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## Recent Happenings in the Area of Alimony and Child Support

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amounts for a particular period paid pursuant to either order shall be credited to either amounts accruing or accrued for the same period under both.<sup>143</sup>

There appears to be, however, no such impediment in a proceeding to establish a foreign support decree as a local judgment.

The provisions for registration apparently do not provide a remedy for the awkward position in which the Missouri courts have placed themselves when an obligee who has moved out of the state attempts to enforce a support order through a second court in another part of the rendering state. This assumes, of course, that our courts will feel bound to follow the unfortunate decision in the *Welch* case.<sup>144</sup> If, however, that decision were not followed, and it should be decided that an obligee could petition for support in a Missouri court other than the one which had previously rendered the support decree, there is no reason why the obligee could not "register" the prior judgment in another Missouri court. In such a situation, though, there still remain the questions as to whether the second court can modify a sister court's decree as to the amounts payable, and whether it can cite the defendant for contempt.<sup>145</sup>

JAMES H. McLARNEY

## RECENT HAPPENINGS IN THE AREA OF ALIMONY AND CHILD SUPPORT

This article will survey the recent Missouri decisions in the area of permanent alimony and child support. The correlation between the two areas will be considered, as well as the contrasts. The writer's main purpose will be to relate the recent court holdings to the established law, and to comment as to the effect of the one upon the other.

### I. PERMANENT ALIMONY

#### A. *Comparison of Ecclesiastical and Statutory Systems*

"Under the canonical law administered by the ecclesiastical courts, marriage was a religious sacrament . . . ."<sup>1</sup> The courts lacked jurisdiction to dissolve a marriage for postnuptial cause, and the only relief that they could grant was a divorce from bed and board. Such a divorce was a mere judicial separation; the marital status remained, as did the husband's marital obligation to support his wife.<sup>2</sup>

Under Missouri law, marriage is not treated as a sacrament, but as a contract

143. § 454.280, RSMo 1959.

144. *Welch v. McIntosh*, *supra* note 99, and accompanying textual material.

145. For a more detailed discussion of this problem, see *Briggs*, *supra* note 104, at 55.

1. *Nelson v. Nelson*, 282 Mo. 412, 420, 221 S.W. 1066, 1068 (1920) (en banc).

2. *State ex rel. Couplin v. Hostetter*, 344 Mo. 770, 129 S.W.2d 1 (1939) (en banc); *Nelson v. Nelson*, *supra* note 1.

between the husband and wife.<sup>3</sup> As a contract it may be dissolved by court order.<sup>4</sup> When the marital status is dissolved, the theory of the husband's continuing obligation which was present in the ecclesiastical courts no longer has much validity. Statutory alimony has filled much of the space formerly occupied by the continuing obligation of the husband.<sup>5</sup> This statutory liability incident to absolute divorce was created in the interest of social welfare and justice.<sup>6</sup> The nature of the statutory obligation "is the allowance of such a sum of money in gross or installments as will fairly and reasonably compensate [the wife] for the loss of her support by the annulment of the marriage contract."<sup>7</sup>

### B. Factors in Determining Permanent Alimony

Alimony will be granted only to the wife and only when she is the innocent and injured party.<sup>8</sup> But even when the wife is innocent and injured, the court is not compelled to grant her alimony.<sup>9</sup> Section 452.070 of the 1959 Missouri Revised Statutes provides in part that "the court shall make such order touching the alimony . . . as, from the *circumstances* of the parties and the *nature* of the case, shall be *reasonable*."<sup>10</sup> (Emphasis added.) The statute has been interpreted to mean that there may be situations in which it would not be reasonable to grant alimony.<sup>11</sup>

3. *Smith v. Smith*, 350 Mo. 104, 164 S.W.2d 921 (1942); *Nelson v. Nelson*, *supra* note 1.

4. § 452.010, RSMo 1959.

5. Section 452.070, RSMo 1959, provides:

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 by him, or upon default of himself or 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. . . .

6. *Smith v. Smith*, *supra* note 3, at 108, 164 S.W.2d at 923.

7. *Nelson v. Nelson*, *supra* note 1, at 421, 221 S.W. at 1069.

In *Smith v. Smith*, *supra* note 6, at 109, 164 S.W.2d at 924, the court admitted that there was some confusion in the Missouri courts as to this point. "This Court has said [that] an allowance of alimony is in the nature of an award for damages because of the husband's breach of the marriage contract, but our courts of appeals have leaned to the theory of a continuing duty to support." Since the *Smith* case, however, courts of this state have consistently treated the award as one of damages.

8. § 452.090, RSMo 1959; *Willis v. Willis*, 274 S.W.2d 261 (Spr. Ct. App. 1954); *Slaughter v. Slaughter*, 106 Mo. App. 104, 80 S.W. 3 (K.C. Ct. App. 1904).

9. *Smith v. Smith*, *supra* note 3.

