

Les solidarités entre générations

Solidarities between Generations

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BRUYLANT

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L'ampleur des enjeux humains, économiques et sociaux posés par la question des solidarités entre générations a conduit l'International society of Family Law (ISFL) à choisir ce thème pour son XV^e congrès mondial.

Plus de 200 intervenants, venus de 50 pays, ont abordé ces questions sous l'angle juridique, mais aussi philosophique, économique et anthropologique. Cet ouvrage présente une partie de ces communications organisées autour de deux grands thèmes : l'enfant au cœur des solidarités familiales et la prise en charge des aînés par la famille.

Des phénomènes tels que l'allongement de la durée de la vie, l'urbanisation des populations, la difficulté d'entrée sur le marché du travail ou encore l'éclatement des modèles familiaux traditionnels marquent notre monde contemporain et impliquent la disparition d'anciennes solidarités et l'apparition de nouvelles solidarités redessinant les relations entre générations, posant alors le problème du sort des personnes les plus fragiles : les enfants, les malades, les handicapés et, surtout, les personnes âgées.

- Quel est alors le rôle de la famille et des collectivités dans la protection de ces personnes ?
- Quels rapports entre solidarités publiques et solidarités privées ?
- Quels sont les droits et libertés reconnus aux personnes que l'âge, la maladie ou le handicap, placent en situation de dépendances ?

Telles sont les questions au cœur de cet ouvrage.

The importance of the human, economic and social issues caused by the question of generations' solidarities led the International Society of Family Law to choose this theme for its XVth World Congress (Lyon, July 19-23rd 2011). More than 200 speakers from 50 countries studied these questions from the legal angle, but also philosophic, economic and anthropological. This work collects a part of these papers about two great issues: the child, as the center of family solidarities; and the support for elders by family.

Phenomena such as increasing life expectancy, population urbanization, labor-market entry barriers, decline of traditional family patterns, mark in depth our contemporary world and involve old solidarity disappearance and new solidarity emergence, reshaping relations between generations while bringing up the problem of the fate of the most vulnerable: children, the sick, disabled, and especially elderly people.

- What then is the role of families and communities in protecting these people?
- What is the relationship between public and private solidarity?
- What are the rights and freedoms of people placed by age, illness or disability in a dependence situation?

These are the issues addressed by the authors of this book.

✓ **Droit international**
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SUPPORT OBLIGATIONS TOWARDS ADULT CHILDREN

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INTRODUCTION

There are great differences between Civil Law and Common Law legal systems when it comes to support obligations within the family.

In general, in Civil law legal systems there are unrestricted support obligations of parents towards their children—minor as well as adult—and reciprocal obligations of children towards their parents (1), the only prerequisite being need on the part of the person asking for support and financial ability to provide such support on the other side. The roots of this system can be traced back as far as to Roman law (2).

Common law legal systems start from the opposite pole. Even as regards support obligations of parents towards minor children, these had only be enacted in England by the Elizabethan Poor Laws in the beginning of the 17th century imposing for the first time statutory child support obligations (3). To the very day the starting point in Common Law countries is that parents have a duty to support their minor children but this duty ends upon the child reaching majority although the age of majority during the last decades has been lowered to 18 almost everywhere (4). Likewise there are no support obligations of children

(1) See for Germany §§1602 para 1, 1603 para 1 BGB, France Art 205 Cc, Belgium Art 203, 205 Cc, Italy Art 433 No. 2, 3 Cc, Luxembourg Art 205 Cc, Spain Art 143 Cc.

(2) I. SCHWENZER, *Verwandtenunterhalt und soziodemographische Entwicklung*, Zeitschrift für das gesamte Familienrecht (FamRZ), 1989, 685 ff.

(3) S. BUHAL, "Parental support of adult children with disabilities," 91 *Minn.L.Rev.* 710, 713 (2007).

