

PARENT AND CHILD: Parent failing to pay maintenance money for a minor child in accord
DIVORCE: with divorce decree is liable to prosecution under nonsupport statute.

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Hon. Robert P. C. Wilson, III
Prosecuting Attorney
Platte County
Platte City, Missouri

Dear Sir:

This is in reply to your request for an opinion, which reads as follows:

"In a divorce suit here the decree rendered awarded the sole care and custody of a child under the age of 16 years to the mother, and allowed the father only visitation rights. Is the father now liable to prosecution under the provisions of Section 4420, Laws Missouri 1947, if he, without good cause, fails, neglects or refuses to provide adequate food, clothing, lodging and medical and surgical attention for the child?"

Section 4420, Mo. R. S. A., also Laws of 1947, Volume I, page 374, reads as follows:

"If any man shall, without good cause, fail, neglect or refuse to provide adequate food, clothing, lodging, medical or surgical attention for such wife; or if any man or woman shall, without good cause, abandon or desert or shall without good cause fail, neglect or refuse to provide adequate food, clothing, lodging, medical or surgical attention for his or her child or children born in or out of wedlock, under the age of sixteen years, or if any other person having the legal care or custody of such minor child, shall

without good cause, fail, refuse or neglect to provide adequate food, clothing, lodging, medical or surgical attention for such child, whether or not, in either such case such child or children, by reason of such failure, neglect or refusal, shall actually suffer physical or material want or destitution; or if any man shall leave the State of Missouri, and shall take up his abode in some other state, and shall leave his wife, child or children, in the State of Missouri, and shall, without just cause or excuse, fail, neglect or refuse to provide said wife, child or children, with adequate food, clothing, lodging, medical or surgical attention, then such person shall be deemed guilty of a misdemeanor; and it shall be no defense to such charge that some person or organization other than the defendant has furnished food, clothing, lodging, medical or surgical attention for said wife, child or children and he or she shall, upon conviction, be punished by imprisonment in the county jail not more than one year, or by fine not exceeding one thousand dollars (\$1,000) or by both such fine and imprisonment. No other evidence shall be required to prove that such man was married to such wife than would be necessary to prove such fact in a civil action."

A certified copy of the decree rendered in the case shows that the mother was granted sole custody and care of the minor child and the father was ordered to pay the sum of \$25 per month for the care and support of the said minor child.

Section 4420, 'supra, makes provision for a conviction in violation thereof for either of two offenses, abandonment or failure to provide adequate food, clothing, lodging, medical or surgical attention for a minor child, under the age of sixteen years.

In the case of State v. Hartman, 259 S. W. 513, the court held that there was not an abandonment of the children since the legal custody of the children had been granted to the mother. However, the court held that, under the statute as it read as

amended by an act in 1921, there could be a separate offense because a parent fails to furnish food, clothing or lodging to his child even though he has not abandoned it.

The rule in Missouri is that when parents are divorced, and the divorce decree is silent as to the custody and maintenance of the child, the father's obligation is unchanged as to his minor child. *Ash v. Modern Sand & Gravel Co.*, 122 S.W. (2d) 45, 48.

The general rule appears to be that which is discussed in 39 Am. Jur., under the heading of Parent and Child, Section 108, page 765, ff., to the effect that a father cannot ordinarily escape criminal liability for failing to support his child, on the ground that a decree of absolute divorce has severed his marital relations with his wife, since his obligation to his child is not altered by such a decree. Even where the decree of divorce requires the father to make payments for the support of his child in the custody of its mother, the weight of authority is to the effect that a father who fails to make such payments is not relieved by the decree from criminal or quasi-criminal responsibility for failure to support the child. Under the nonsupport statutes of some jurisdictions, a decree requiring the parent to make payments is not only no defense, but is regarded as establishing a legal duty of support for the entire or partial nonperformance of which he may incur criminal liability irrespective of whether he may be held criminally responsible on the theory that his pre-existing legal duty to support his child survives the decree. However, there is some authority to the effect that a divorced parent whose child has been taken from his custody should be relieved of responsibility where the decree requires him to pay certain sums for its maintenance. The reason advanced for such a rule is that the remedy for nonsupport lies in the divorce court which has, by the decree, assumed jurisdiction of the maintenance of the child. This theory apparently rests on the assumption that the sole purpose of a criminal proceeding against such a person is to coerce him to comply with an order which the divorce court has power to enforce.