10. § 452.070, RSMo 1959.

11. *Ballew v. Ballew*, 288 S.W.2d 24 (K.C. Ct. App. 1956); *Smith v. Smith*, *supra* note 3.

The courts of this state have repeatedly said that the factors to be considered in determining alimony are:

[T]he financial status of the respective parties, including the question of their individual estates, incomes, obligations, and necessities; the contribution of each to the accumulated property; the probable future prospects of each; their respective ages, health, and ability to follow gainful occupations; their stations in life; their children, if any; the duration of the marriage, and whether it was one of affection or convenience; and the conduct of the parties, with particular regard to the cause of the divorce and the relative and comparative responsibility of each other therefore.<sup>12</sup>

The duty of weighing these factors and making the determination rests with the discretion of the trial court, and it is only in a case where the court abuses this discretion that the decree will be set aside.<sup>13</sup> The circumstances and needs which the court will weigh are those present at the time of the divorce decree.<sup>14</sup>

It would seem that when the wife is the innocent and injured party, a court should investigate thoroughly before it determines that she is not entitled to permanent alimony. Once the court makes such a determination it forecloses the rights of the wife, regardless of any later change in her needs.<sup>15</sup> If, however, when in doubt a nominal allowance is granted (one dollar per month, for example), then the decree will allow the court to later re-examine the conditions and needs of the parties.

### C. Treatment on the Appellate Level

When a question of alimony is raised on appeal, the appellate courts will hear the case de novo and examine the whole record.<sup>16</sup> Due deference will be given to the trial court's determination, for it will have had an opportunity to hear and observe the witnesses as they testified.<sup>17</sup>

In a recent St. Louis Court of Appeals case,<sup>18</sup> the husband contended that the award of alimony in the lower court was excessive.<sup>19</sup> The wife argued that an award of alimony, considered in modern usage as an assessment of damages for the breach of the marriage contract, should be left to the discretion of the trial court.<sup>20</sup> The court stated that while in *Nelson v. Nelson*<sup>21</sup> the term "assessment of damages" was mentioned, what was there said was that in a "limited sense at least

12. Spivack v. Spivack, 283 S.W.2d 137, 142 (Spr. Ct. App. 1955); Simmons v. Simmons, 280 S.W.2d 877, 880 (Spr. Ct. App. 1955).

13. Brinker v. Brinker, 360 Mo. 212, 227 S.W.2d 724 (1950); Fields v. Fields, 343 S.W.2d 168 (K.C. Ct. App. 1960).

14. Smith v. Smith, *supra* note 3.

15. Ballew v. Ballew, *supra* note 11; Smith v. Smith, *supra* note 3.

16. Coggburn v. Coggburn, 256 S.W.2d 836 (Spr. Ct. App. 1953); Fossett v. Fossett, 243 S.W.2d 625 (Spr. Ct. App. 1951).

17. *Ibid.*

18. Coleman v. Coleman, 318 S.W.2d 378 (St. L. Ct. App. 1958).

19. He earned approximately \$333.66 per month, and the payments amounted to \$285.00, leaving him \$48.66 per month to live on.

20. Coleman v. Coleman, *supra* note 18, at 382.

21. *Supra* note 1.

it may be deemed an assessment of damages,<sup>22</sup> qualified by the factors to be given consideration in measuring damages.<sup>23</sup> So, even though the courts have changed their view as to why alimony is granted, it seems clear that the weighing procedure is still the same.

#### D. *Incidents of a Money Judgment*

A judgment for alimony is subject to the same incidents as any other judgment rendered in an action at law, and since it may be considered compensation awarded in redress of a legal injury, it has been held that the wife has a property right in the money judgment which vests as the installments accrue.<sup>24</sup>

In a recent modification proceeding,<sup>25</sup> the trial judge ordered that the husband pay the wife her already accrued alimony of 300 dollars in equal installments of 75 dollars, payment to be made on September 1, 1956, 1957, 1958, and 1959. On appeal, the court reversed the order, stating that the wife had a vested property interest in the judgment and that the trial court could not impair her vested right by postponing its payment.<sup>26</sup>

Garnishment in aid of execution may be used to collect accrued installments of an alimony decree.<sup>27</sup> When execution is issued on the alimony judgment, it will be subject to the ten year statutory provision concerning presumption of payment.<sup>28</sup> In fact, it has been held that after the alimony decree has laid dormant for ten years it may not be modified,<sup>29</sup> there being nothing for the court to modify.

#### E. *Modification of Permanent Alimony*

When permanent alimony is granted to the wife it may be in gross,<sup>30</sup> or in monthly or yearly installments. If the trial court grants alimony in gross, then the only method of modification is through direct appeal.<sup>31</sup> Monthly or yearly installment alimony, however, is subject to "alteration from time to time . . . as may be proper . . ." <sup>32</sup> This provision affords the court an opportunity, as new conditions arise, to determine more exactly the extent of the loss suffered by the wife.<sup>33</sup>

22. *Coleman v. Coleman*, *supra* note 18, at 382.

