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Enforcement of Alimony Decrees in Kentucky

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ENFORCEMENT OF ALIMONY DECREES IN KENTUCKY —

Alimony has been defined as that allowance which is made to a woman on a decree of divorce for her support out of the estate of her husband, after their separation, in lieu of husband's common law obligation to support her.[1] During Blackstone's day when ecclesiastical courts granted only divorces *a mensa et thoro* the wife was usually awarded alimony, since the decree of the court could not affect the property rights of the parties and it therefore remained absolutely necessary that the husband provide for her maintenance.[2] In the American states absolute judicial divorces were authorized by statute long before they were permitted in England, but courts nevertheless continued to follow the practice of the ecclesiastical courts and awarded alimony to the wife even though the statutes did not expressly permit it.[3]

Proper procedural devices obviously must be provided for the enforcement of any judgment. Normally the inability to enforce a judgment works hardships only on the individual obtaining the judgment. However, when an alimony decree cannot be enforced, hardships may fall upon a whole community which faces the burden of supporting an indigent wife and perhaps children. The number of persons placed on the court's register for failure to pay alimony is appalling.[4] In view of the ever increasing number of divorce actions,[5] it would seem timely to examine the remedies available in Kentucky for the enforcement of alimony decrees.

A court of equity historically had two means of enforcing decrees of alimony. The method resorted to more frequently was the writ of attachment of the defaulting husband under which he was cited for contempt of court and imprisoned until he purged himself by paying

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[1] Ballentine's Law Dictionary 66 (1930); Gibson v. Stiles, 240 S.W. 2d 609 (Ky. 1951); Collins v. Collins, 279 Ky. 139, 130 S.W. 2d 37 (1939); Metcalf v. Metcalf, 244 Ky. 536, 51 S.W. 2d 675 (1932).

[2] MADDEN, PERSONS AND DOMESTIC RELATIONS, sec. 97 (1931); Vernier and Hurlbut, *The Historical Background of Alimony Law and Its Present Statutory Structure*, 6 LAW AND CONTEMP. PROB. 197 (1939); Note, 60 Am. Dec. 667 (1854).

[3] See note 2 *supra*. Maguire v. Maguire, 37 Ky. 181 (1838).

[4] The state of Michigan reports 63,500 contempt proceedings during an eighteen year period out of approximately 76,500 defaults. Taken on a percentage basis, this shows that 83% of the defaulting husbands were cited for contempt. KEEZER, LAW OF MARRIAGE AND DIVORCE, 1243, 1244 (3rd ed. 1946).

[5] The divorce rate was approximately 22.8% in 1948 and 24% in 1949. (The World Almanac 444, 1950-51). It has been estimated that by 1962, one in every two marriages will end in divorce. (N. Y. Herald Tribune, Oct. 24, 1950, p. 4, col. 3). Whether or not this forecast is accurate, the number will undoubtedly be high. See also 10 KY. S. B. J. 140 (1945).

the amount ordered by the court under the decree.[6] The writ of sequestration, whereby the court took charge of the property of the defaulting husband and used it for the benefit of the wife, was frequently utilized by the ancient chancellor.[7] These two remedies were available in Kentucky prior to 1893.[8]

In 1893, the Kentucky Legislature provided additional methods for enforcing the decrees of courts of equity by means of the process of execution, by the following statute:

> "A final order or judgment in equity for money, land, or other specific thing may be enforced by any appropriate writ of execution, allowable on a judgment at law, or by the ancient practice of courts of chancery. The writ shall issue and be returnable as other writs of execution."[9]

One obvious design of this statute was to provide new remedies for the enforcement of alimony and other equity decrees. Similar statutes in other jurisdictions have consistently been so construed.[10] In only two alimony cases, however, has the Kentucky Court expressly referred to the statute as such.[11] Although the Kentucky Court admits that the use of contempt is discretionary,[12] the customary practice is to use the process of contempt automatically as the easiest and quickest method of compelling the husband to obey the decree of the court.[13] There appears to be a contemporaneous unanimity among other writers concerning this problem.[14]

That the court is not dependent upon the process of contempt alone to secure the payment of alimony is evinced by the many and varied methods by which enforcement has been secured since the

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[6] See Notes 137 Am. St. Rep. 876-878 (1911); 35 KY. L. J. 74 (1946).

