did not act within a reasonable time.

A child may be emancipated for certain purposes but not for others. In such a case there is a partial emancipation. The most common instance of partial emancipation is that of a gift to the child of his earnings, or the parents' allowing a child to secure employment and keep his earnings. Thus it has been held that the gift of his earnings to the child does not in itself operate as a complete severance of all the mutual rights and duties arising out of the relationship of parent and child, and the right of the child to his earnings does not depend on the question whether he has been fully emancipated.[24]

Although it is well settled that what constitutes an emancipation is a question of law, the question of whether an emancipation has occurred in a particular case is one of fact for the jury.[25] The important consideration then, is what circumstances and conduct in a particular case will justify the implication of an emancipation. It has been held in numerous cases that where the child hires himself out to an employer, either with the express consent of his parent or without objection from the parent, collects and retains his earnings, a jury finding of emancipation is justified by the evidence. (But, as has been seen above, such facts may constitute only a partial emancipation, depending on whether there has been a severance of the filial relation.) But a mere offer of a gift of his earnings to the child, not acted upon by the child, does not constitute an emancipation.[26] However, a recent Pennsylvania case[27] held where a 16 year old girl had been working for about four years prior to her accidental death, had earned and spent her own money, and her paernts had exercised no authority or control over her behavior other than in an advisory capacity, that these facts constituted sufficient evidence of complete emancipation, so that her administrator instead of her father could prosecute an action to recover damages for her wrongful death. It has been held that where the parent brings an action for and on behalf of his child, as next friend of the child, and not in

23. Rounds Bros. v. McDaniel, 133 Ky. 669, 118 S.W. 956 (1909).

24. Dunks v. Grey, 3 F. 862 (C.C.E.D. Pa. 1880). See also P. J. Hunnicutt & Co. v. Thompson, 159 N.C. 29, 74 S.E. 628 (1912); Detwiler v. Detwiler, 162 Pa. Super. 383, 57 A. 2d 426 (1948). In the latter case it was held that an eighteen year old boy, who quit school at the age of seventeen, earned and spent his own money, but continued to live at home, was not emancipated.

25. Parker v. Parker, S.C. , 94 S.E. 2d 13 (1956); 67 C.J.S., *Parent and Child*, § 90 (1950).

26. Smith v. Gilbert, 80 Ark. 525, 98 S.W. 115 (1906).

27. Pennsylvania R. Co. v. Patesel, 118 Ind. App. 233, 76 N.E. 2d 595 (1948).

his own right as a parent entitled to the earnings and services of the child, this does not, in the absence of other circumstances, amount to an implied emancipation.[28] But where a father brought an action on behalf of his minor son and as his next friend, and asserted in his suit that the son had the right to receive such damages, it was held that this amounted to an allegation of the emancipation of the son.[29] Also, where the father had brought suit as next friend of his child to recover damages for personal injuries received in the course of the child's employment, and subsequently brought suit in his own right for loss of services of the child in connection with the same injury, it was held that he could not recover because his prosecution as next friend of the child in the first action amounted to a relinquishment of such loss of son's services.[30]

It has been seen that the fact that a child leaves and lives away from home does not of itself constitute an emancipation. But where the child has voluntarily abandoned the parental roof, turned his back to its protection and influence, it has been held that the parent is under no obligation to support him and a complete emancipation may be implied.[31] And where the child leaves home, with the consent of the parent, to make his own way in the world, it has been frequently held that this is an implied complete emancipation.[32] It

28. Farrar v. Wheeler, 145 F. 482 (1st Cir. 1906); Pawnee Farmers Elevator Co. v. Powell, 76 Colo. 1, 227 P. 836 (1942). But see Abeles v. Bransfield, 19 Kan. 16 (1877) where it was held that a mother's act in commencing an action in her son's name as his next friend, setting forth in the petition the loss of time and expenses incurred as a part of her son's damages resulting from an injury sustained by him, and in asking judgment in favor of her son for such damages, must be conclusively presumed to amount to a relinquishment in his favor of all her rights to recover compensation for such loss of time and such expenses, so that recovery might be had in the name of the son.

29. Revel v. Pruitt, 42 Okla. 696, 142 P. 1019 (1914). See also Augler v. Badgely, 29 Ill. App. 336 (1888).

30. Baker v. Flint & P. M. R. Co., 91 Mich. 298, 51 N.W. 897 (1892); Chicago School Co. v. Weiss, 203 Ill. 536, 68 N.E. 54 (1903); National City Development Co. v. McFerran, 55 A. 2d 342 (Wash. D.C. 1947).