(4) England: Child Support Act 1989, Child Support Act 1991, app. 1 § 4, see also J. EEKELAAR, *Family Solidarity in English Law*, in: D. SCHWAB and D. HENRICH, *Familiäre Solidarität, Beiträge zum europäischen Familienrecht*, Bielefeld 1997, 63 ff.; I. SCHWENZER, *FamRZ* 1989, 685, 685 ff. For USA state law see L.W. MORGAN, *The duty to support adult disabled children*, *Divorce Litig.*, October 1997, 185; S. BUHAL, 91 *Minn.L.Rev.* 710, fn. 60 (2007).

towards their parents in need. More and more systems formerly sharing the Civil law background, such as the Netherlands (5) and the Scandinavian legal systems, nowadays also follow the Common law approach (6).

In this paper we will discuss the consequences of these two different approaches as regards the support obligations of parents towards their adult children. The main focus will be on support for educational purposes and support for disabled children. For the Civil Law legal systems we will analyze the situation in German and Swiss law; for the Common Law legal systems we will discuss the current situation in the USA by way of example.

I. – SUPPORT FOR EDUCATIONAL PURPOSES

A. *German and Swiss Law*

As in Civil law legal systems parents are generally obliged to support the children without a general limitation this duty naturally encompasses support during the time when the child is not able to support itself because it pursues a higher education. However, recent years have seen the endeavour of courts in Germany as well as in Switzerland to limit this support obligation.

First of all, educational support can only be asked for an education befitting the child's intellectual capacities and desires, and ends with the first qualification which allows entering a profession (7). It has been held that a bachelor degree does not yet fulfil this requirement but that the support duty continues until the master degree has been achieved. Especially German courts have developed meticulous guidelines with regard to the necessary relationship between the bachelor and the master studies (8) as well as concerning the question whether after an apprenticeship that qualifies for a profession – such as a car mechanic – support for university studies – such as engineering – may be claimed (9). In any event, the studies must be pursued

(5) See art. 392 BW: Generally the parents of the child are not obliged to provide for the living costs during the time of studying at university after the child reached majority. Maintenance claims may be extended until the age of 21 during the time of education (art. 392, para 2 BW).

(6) Denmark: According to § 14, para 2 Child Care Act the parental duty ends when the child reaches majority at the age of 18 or at marriage, even though a facultative support for education can be claimed until the age of 24 (§ 14, para 3 Child Care Act). Compare for Norway: Generally until child reaches majority (aged 18), continuing in case of financial ability of the parents (§§ 66-68 statute No. 7, 8 avril 1981); for Sweden see chap. 7 §§ 1 et seq. Föräldrabalken: until the age of 18.

(7) For German Law see § 1610 para 2 BGB; 379; BGH, 14 July 1999, *Fam.RZ* 2000, 420, 420 ff.; BGH, 17 May 2006, XII ZR 54/04.

(8) OLG Celle, 2 February 2010, *Fam.RZ* 2010, 1465 ff.

(9) See BGH, 17 May 2006, *Fam.RZ* 2006, 1100, 1101.

with ordinary diligence and must be finished within an average period of time (10). However, support does not extend to PhD-studies (11).

Still, it is clear that such support obligations for educational purposes may well last for a considerable time, often until the child is well in its mid to late twenties. Hence, it is quite understandable that courts are seeking to further limit the parents' support obligations. As there are no other statutory restrictions – especially no fixed age limits – courts tend to consider the personal relationship between the parents and the children (12). Support may not be asked for if the child has breached its obligations of familial solidarity. This obviously resembles the fault principle that has been abandoned in cases of spousal support already decades ago. Not surprisingly it is relied upon especially in cases of children of divorced parents. Typically, after years of experience of high conflict within the family the child refuses contact to the non-custodial parent, mostly the father, who in turn typically is the one to be able to financially support the child. In numerous decisions it has been held that an adult child stubbornly refusing contact with the parent is in breach of its reciprocal familial duties and thus not entitled to support (13). The facts of some of the cases are quite drastic, such as a child refusing contact with its father addicted to alcohol and accused of sexual abuse (14), or with a mother who had made available personal data of the daughter via the internet and furthermore was a member of a radical sect (15). Even the fact of a daughter living in a non-marital relationship that was not approved by the parents gave rise to a denial of educational support (16).