In the case before us we have an instance where the parents have been divorced and the decree entered in the case has fixed the amount that the father should pay for the care and support of the minor child. In an annotation in 22 A. L. R., page 795, the rule is stated, followed by authorities, as follows:

"By the weight of authority, a father who is required by a decree of divorce to make periodical payments for the support of a child in the custody of its mother, and who fails to make such payments, is not relieved, by the decree of divorce, from criminal or quasi criminal responsibility for a failure to support the child. * * *"

Thus, it appears that the weight of authority holds that a father may be criminally responsible for a failure to make payments provided for in the decree of divorce. We think this should be the rule in Missouri, inasmuch as our divorce courts do not have the power to punish by contempt for the nonpayment of alimony and maintenance money by virtue of the divorce decree alone. The Missouri view is that a judgment for such is a judgment for the payment of money and the failure to pay is no ground for imprisonment. In re Kinsolving, 116 S. W. 1068, 135 Mo. App. 631; McMakin v. McMakin, 68 Mo. App. 57; Francis v. Francis, 179 S. W. 975, 192 Mo. App. 710.

When the decree of divorce was entered, the court measured in money the ability of the father to contribute to the support of his minor child. We believe that a failure of the father to make these payments makes him liable for criminal prosecution under Section 4420, Mo. R. S. A. However, we believe that the payment of the amounts ordered in the divorce decree removes from further consideration the question of whether or not a father has neglected to provide adequate food, clothing, lodging and medical or surgical attention for a minor child. Said Section 4420 provides that the father must fail "without good cause" to provide adequate food, clothing, lodging, medical or surgical attention for the child. In State of Kansas v. Miller, 206 P. 744, 22 A. L. R. 788, the court indicated that the use of this same phraseology should have great bearing in the determination of criminal liability for violation of a nonsupport statute. The court reversed a criminal conviction because of the very persuasive significance that it attached to the defendant's prima facie lawful excuse, and stated that the ends of justice would be better served if the machinery of the criminal law had not been set in motion against the defendant until the civil aid of the court which originally granted the divorce had been invoked.

In order to convict a father for failure to support a minor child there must be evidence that the father possessed

the means for supporting the child. State v. Miller, 33 S.W. (2d) 1063; State v. Young, 273 S. W. 1106. Section 1519, R. S. Mo. 1939, reads as follows:

"When a divorce shall be adjudged, the court shall make such order touching the alimony and maintenance of the wife, and the care, custody and maintenance of the children, or any of them, as, from the circumstances of the parties and the nature of the case, shall be reasonable, and when the wife is plaintiff, may order the defendant to give security for such alimony and maintenance; and upon his neglect to give the security required of him, or upon default of himself and his sureties, if any there be, to pay or provide such alimony and maintenance, may award an execution for the collection thereof, or enforce the performance of the judgment or order by sequestration of property, or by such other lawful ways and means as is according to the practice of the court. The court, on the application of either party, may make such alteration, from time to time, as to the allowance of alimony and maintenance, as may be proper, and the court may decree alimony pending the suit for divorce in all cases where the same would be just, whether the wife be plaintiff or defendant, and enforce such order in the manner provided by law in other cases."

Under the provisions of Section 1519, supra, it must be assumed that the court took into consideration the father's ability to support and determined that the amount provided for in the divorce decree was proper, in view of the circumstances of the parties and the nature of the case. In the event of changed circumstances, the court may make such alteration as to the allowance as may be proper. Thus, we see that the court may order adequate support for children of divorced parents in the divorce decree itself. A father complying with such orders should not remain subject to the criminal proceedings outlined in Section 4420, supra.

Conclusion.

Therefore, it is the opinion of this department that a father who neglects to pay maintenance money for the care and support of a minor child, when a decree of divorce provides for such payment, is liable to prosecution under the nonsupport statute of the laws of Missouri. However, we believe that such payment satisfies the requirements of the nonsupport statute.

Respectfully submitted,

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APPROVED:

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