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**CAPACITY OF CHILD TO SECURE COURT ORDER
AGAINST FATHER FOR FUTURE SUPPORT IN
EXCESS OF AMOUNT STIPULATED IN
SEPARATION AGREEMENT
BETWEEN PARENTS**

*Yost v. Yost*¹

Plaintiff-appellant-child, an infant of six years, by his mother and next friend sued defendant-appellee-father in Circuit Court No. 2 of Baltimore City praying the court to pass a decree directing the father to pay the mother such sum per month as the court might deem proper for the necessary expenses to be incurred by the infant.

The mother had obtained a divorce *a vinculo matrimonii* from the father in Pennsylvania. Prior to the date of that divorce decree, in the municipal court of Philadelphia, at the suit of the commonwealth of Pennsylvania against the father, an order had been passed directing the latter to pay the mother the sum of \$50 per month for the child's support. This order incorporated a prior agreement between the parties to that effect. Since that time the annual income of the father had increased as also had the maintenance expenses of the infant.

The chancellor heard the case on demurrer and from an order sustaining the same and dismissing the bill of complaint, an appeal was taken. *Held*: Affirmed.

The trial court had said that this proceeding was to force the father to provide for the son on a scale, and in a manner, more expensive than the father, in his judgment, felt called upon to provide. It was there held that to entertain such a proceeding would tend to foster discord and antagonism in the family circle about a matter which, it would seem is peculiarly and exclusively committed to the father as the natural guardian. To allow a child to bring a parent into court whenever the child's idea of standard of support is not met or complied with, would leave the family relation in a state of chaos. The trial court opinion also stated that the amount stipulated in the separation agreement was completely adequate for a six year old infant.

On appeal, appellee argued that the lower court was without jurisdiction because the matter of the amount of maintenance to which the infant was entitled had been adjudicated by the Pennsylvania court, and hence, under the full faith and credit clause of the Constitution of the

¹ 190 Atl. 753 (Md. 1937).

United States² it was *res adjudicata*. The court disposed of that contention by saying that the agreement between the parties was embodied in the court order. As the agreement, by its express terms, expired when the child reached the age of three, neither the decree nor the agreement could apply beyond the scope of their intent and purport and were not necessarily conclusive as to a subsequent time on a different state of facts. The Court said that, because the father had not repudiated his duty of support, there was no jurisdiction in a court of Equity, under Article 16, Section 80, to adjudicate the case.

The points of immediate interest are the capacity of a child to secure a court order against the father for future support; and the effect of a previous separation agreement fixing the amount the child is to receive. In this case the Court of Appeals said that although the parties had been living apart, the custody of the infant had meanwhile evidently been adjusted through the mutual agreement of its parents, and during the period of the existing custody the father had contributed the sum of \$50 per month for the support of the child. At common law the moral obligation to support the child during its minority rests upon the father; and this obligation continues, without regard to a divorce decree, unless by virtue of that decree the court having jurisdiction over the subject matter orders otherwise.

The earliest reported Maryland cases all clearly hold that a father is under a moral and legal obligation to maintain his infant children and if someone performs this natural duty for him the father is liable to pay a reasonable sum to the person performing.³

The liability of the father for support of the infant children continues until they reach majority or are self supporting. In *Blades v. Szatai*⁴ the plaintiff wife got a divorce from her husband. The court granted the wife the custody of the child and ordered the husband to pay a weekly sum for the child. After the husband's death the wife sued his estate both for the balance then due and for future payments until the son reached his majority. The court said the father was under a common law obligation to support his child during its minority and this obligation continued without regard to a divorce decree, unless in that decree

² U. S. Const., Art. IV, Sec. 1.

³ *Addison v. Bowie*, 2 Bl. 606 (1830); *Thompson, et al., v. Dorsey, et al.*, 4 Md. Ch. 149 (1853). The liability is not extended farther back than the parent, *Ellicott v. Peterson's Executors*, 4 Md. 476 (1853), 9 Md. 52 (1856).