Finally, a singular feature of German law is often used to reject a young adult's claim for educational support; the parents' right to dictate the child to receive support *in natura* in the household of the parents (17). Again, mostly children of divorced parents are thereby affected. Typically, the father has founded a new family and – to escape his support obligations towards the child from the former family – now – after many years of having lived apart – offers this child to move in with him and his new family.

(10) OLG Naumburg, 26 February 2004, *FamRZ* 2004, 1456, 1456; OLG Sachsen-Anhalt, 12 January 2010, *FamRZ* 2010, 1245 et seq.; OLG Hamm, 13 February 2004, *FamRZ* 2005, 60.

(11) OLG Hamm, 9 August 1989, *FamRZ* 1990, 904, 905.

(12) See § 1611 para 1 BGB: grave misconduct may cause the end of the duty.

(13) OLG Frankfurt, 21 December 1989, *FamRZ* 1990, 789, 790. Similarly, see for Switzerland BGer, 24 September 1987, BGE 113 II 374 et seq.

(14) OLG Hamm, 12 January 1995, *FamRZ* 1995, 958, 959.

(15) OLG Celle, 4 July 2001, *FuR* 2002, 332 ff.

(16) AG Garmisch-Partenkirchen, 29 October 2009, *FamRZ* 2010, 990, 991; AG Garmisch-Partenkirchen, 26 July 2010, 1 F 265/09.

(17) See § 1612 para 2 BGB.

Many German courts have approved of such an offer and denied the claim of the child for monetary support (18).

B. *US American law*

As has been mentioned in US law parents are under an obligation to support their minor children. This former Common law principle has been laid down in statutes in most US states during the last decades (19).

Since the 1970s there has been some discussion whether having regard to the lowering of the age of majority on the one hand and the ever increasing divorce rate on the other there should be a support obligation at least for the education of children of divorced parents.

Indicative for the legal development are Illinois on the one hand and Pennsylvania on the other. In 1978 in Illinois the Supreme Court (20) upheld a statute (21) giving the divorce court the power to make « provision for the education and maintenance of the child whether of minor or majority age » (22). This was regarded as discriminating against divorced parents. Conversely, in Pennsylvania the Supreme Court in 1992 decided that no support obligation exists for the college education of an adult child (23). As a result of that decision the legislator intervened by promulgating the statutory possibility for the court to « order either or both parents who are separated, divorced, unmarried or otherwise subject to an existing support obligation to provide equitably for educational costs of their child » (24). However, the Supreme Court (25) in turn held this statute to be unconstitutional because of violating the equal protection clause of the 14th Amendment by privileging certain classes of children over others.

Today, state statutes typically and indiscriminately provide for support obligations towards minor children. Support obligations typically end upon the child reaching majority or being otherwise emancipated. Some add support obligations until the child has reached the age of nineteen or twenty-one and /or has graduated from high school (26).

(18) OLG Schleswig, 13 January 1998, *FamRZ* 1998, 1195, 1196; *BayObLG*, 19 May 1999, *FamRZ* 2000, 976, 977.

(19) For an overview about existing state law see L.W. MORGAN, *Divorce Litigation.*, October 1997, at 185.

(20) *Kujawinski v. Kujawinski*, 71 Ill. 2d 563, 376 N.E. 2d 1382 (1978).

(21) Illinois Marriage and Dissolution of Marriage Act (Ill. Rev. Stat. 1977, ch. 40, para 101 ff.).

(22) *Kujawinski v. Kujawinski*, 71 Ill. 2d 582.

(23) *Blue v. Blue*, 532 Pa. 521, 616 A. 2d 628, 523 ff. (1992).

(24) 23 Pa.C.S. § 4327(a).