31. Brosius v. Barker, note 8, *supra*. But see Porter v. Powell, 79 Iowa 151, 44 N.W. 295 (1890). There a daughter, at the age of fourteen, went to reside away from her father's house, at a place some 30 miles distant, and for three years she contracted for, earned, and controlled her own wages, clothed herself, and her father neither promised or gave her any money or means of support. Nevertheless, it was held that the father was liable for medical services rendered the child, at the child's request, and without the knowledge or consent of the father. The court held this an emancipation for the purpose of relieving the daughter of her duty of service to her parent, but not emancipation for the purpose of relieving the father of his duty to furnish necessary medical attention in the event of the sickness of the daughter.

32. But if the child leaves home under the erroneous assumption that the father has emancipated him, his rights to his earnings and services are not absolute as in the case of an express emancipation, and the father may, by taking timely action, resume parental authority and reclaim the services of the child. Rounds Bros. v. McDaniel, 133 Ky. 669, 118 S.W. 956 (1909).

has also been held that the appointment of a guardian for a child does not of itself amount to an emancipation,[33] but a child may be emancipated by being given away to someone else.[34] However, such a gift must be complete, and must terminate the filial relation.[35] Where the parents of a minor child contracted with another person that the child would live with such other person until he reached 21 years of age, it was held that this did not constitute an emancipation before the child became 21.[36] And where a minor child was taken from its parents and detained in an insane asylum without the father's consent, it was held that this did not constitute an emancipation.[37]

2. By operation of law.

Emancipation of a child may be effected by operation of law where the parent abandons or fails to support the child, where the child marries, either with or without the consent of his parent, and where the child attains his majority. An emancipation by operation of law is also effected where the child enlists or is drafted into military service, and such emancipation is effective for so long, at least, as the military service continues.

(a) Abandonment or failure to support

The law relating to abandonment or failure to support a child is well summarized in the leading case of *Rounds Bros. v. McDaniel*[38] where the court says: "A parent, although entitled to the services and earnings of his child, may relinquish or surrender this right by failing to provide for his child a home if he is able to do so, or by such ill treatment, neglect, or cruel conduct as forces the child to abandon his home, or by becoming so degraded or dissolute a character that his child cannot in morals or decency live with him."

(b) Marriage of the child

It is well settled that the marriage of a child with the consent of the parent constitutes an emancipation of the child. Although there is some conflict on the question whether marriage of a child still under the age of consent, without the permission of the parent, con-

33. Lessard v. Great Falls Woolen Co., 83 N.H. 576, 145 A. 782 (1929).
34. Town of Tunbridge v. Town of Eden, 39 Vt. 17 (1866).
(In South Carolina, by statute, a parent may, under certain conditions, deed away the custody of his child for the remainder of its minority, and such disposition of the child is valid against all persons claiming custody of the child as guardian or otherwise. CODE OF LAWS OF SOUTH CAROLINA, 1952 §§ 31-52—31-55.)
35. Brumfield v. Brumfield, 194 Va. 577, 74 S.E. 2d 170 (1953).
36. Tamworth v. New-Market, 3 N.H. 472 (1826).
37. Guthrie County v. Conrad, 133 Iowa 171, 110 N.W. 454 (1907).
38. Rounds Bros. v. McDaniel, 133 Ky. 669, 118 S.W. 956 (1909).

stitutes an emancipation,[39] it seems to be the majority and better rule that an emancipation is thereby effected.[40] A recent Texas case[41] held that a seventeen year old married girl was qualified to be appointed guardian of a person adjudged to be of unsound mind, and that a statute providing that an unemancipated minor was not qualified to be appointed guardian did not apply to her. Those cases holding that marriage does effect an emancipation appear to adhere to the theory that a new relation is created by a marriage, which is inconsistent with the subjection of the child to the control and care of his parents. A child is, by virtue of his marriage, subjected to new responsibilities, recognized by law, and has a primary responsibility to the new family created by the marriage.