⁴ 151 Md. 644, 135 Atl. 841, 50 A. L. R. 232 (1926).

the court should order that it be supported by someone other than the father. The fact that he had to pay a stated sum for support in no way affected his common law obligation to support the child, but only prescribed the amount to be paid for its support and through whom the child was entitled to receive it. But at the death of the father his obligation to support the child ceased. This case also pointed out that a divorce decree does not impair the common law obligation of the father to support the child unless the decree states otherwise. Even if the custody of the children is taken away from the father by a court of competent jurisdiction, his duty to provide for their maintenance continues. In *Alvey v. Hartwig*,⁵ where the plaintiff was granted a divorce *a vinculo* and was awarded the care and custody of the two minor children, she was allowed to recover sums expended for necessities for them. So, as to third persons and as between husband and wife, the father's responsibility is primary and the mother's has been considered secondary; and, no other facts or circumstances intervening, under the common law the mother can compel the father to provide for his children to the relief of herself. It is arguable, however, that a recently enacted statute⁶ declaring both parents equally to be the natural guardians of their children and charging them equally with their "care, nurture, welfare and education" has the effect of making the mother as much responsible for the child's expenses, if she have funds, as the father.

One of the ways for this liability of the father to be enforced is for a third person, who may even be the wife, to furnish necessities to the infant and then to sue to be reimbursed by the father. In the case⁷ previously cited the wife was allowed to recover money she had expended for necessities for the children. In *Boggs v. Boggs*⁸ the wife was granted a divorce and also the custody of the infant child. She sued the father, at law, for moneys expended by herself for support and education of their infant son. The court, citing *Alvey v. Hartwig* again, said that even after a divorce where custody is taken away from the father his obligation to provide for their reasonable support continues. In suing the father for the recovery of debts previously incurred for the benefit of the child it is necessary that the suit be brought in a court of law, rather than in a court of Equity as was unsuccessfully attempted in *Kriedo v. Kriedo*.⁹ If,

⁵ 106 Md. 254, 67 Atl. 132, 11 L. R. A. (N. S.) 678 (1907).

⁶ Md. Code Supp., Art. 72A, Sec. 1.

⁷ *Alvey v. Hartwig*, supra, note 5.

⁸ 138 Md. 422, 114 Atl. 474 (1921).

⁹ 159 Md 229, 150 Atl. 720 (1930).

as pointed out above, the recent Maryland statute makes the mother jointly responsible with the father for the child's support then it would seem that she could only recover from the father half the amount she had expended for the child's necessities.

However, this method of obtaining support for the child is in many ways tactically disadvantageous. First, there is always the possibility of not being able to collect from the father once the money has been expended. Perhaps the court will decide that what were considered necessities actually were not. Then again this method is awkward because of the troubles in every law suit, i. e., time and money. Suit must be brought each and every time money has been spent. To the attorney for the plaintiff, the situation is not the most desirable because of the problem of collecting his fee. On the whole, because of the time, expense, amount of litigation involved, and uncertainty surrounding the whole proceeding it is the type of remedy that should be used only when no other remedy is available.

The alternative to suing to recover for past debts is to secure a court order for future payment. This usually disposes of the matter quickly, somewhat less painfully, and with much less uncertainty of litigation. In such a case the wife is sure of the amount of money she will receive every month, and does not have to worry whether she is spending it for what a court may not consider necessities.

One method of obtaining such a court order for future payments is through criminal prosecution. The statute,¹⁰ in brief, provides that when one, without just cause, deserts or wilfully neglects to provide for the support and maintenance of his wife or minor child he is guilty of a misdemeanor. Instead of imposing punishment, the Court, in its discretion, may pass an order directing defendant to pay a certain sum weekly for the space of three years to the wife. The defendant is then released from custody, on probation, for that period.¹¹ By the words used in the statute the remedy is only applicable after desertion or wilful neglect on the part of the husband. Criminal punishment cannot be used to aid a wife in enforcing payment of support for children when that support has been granted by an equity court in connection with a suit for divorce, or otherwise, because

¹⁰ Md. Code and Md. Code Supp., Art. 27, Secs. 87, 88, 89.