[7] *Supra* footnote 6.

[8] Speers v. Reed, 12 Ky. Op. 73 (1883); Ballard v. Caperton, 59 Ky. 412 (1859); Lockridge v. Lockridge, 33 Ky. (3 Dana) 28 (1835).

[9] This statute is today KY. REV. STAT. 426.430 (1948).

[10] People v. District Court, 21 Colo. 251, 40 P. 460 (1895); Staples v. Staples, 87Wis. 592, 58 N.W. 1036 (1894). The Louisiana court when faced with such a question said, "It is by no means unusual for the same right to be enforceable by concurrent or cumulative or consecutive remedies." Huber v. King, 49 La. A. 1503, 22 So. 887, 889 (1897).

[11] Stinson v. Stinson, 311 Ky. 139, 223 S.W. 2d 727 (1949); Rudd v. Rudd, 184 Ky. 400, 214 S.W. 791 (1919).

[12] Barrett v. Barrett, 287 Ky. 216, 152 S.W. 2d 610 (1941).

[13] Gibson v. Bax, 241 S.W. 988 (Ky. 1951); Gibson v. Stiles, 240 S.W. 2d 609 (Ky. 1951); Terrell v. Terrell, 239 S.W. 2d 975 (Ky. 1951); Smith v. Smith, 287 Ky. 287, 152 S.W. 2d 944 (1941); Honaker v. Honaker, 267 Ky. 129, 101 S.W. 2d 679 (1937); Hall v. Hall, 246 Ky. 12, 54 S.W. 2d 391 (1932); Roper v. Roper, 242 Ky. 658, 47 S.W. 2d 517 (1932); Hembree v. Hembree, 208 Ky. 658, 271 S.W. 1100 (1925); Sebastian v. Rose, 135 Ky. 197, 122 S.W. 120 (1909).

[14] See Notes 35 KY. L. J. 74, 77 (1946); 1 ILL. L. FORUM 654, 666 (1949); 32 ILL. L. REV. 295, 299 (1936); 18 IOWA L. REV. 493, 505 (1933); 21 ROCKY MT. L. REV. 364, 365 (1949); 4 S. C. L. Q. 341, 342 (1951-52).

statute of 1893. The Kentucky Court of Appeals using the methods granted under the above statute has upheld enforcement of payment of alimony by execution upon the personal property of the defaulting husband,[15] by execution upon the real property of the husband,[16] by garnishment of the income of the husband,[17] by adjudging a lien upon the property of the husband,[18] and by ordering notes owned by the husband collected and paid to the court to be held for the benefit of the wife.[19] The Court has also allowed the wife to attach her husband's property upon the filing of her petition for divorce;[20] it has taken charge of a trust fund set up for the benefit of the husband and applied the proceeds to the satisfaction of the divorce decree;[21] it has levied upon insurance policies left the husband by a deceased relative.[22] In addition, the Court has allowed the wife to have a bond, securing the amount payable but reserving the right to compel payment by attachment or otherwise.[23] She may also have a fraudulent sale of the realty set aside;[24] she may obtain an injunction restraining the husband from conveying more than two-thirds of his property pending suit;[25] have a mortgage set aside as void against her claim of alimony;[26] or where grounds for attachment appear she may attach her husband's property before the award of alimony is obtained.[27] Apparently the only restriction upon the power of the courts to enforce the decree of alimony out of property of the husband stated in Ky. Rev. Stat. sec. 403.060 that the "decree" shall not divest either party of the fee-simple title to real estate.[28] Furthermore, the wife's claim to alimony is su-

[15] Ferree v. Ferree, 285 Ky. 825, 149 S.W. 2d 719 (1941); Ford v. Ford, 230 Ky. 56, 18 S.W. 2d 859 (1929); Campbell v. Trosper, 108 Ky. 602, 57 S.W. 245 (1900); Tyler v. Tyler, 99 Ky. 31, 34 S.W. 898 (1896).

[16] Davenport v. Davenport, 313 Ky. 412, 231 S.W. 2d 26 (1950); Moss v. Moss, 311 Ky. 364, 224 S.W. 2d 175 (1949); Ferree v. Ferree, 285 Ky. 825, 149 S.W. 2d 719 (1941); Security Trust Co. v. Moberly, 199 Ky. 703, 251 S.W. 964; Tyler v. Tyler, 99 Ky. 31, 34 S.W. 898 (1896).