(25) *Curtis v. Kline*, 542 Pa. 249, 666 A. 2d 265 (1995).

(26) Compare for example Hawaii: Haw. Rev. Stat. § 580-47(a): until age of 19; Indiana: Ind. Code § 31-11-5-12(d)(1): until the age of 21 or in case of child's aptitude and ability during the time of an appropriate post-secondary education.

II. – SUPPORT FOR DISABLED ADULT CHILDREN

A. *German and Swiss law*

According to the general principle under German and Swiss law parents have a duty of support if an adult child is not able to support itself due to disability. However, there are strong tendencies to relieve parents of disabled children from their ongoing support obligations. It must be emphasized that in Germany as well as in Switzerland in these cases it is not the disabled child who sues its parents but it is the state providing for the living of the disabled in the first place in form of social security payments and disability benefits, and then seeking reimbursement from the parents by way of subrogation.

In Switzerland, the father of a forty-year-old drug addict with work incapacity was not obliged to pay for the support of his son. The court thereby among others heavily relied on the fact that there had been no contact between father and son for 25 years and the son had changed his name (27).

In Germany, the legislator stepped in. If the state contributes to the living and care of a disabled adult person recourse against its parents is limited to an amount of now maximum EUR 46 (28). In case of hardship recourse may be even totally denied (29). The privilege of the parents of disabled adult children in Germany stands in strong contrast to the situation of children having to support their disabled parents. The only statutory exclusion of the state's recourse in these cases relates to hardship (30). Case law, however, is extremely harsh on children. Thus very recently hardship has been denied by the German Supreme Court (31) in the case of a 49-year old son who had severely suffered from a schizophrenic mother throughout from the time of being an infant. Out of a net monthly income of about EUR 3,000 he was obliged to pay EUR 700 per month to the support of his mother. The court held that because of family solidarity the fate of disability in these cases must be borne by the nuclear family (32), the privilege of parents of disabled children not being extended to this situation.

(27) BGer, 21 Feb 2002, 5C.298/2001 with note T. KOLLER, *Jusletter*, 8th April 2002; see also BGer, 28 August 2009, BGE 136 III 1.

(28) § 94(2) SGB XII, BGH, 23 June 2010, XII ZR 170/2008.

(29) § 94(3) SGB XII, see also BGH, 15 September 2010, XII ZR 148/09.

(30) § 94(3) no 2 SGB XII.

(31) BGH, 15 September 2010, XII ZR 148/09, *FamRZ* 2010, 1888.

(32) But see BGH, 21 April 2004, *FamRZ* 2004, 1097: when disability is consequence of war hardship can be found.

B. US American law

In the US in recent years support obligations of parents towards disabled adult children have received much attention (33). Although in the US, too, this mechanism is frequently used to reimburse the state for the costs of hospitalization, it is still remarkable that case law suggests that also children themselves are suing their parents (34).

An overview of the solutions found in the 50 states reveals three possible approaches (35):

The first one is the traditional Common Law approach; support obligations are limited to the minority of the child regardless of existing or subsequent disabilities (36).

In the second group – almost half of all states – it is decisive whether the disability arose before or after the child having reached the age of majority. Whereas in the first case the support obligation of the parents subsists, it does not revive in the second scenario (37). From a dogmatic viewpoint it is deemed that the inability to self-support prevents the child's emancipation (38) and thus he or she remains a minor in the eyes of the law.

The third group of states provides for ongoing support obligations of the parents towards their disabled children regardless when the disability occurred and how long it lasts. A prominent example of the latter group is California and the case *Culp v. Culp* (39) that received much attention from the family law community. A 50-year old son – a graduate from Stanford Law School – after having practised family law for 19 years claimed to suffer from depression and bipolar disorder; the Ventura Superior Court held that he was entitled to ongoing support in the amount of 3500 USD per month from his parents.

CONCLUSION

Starting from different poles the results achieved in Germany and Switzerland on the one hand and in the US on the other are quite astonishing.