¹¹ Under Md. Code Supp., Art. 27, Secs. 87, 87A to 87E, inclusive, a separate procedure is set up for Baltimore City, whereby the bulk of these cases may be handled in the State's Attorney's office without the necessity of a court hearing. This procedure was provided in order to expedite matters and avoid crowded court dockets.

of the constitutional inhibition against imprisonment for debt. In *Bushman v. Bushman*¹² the Court laid down the rule that though provisions for the support of the children and maintenance of the wife are commonly included in the same decree, those for the support of the children are not alimony, and consequently that part of the decree is within the protection of the constitutional inhibition against imprisonment for debt, and obedience thereto cannot be enforced by imprisonment as for contempt of court.

There are two other statutory methods available for securing a court order for future payments. The first is under the divorce statute¹³ which states that where a divorce is sought the court hearing the case shall have full power, in all cases in which the care and custody of the children of parties forms part of the relief prayed, and whether a divorce is decreed or denied,¹⁴ to order and direct who shall have the guardianship and custody of the children, and be charged with their support and maintenance and may at any time thereafter annul, vary, or modify, such order in relation to the children. The case of *Simmont v. Simmont*¹⁵ interprets this statute. There the wife sued for permanent alimony, and the husband filed a cross bill for divorce which was refused. The court had the power to determine the custody of the infant children and who should be charged with their support by force of the statute. So, under this statute there must be a suit for divorce and care and custody of the children must form part of the relief prayed before the court has jurisdiction to render a decree for future payment. It is immaterial whether a divorce is granted. Plaintiff in the *Yost* case was unable to invoke the aid of this statute because she was already divorced by a Pennsylvania court and as she was neither seeking nor had secured a divorce in Maryland this statute gave no jurisdiction to vary or modify the amount of support granted for the children.¹⁶

The other method of obtaining a court order for future payments is through the general custody statute¹⁷ which

¹² 157 Md. 166, 145 Atl. 488 (1929).

¹³ Md. Code, Art. 16, Sec. 39.

¹⁴ Prior to the passage of the statute cited in the preceding footnote, the rule was that the divorce court could only adjudicate the custody and support of the children when a divorce was granted, *Murray v. Murray*, 134 Md. 653, 107 Atl. 550 (1919).

¹⁵ 160 Md. 422, 153 Atl. 665 (1931).

¹⁶ Had the divorce been granted in Maryland, then, of course, the court granting it would have had jurisdiction to hear a petition to re-open the question of the amount of support to be awarded the child. Md. Code, Art. 16, Sec. 39; *Bowers v. Bowers*, 135 Md. 453, 109 Atl. 111 (1919).

¹⁷ Md. Code, Art. 16, Sec. 80.

provides that the Equity courts of this state shall have original jurisdiction in all cases relating to the custody or guardianship of children and may on bill or petition filed by the father or mother or relative or next of kin or next friend of any child or children direct who shall have the custody or guardianship of such child or children and who shall be charged with his, her, or their support and maintenance. In *Barnard v. Godfrey*¹⁸ the father filed a bill for custody under this statute. The parties had been divorced by a Pennsylvania court, but the court made no provision for the guardianship of the children and awarded no alimony. The Maryland Equity court not only awarded the custody of the two minor children to the wife but also decreed that the father should pay \$200 per month for their support until they attained the age of twenty-one. The court said that Equity courts have full power to determine custody and support of minor children whether the parents of the children have been divorced or are living apart. Jurisdiction was given the court under the statute because this was a suit for custody and, therefore, the court had power to grant an order for future payments. But since the statute may only be invoked when there is a suit for custody of the children, and as the nominal plaintiff in the *Yost* case already had custody and was merely asking the Court to raise the amount of the support the Court had no jurisdiction under that statute to grant the relief sought.