[17] *See* Coggins v. Coggins, 289 Ky. 570, 159 S.W. 2d 4 (1942).

[18] Davenport v. Davenport, 313 Ky. 412, 231 S.W. 2d 26 (1950); Moss v. Moss, 311 Ky. 364, 224 S.W. 2d 175 (1949).

[19] Adkins v. Adkins, 213 Ky. 100, 280 S.W. 477 (1926).

[20] Ferree v. Ferree, 285 Ky. 825, 149 S.W. 2d 719 (1941).

[21] Montgomery v. Offutt, 136 Ky. 157, 123 S.W. 676 (1909). *Cf.* McFerran v. Fidelity Trust Co., 140 Ky. 536, 131 S.W. 393 (1910). As to a spendthrift trust see Ford v. Ford, 230 Ky. 56, 18 S.W. 2d 859 (1929).

[22] Hooge v. Hooge, 142 Ky. 439, 134 S.W. 476 (1911).

[23] Caskey v. Caskey, 4 Ky. L. Rep. 811 (1883).

[24] Wooldridge v. Wooldridge, 229 Ky. 406, 17 S.W. 2d 220 (1929); May v. May, 33 Ky. L. Rep. 193, 109 S.W. 352 (1908). See also Shelton v. Shelton, 167 Ky. 167, 180 S.W. 83 (1915).

[25] Droste v. Droste, 138 Ky. 53, 127 S.W. 506 (1910).

[26] Ellison v. Davis, 159 Ky. 818, 169 S.W. 552 (1914).

[27] Stewart v. Stewart, 299 Ky. 363, 185 S.W. 2d 542 (1945).

[28] Jackson v. Jackson, 248 S.W. 2d 411 (Ky. 1952); Faulconer v. Faulconer, 307 Ky. 850, 212 S.W. 2d 322 (1948); Harley v. Harley, 283 Ky. 725, 142 S.W. 2d 992 (1940); Tyler v. Tyler, 99 Ky. 31, 34 S.W. 898 (1896).

perior even to the husband's statutory exemptions,[29] and discharge in bankruptcy does not release him from such claim.[30] Thus, the Kentucky courts have available numerous methods for the enforcement of their decrees to pay alimony without resorting to the ancient ecclestiastical process of contempt.[31]

It is not denied that the court has jurisdiction to imprison the defaulting husband. Indeed, this power has prevailed over the objection that imprisonment of the husband for failure to pay alimony is imprisonment for debt and thus prohibited by the state constitution as well as certain provisions of the United States Constitution. In so holding, the Kentucky Court of Appeals said:

> "Considering the nature of alimony, it appears reasonably clear that a decree for the payment of continuing alimony is not merely a judgment for the payment of money, in the ordinary sense, but is in the nature of an order making specific a duty imposed upon the husband by law in the enforcement of which the public has an interest. Therefore, when the defaulting husband, though able to comply, has disobeyed the decree, and is found guilty of contempt by reason thereof, and is committed to jail to enforce obedience to the decree, his imprisonment is not 'to compel the payment of money under judgement of the court', within the meaning of KRS 426.400, but is rather to coerce the performance of the duty to support his wife that the laws of our society have imposed upon the husband."[32]

Even so, why will a court with such a profusion of remedies so repetitiously resort to imprisonment for contempt upon default of the husband? This is a question of great concern to society in virtually every jurisdiction, and one of greater concern to the defaulting husband. The most frequent argument for justification of imprisonment of the husband is that it is often the only effective means of enforcement.[33] It is doubted that this is true in practice. In many situations, it would seem that the payment of alimony would be better assured if the husband was not placed in jail, thereby preventing him from

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[29] Pearson v. Pearson, 166 Ky. 91, 178 S.W. 1164 (1915); Nunn v. Page, 134 Ky. 698, 121 S.W. 442 (1909); See note 11 A.L.R. 123 (1921).

[30] 11 U.S.C.A. sec. 35 (a) (2) (1938); 17 AM. JUR. 417 (1938).