(33) *McCartney v. McCartney*, 11 So. 3d 213 at 219 (Ala.Civ.App. 2007): “[...] the adult child is so mentally or physically disabled that he cannot support himself or herself.”; *Jaylo v. Jaylo*, 248 P. 3d 1219 (Haw.App. 2011); *Willens v. Garcia*, 2011 WL 222150 (Fla.App.3.Dist. 2011).

(34) See only S. BUHAI, *Parental Support of Adult children with Disabilities*, 91 *Minn.L.Rev.* 710 ff. (2007) with further references.

(35) See for details S. BUHAI, 91 *Minn.L.Rev.* 710 at 721 ff.

(36) See for details S. BUHAI, 91 *Minn.L.Rev.* 710 at 723 ff.

(37) See for details S. BUHAI, 91 *Minn.L.Rev.* 710 at 730 ff.

(38) See *Hanson v. Hanson*, 625 A.2d 1212 at p. 1214 (Pa.Super.Ct. 1993).

(39) *Culp v. Culp*, Ventura Super. Ct., dec 29, 2000; discussed by S. BUHAI, 91 *Minn.L.Rev.* 710 at 711.

Whereas the starting point of unrestricted support obligations between parents and children and *vice versa* in German and Swiss law might suggest that adult children can count on support by their parents, reality looks different. The unrestricted support obligations themselves induce courts to use any legal device to possibly restrict these. This works especially to the detriment of children of divorced parents who are thus often re-traumatized. In contrast, US law that in general does not know ongoing support obligations seems to be more cognizant of the special situation of children of divorced parents. The case of disabled children is especially revealing. Whereas in the US more and more states provide for support obligations towards disabled adult children, German law seems to go the opposite way. One might just speculate why recourse of the state against parents of disabled children is limited to a derisory amount; maybe the aim is to encourage parents of disabled children not to abort them.

In the end the question must be answered why we need legal support obligations and how far they should be extended (40). Certainly, moral duties to support members of the same family who are in need do exist in most societies. And these moral duties are in fact fulfilled in most cases. The majority of students are supported by their parents enabling them to cover the costs of living and studying. And the majority of disabled children and old aged persons are living within the family being cared for and supported by family members notwithstanding whether legal support obligations exist or not (41). These families have to be further encouraged and supported for example via tax reductions or the like. Legal support obligations, however, rather deter than promote voluntary support within the family especially if the members of the family have been estranged for years following a breakdown of the family. And where legal support obligations aim at securing recourse by the state against family members they enhance the risk that people in need forgo social security payments and disability benefits just to avoid the close family members to be subject to such state recourse (42).

All in all limiting support obligations in principle to minor children seems to be the solution to be preferred. However, having in mind that almost half of the children nowadays come from divorced parents (43) provision should be made that these children have equal opportunities as their fellow stu-

(40) I. SCHWENZER, *Reform des Verwandtenunterhalts – Eine rechtspolitische Notwendigkeit oder übereilte Aufgabe der Familiensolidarität?*, in *Brühler Schriften zum Familienrecht*, Vol. 8, Zehnter Deutscher Familiengerichtstag, Bielefeld 1994, pp. 59 ff. See also C. KRAUS, *Grundlagen des Unterhaltsrechts*, Schriften zum Familien – und Erbrecht, Vol. 3, Baden-Baden 2011, 100 ff.

(41) See S. BUHAL, 91 *Minn.L.Rev.* 710 at 751.

(42) See C. KRAUS, (fn. 40), 99.

(43) C. KRAUS, (fn. 40), 31.

dents from so-called intact families where parents usually pay educational support voluntarily. Thus the support obligation should be extended to cover the costs for an education beyond majority. For reasons of clarity and predictability there should be a precise age limit beyond which support can no longer be asked for. Which age this should be will probably depend on the respective educational system that varies from country to country. It seems conceivable that an age of 24 or 25 appears reasonable for most legal systems. Such a system will not only protect young adults but also serve legitimate interests of parents as regards planning reliability.