Thus it is that a court order for future payments may be secured only in a criminal prosecution, or in a divorce case where care and custody of the children forms part of the relief prayed, or in a proper custody case under the Equity jurisdiction. As the *Yost* case came under none of the above headings, there was no jurisdiction to hear the case.

The other point of interest is: Given appropriate jurisdiction to inquire into the amount the father should contribute for the child, either in a court that can make an order for the future, or in a suit at law for reimbursement, what will be the effect of a separation agreement between the spouses fixing the amount which the father should contribute for the child's support?

In *Kriedo v. Kriedo*¹⁹ the court said that parties to divorce proceedings cannot by agreement between themselves limit the amount necessary for the support and maintenance of their minor children, so as to bind the courts. The court may set the amount agreed upon and incorporate

¹⁸ 157 Md. 264, 145 Atl. 614 (1929).

¹⁹ *Supra*, note 9.

it in the decree, but it has the power to change or modify the decree in this respect when it shall be satisfactorily apparent that new or changed conditions or circumstances make a modification necessary. In the *Boggs* case,²⁰ during the pendency of the divorce proceedings and before final decree the parties entered into an agreement for support and maintenance of wife and child. The court said that in determining the validity and effect of such agreements the court will treat the welfare of the child as the paramount and controlling consideration.²¹ The wife has a right to sign away her rights under a deed of mutual separation which may be executed in lieu of all other claims. So long as the terms of the deed are complied with by the husband, it exonerates him from the obligation to support his wife, and is a protection against any claim which can be made upon him for supplying her even with necessaries.²² However, in *Bowers v. Bowers*,²³ husband and wife entered into a separation agreement whereby the wife discharged the husband from all future claims for support and maintenance of their infant child. Later she sued for divorce which the court granted and the court also ordered the husband to pay a weekly sum for the support of the child. Two years later she asked, in Equity, for more money for support of the child. The court decided that the divorce decree established the obligation of the husband to contribute for the support of the child. Thus it is that a separation agreement limiting the amount of support a wife is to receive will be enforced but one limiting the amount to be received by a child will not be.

The recent Maryland Statute²⁴ governing separation agreements specifically provides that any stipulation regarding support of the children shall be subject to modification by a court having jurisdiction over the question of support.

If the plaintiff in the instant case had been able to go into a court having jurisdiction to make an order for future support, the separation agreement would have presented no obstacle to the court's award of an increased amount, had the facts called for it. Under the principal case, however, a court order for future support can only be secured in a criminal proceeding, as an incident of a Maryland di-

²⁰ *Supra*, note 8.

²¹ See, to the same effect, *Melson v. Melson*, 151 Md. 196, 134 Atl. 136 (1926).

²² *Brown v. Brown*, 5 Gill 249 (1847); *Brown v. Brown*, 2 Md. Ch. 316 (1846); Md. Code Supp., Art. 16, Sec. 30A.

²³ *Supra*, note 16.

²⁴ Md. Code Supp., Art. 16, Sec. 30A.

voiced suit, or where a change of custody is sought by direct proceeding in equity. The situation in the principal case raises the question of the desirability of a legislative change to make it possible to receive a court order for future support—as distinguished from the more awkward reimbursement for necessities advanced—without a criminal prosecution, a divorce suit, or proceeding to change a present custody.

In favor of the change is the argument that if it is desirable to award future orders in those situations, it is equally desirable to award them in any situations where it is necessary to go to court to compel a father to perform his duty to support his child. Against such a change is the point that the future order is a drastic procedure, to be availed of only in the more stringent situations which are apparent when it is necessary to prosecute a father criminally, or where the parents are being divorced, or where a change of custody of the child is imminent. As was pointed out in the trial court opinion in the *Yost* case, to permit the award of future support when there is not happening any such drastic and abrupt event might tend to impair the harmony of happy family life.

But then it might be argued that, as long as we have by statute legalized separation agreements which provide for future support, we should also make provision for handling situations where the spouses cannot agree on the regular amount of support for children.