[31] See Note DAVIS, *Alimony Decrees Available Means of Enforcement in Kentucky*, 35 KY. L. J. 74 (1946).

[32] Gibson v. Stiles, 240 S.W. 2d 609, 611 (Ky. 1951). See also Stinson v. Stinson, 311 Ky. 139, 223 S.W. 2d 727 (1949); Roper v. Roper, 242 Ky. 658, 47 S.W. 2d 517 (1932); Rudd v. Rudd, 184 Ky. 400, 214 S.W. 791 (1919). Only one state holds that a judgment for alimony is a money judgment, payment of which cannot be enforced by contempt action and imprisonment; 2 MO. REV. STAT. ANN. sec. 476.150 (1949); Harrington v. Harrington, 233 Mo. App. 390, 121 S.W. 2d 291 (1938). For remedies available to the court for the enforcement of their alimony decrees, see 2 MO. REV. STAT. ANN. secs. 452.070, 452.080, 452.150, 452.190 and 452.210.

[33] Gibson v. Stiles, 240 S.W. 2d 609 (Ky. 1951); Roper v. Roper, 242 Ky. 658, 47 S.W. 2d 517 (1932).

pursuing his vocation and adding to his property which may be reached by his wife. Apparently, in the long list of remedies illustrated by the above cases, the desired result was accomplished without resorting to imprisonment of the husband. An impetuous court, employing the process of contempt when other means are available undoubtedly burdens the taxpayers by accelerating the maintenance and expense costs of necessary jail and prison facilities. Any method which will accomplish the payment of alimony is to be preferred to imprisonment.[34]

One possible solution would be to limit the employment of contempt proceedings as a means of enforcing alimony to cases in which it cannot be enforced by some other method. Only New York has adopted such limitation on the use of imprisonment and she has done this by statute.[35] It is submitted that the New York solution is the proper procedure to be followed by a court in enforcing alimony decrees, because if the husband owns real property he will cheerfully pay the amount decreed by the court rather than allow the court to take over its management. Even if he owns no realty, numerous other methods are available without first resorting to the process of contempt. In those few cases where the methods of execution do not succeed, recourse to the process of contempt can be had. However, citation for contempt would be used infrequently because it is a general rule that where a husband has defaulted in the payment of alimony, he will not be adjudged in contempt for disobedience unless he is at fault or has voluntarily created his disability.[36] Where he makes a good faith effort to comply with the judgment, no court will use the process of contempt to commit him to jail for his non-compliance.[37] A few jurisdictions have held that a husband who has no money or tangible property may be punished for contempt if he makes

[34] The state of Michigan reports that of 63,500 contempt proceedings, only 80% yielded results in the form of payment of the decree, the punishment for non-payment being imprisonment in the House of Correction for not more than one year. See note 4 *supra.*

[35] N. Y. CIV. PRAC. ACT sec. 1172 (Thompson 1946); Andrews v. Andrews, 98 N.Y.S. 2d 254, 198 Misc. 223 (1950) where the court held that where it is found that the husband owns various properties and it does not appear presumptively that payment of alimony cannot be enforced by means of sequestration of the husband's property, the husband cannot be punished for contempt for default in payment of alimony under this statute. See also Allen v. Wagner, 191 N.Y.S. 697, 117 Misc. 526 (1921). For a very thorough discussion of the methods of enforcement of alimony decrees in New York, see 3 SYRACUSE L. REV. 136 (1951).

[36] Honaker v. Honaker, 267 Ky. 129, 101 S.W. 2d 697 (1937); Roper v. Roper, 242 Ky. 658, 47 S.W. 2d 517 (1932).

[37] Barrett v. Barrett, 287 Ky. 216, 152 S.W. 2d 610 (1941); Roper v. Roper, 242 Ky. 658, 47 S.W. 2d 517 (1932); Hembree v. Hembree, 208 Ky. 658, 271 S.W. 1100 (1925).

no honest effort, considering his physical and mental capabilities, to earn money to pay the alimony,[38] and regard his refusing or willfully neglecting as "contumaciously disabling" himself, just as much as a fraudulent transfer of property would be. This result seems reasonable in that otherwise the order would be useless against a lazy and worthless husband though sometimes enforceable against a working one.[39] The process of contempt should be used only (1) where the failure to pay is willful and contumacious and (2) where the alleged contemnor has purposely brought about an inability to pay.