(c) Attaining majority

The general rule is that a child is emancipated upon attaining his majority (which is 21 years at common law, although by statute, in some jurisdictions, a female reaches her majority at 18), except where the child has an infirmity of mind or body rendering him incapable of taking care of himself and requiring that he remain with his parent. But it has been held that where the child continues to live with the parent after attaining his majority, and the latter continues to provide him with support and care, no emancipation is effected.[42]

(d) Military service

The majority rule regarding minor's entry into military service is well stated in the recent case of *Green v. Green*[43] where it was said,

39. Guillebert v. Grenier, 107 La. 614, 32 So. 238 (1902). In this case the court said: "To sustain the defense of emancipation by marriage not preceded by consent would hold out encouragement to minors indifferent to parental influence and control to go counter to their proper authority. It would offer inducements to youths to enter into improvident and ill-advised marriages which mature years would cause them to regret or deplore." *Accord,* Easterly v. Cook, 140 Cal. App. 115, 35 P. 2d 164 (1934); Irby v. State, 57 Ga. App. 717, 196 S.E. 101 (1938); White v. Henry, 24 Me. 531 (1845); People v. Todd, 61 Mich. 234, 28 N.W. 79 (1886); Austin v. Austin, 167 Mich. 164, 132 N.W. 495 (1911). In the last named case the court expressed the opinion that the lawful marriage of minors emancipates both, but felt bound by the decision in People v. Todd, *supra,* this note, which was construed as holding that the marriage of a minor does not emancipate him.

40. See, generally Annot., 165 A.L.R. 745, 746, and cases there cited. See also Ex parte Olcott, 141 N.J. Equity 8, 55 A. 2d 820 (1947) where it was held that a sixteen year old female was emancipated by marriage.

41. Kinser v. Hudgins, 275 S.W. 2d 847 (Texas, 1955).

42. Brown v. Ramsay, 29 N.J. 117 (1860). See also Union Pacific v. Jones, 21 Colo. 340, 40 P. 891 (1895); Overseers of Poor of Alexander Twp. v. Overseers of Poor of Bethlehem Twp., 16 N.J. 119, 31 Am. D. 229 (1837).

43. 234 S.W. 2d 350 (Mo. 1950). See also Swenson v. Swenson, 241 Mo. App. 21, 227 S.W. 2d 103 (1950).

that where a minor became a member of the military establishment of the country, "he was brought within the exclusive control of the government and was emancipated so long as his service continued, and the emancipation was effected by implication of law no less than if it had been brought about by the voluntary act of the parent . . ." The recent California case of *Argonaut Insurance Exchange v. Kates*[44] after a review of the cases on this question, recognized that the majority view was as stated above, but adopted the minority view that "the induction of the minor son into the army did not constitute such an emancipation as to relieve the father of his obligation to comply with a court order for support . . . ." Under the majority view, there appears to be no distinction whether the minor enlists or is drafted. If his military service is terminated while he is still a minor, he will again become subservient to the authority of his parents,[45] but if he attains his majority while still in military service, the emancipation becomes absolute under the same conditions noted in subsection (c).

Conclusion

While the material on this subject presents an imposing array of cases, in the final analysis there appears to be no serious conflict in the authorities as to the law of emancipation. As has already been stated,[46] what constitutes emancipation is a matter of law, but the question of whether an emancipation has occurred in a particular case is a question of fact for the jury. There is a presumption that a child attaining his majority is emancipated, but no such presumption exists when the child is in his minority, and the burden rests on the party alleging the emancipation to prove such fact by clear, cogent, and convincing evidence.[47]

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44. 137 Cal. App. 2d 158, 289 P. 2d 801 (1955). See also the two New York cases of Harwood v. Harwood, 49 N.Y.S. 2d 727 (1944), and Wack v. Wack, 74 N.Y.S. 2d 435 (1947). Both of these cases involved a written separation agreement, and held that the induction into military service of a minor did not operate as a temporary emancipation during the minor's term of service so as to suspend the obligation of the father to make payments under the separation agreement.

45. Dean v. Oregon, R. & Nov. Co.. 44 Wash. 564, 87 P. 824 (1906). See also Iriquois Iron Co. v. Industrial Commission, 294 Ill. 106, 128 N.E. 289 (1920); Baker v. Baker, 41 Vt. 55 (1868); Annot. 12 A.L.R. 924.

46. 67 C.J.S., *Parent and Child*, § 90 (1950).

47. Parker v. Parker, S.C. , 94 S.E. 2d 13 (1956).