The law is not static. It is both a progressive and resourceful science, ever alert to accommodate itself to constant changing circumstances and conditions of society. A knowledge of the early law is helpful in both properly evaluating precedents and in observing trends. But, as Mr. Justice Cardozo once observed:

> "We take a false and one-sided view of history when we ignore its dynamic aspects. The year books can teach us how a principle or a rule had its beginnings. They cannot teach us that what was the beginning shall also be the end. . . ."[40]

The character of the law is to be tested by what can be accomplished under it. If alimony laws work a hardship in certain cases, it would seem that it should be possible to amend them so that the abuses could be done away with, rather than let the defects blind us to the essential justice of the principle involved. It is for these reasons that the laws governing the enforcement of alimony decrees need to be carefully drafted so that the rights of neither party are circumvented. Such an enterprise is one to be accomplished by the State Legislature. In anticipation that the contemporary predilection of the Kentucky Court to imprison the defaulting husband be limited, the following suggestions are submitted as an aid for such a limitation:

(1) When the husband defaults in paying the alimony ordered and the court is satisfied that payment cannot be enforced by any method other than contempt, then the court may institute contempt

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[38] Woodward v. Woodward, 172 Ga. 713, 158 S.E. 569 (1931); State v. District Court et al., 37 Mont. 485, 97 P. 841 (1908); Fowler v. Fowler, 61 Okla. 280, 161 P. 227 (1916); Branch v. Branch, 144 Va. 244, 132 S.E. 303 (1926). *Contra:* Webb v. Webb, 140 Ala. 262, 37 So. 96 (1904); Ex parte Todd, 119 Calif. 57, 50 P. 1071 (1897); Messervy v. Messervy, 85 S. C. 189, 67 S.E. 130 (1910).

[39] Wells v. Wells, 46 Okla. 88, 148 P. 723 (1915): Where the court reasoned that one adjudged guilty of contempt for failure to pay alimony and ordered to jail until the same is paid carries the keys of his prison in his own pocket and can end the sentence and discharge himself at any moment by doing the thing commanded and which he has previously refused to do.

[40] Quoted in Newson v. Fleming, 165 Va. 89, —, 181 S.E. 393, 396 (1935).

proceedings. However, the process of contempt should never be resorted to as a first means but only when no other remedy would be effective.

(2) When the defaulting husband proves to the court that he is financially unable to comply with the decree directing the payment of alimony, the court may relieve him temporarily or reduce the amount ordered to be paid with the reserved power to review the revocation or modification order, and

(3) When any husband against whom a decree to pay alimony has been rendered, refuses to work if able, or refuses work when found or offered or who willfully conducts himself so as to be discharged from work for the purposes of avoiding the provisions of the decree, he shall upon conviction be guilty of a misdemeanor and punished by imprisonment for not more than six (6) months.

It will be noted that number (1) takes away from the court the power to imprison a defaulting husband for failure to pay alimony unless satisfied that the decree can be enforced by no other means or where the husband refuses to place himself in a position to be able to comply with the order. Number (2) makes it possible for an insolvent husband in good faith to temporarily escape the decree of alimony, subject, however, to liability upon becoming solvent. But, number (3) grants the court an additional power to prevent the husband from willfully remaining insolvent, thus assuring the wife of future alimony payments. It is believed that these limitations grant the court substantial remedies for enforcing their decrees and at the same time assure the wife of her alimony payments, saving the cooperative husband from a jail sentence and reducing the tax money spent for the operation of county jails.

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THE DEGREE OF INTEREST NECESSARY TO DISQUALIFY A WITNESS UNDER THE DEAD MAN'S ACT

Soon after the enactment of the statute removing the general disqualification of witnesses by interest, almost every jurisdiction in the United States enacted a statute excluding testimony of a survivor of a transaction with a decedent when such testimony was offered against the latter's estate.[1] These statutes are commonly called "Dead Man's Acts." Kentucky is among that majority of jurisdictions which have such statutes in force today. Kentucky's "Dead Man's Act" is incorporated in section 606(2) of the Civil Code of Practice which also

[1] II WIGMORE, EVIDENCE, sec. 578 (1940).