23. *Supra* note 12, and accompanying textual material.

24. *Nelson v. Nelson*, *supra* note 1, at 423, 211 S.W. at 1069.

25. *Hughes v. Wagner*, 303 S.W.2d 181 (St. L. Ct. App. 1957).

26. *Id.* at 185.

27. *Harrison v. Harrison*, 339 S.W.2d 509 (St. L. Ct. App. 1960).

28. Section 516.350, RSMo 1959, provides in part: "Every judgment . . . of any court of record . . . of this . . . state . . . shall be presumed to be paid and satisfied after the expiration of ten years . . ." See *Mayes v. Mayes*, 342 Mo. 401, 116 S.W.2d 1 (1938).

29. *Sisco v. Sisco*, 339 S.W.2d 283 (St. L. Ct. App. 1960). For more extended comment upon this case, see *Recent Case Notes*, this issue, *Missouri Law Review*.

30. It will be noted that gross alimony may be payable over a period, as with a grant of \$3,000.00 gross alimony, payable at \$300.00 per year for ten years.

31. *Carl v. Carl*, 284 S.W.2d 41 (K.C. Ct. App. 1955).

32. § 452.070, RSMo 1959.

33. *Nelson v. Nelson*, *supra* note 1, at 422, 221 S.W. at 1069.

## 1. Change of Condition

The authority to modify a judgment for alimony is dependent upon proof of a change in conditions subsequent to the time of the decree. This necessity is created by the fact that the original judgment for alimony is *res judicata* as to all the facts and conditions bearing upon the award and existing at the date of its rendition.<sup>34</sup> Since the amount of alimony is determined by "nicely balancing between the needs of the wife and the ability of the husband to pay,"<sup>35</sup> it would seem at first glance that a substantial change in either element would authorize a redetermination. However, a question arises as to whether an increase in the husband's income, after the decree, should benefit his erstwhile wife. It must be remembered that the wife voluntarily assumed the status of an unmarried woman and that she has contributed nothing to the husband's acquisition of wealth after the entry of the divorce decree.<sup>36</sup> Therefore, unless the wife can show an increased cost in maintaining that station of life enjoyed by her at the time of the divorce, the single fact that the husband has enlarged his income will be immaterial.<sup>37</sup> If the wife can also show a change in her position, then the modification will be granted.<sup>38</sup>

## 2. The Self-Imposed Change of Condition

When a court determines that the party asking for the modification is the party that has created the changed condition, it will generally dismiss the motion. A good example of the above rule is found when the husband falls behind in his alimony payments and as a consequence the wife is forced to take employment to support herself and her child.<sup>39</sup> In such a case courts usually hold that the husband's improper conduct has caused the changed condition and, therefore, that the change should be ignored.<sup>40</sup>

When an ex-wife went into debt to purchase a farm, it was said that such a change of condition would not entitle her to more alimony.<sup>41</sup> In another case, the court seemed to say that when the ex-husband decreases his income as a result of improvident acts, the request for modification should be denied.<sup>42</sup> It could be argued that in many cases a simple decrease in the husband's income should not by itself be grounds for modification of the decree. This is because the wife is still entitled to be maintained according to the station of life which she enjoyed "*at the time the decree was granted*,"<sup>43</sup> and a subsequent decrease in the husband's income has no effect upon that standard.

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34. *Adkins v. Adkins*, 325 S.W.2d 364 (K.C. Ct. App. 1959); *Shilkett v. Shilkett*, 285 S.W.2d 67 (Spr. Ct. App. 1955).

35. *Adkins v. Adkins*, *supra* note 34, at 367.

36. *Harriman v. Harriman*, 281 S.W.2d 566, 570 (St. L. Ct. App. 1955).

37. *Adkins v. Adkins*, *supra* note 34; *Harriman v. Harriman*, *supra* note 36.

38. *Harriman v. Harriman*, *supra* note 36, at 571.

39. *Jourdan v. Jourdan*, 251 S.W.2d 380 (St. L. Ct. App. 1952).

40. *Id.* at 384.

41. *Adkins v. Adkins*, *supra* note 34.

42. *Shilkett v. Shilkett*, *supra* note 34.

43. *Harriman v. Harriman*, *supra* note 36, at 570. (Emphasis added.)

If the ex-wife remarries, the husband is relieved from further payment.<sup>44</sup> What if the ex-husband remarries? The courts of this state have been consistent in holding that the remarriage of the husband, by itself, does not constitute a sufficient change.<sup>45</sup> When, however, the husband's remarriage is coupled with the birth of a child in the second marriage, the courts will recognize the change of condition.<sup>46</sup>

### 3. Equitable Quality of Modification

Even though the courts speak of the divorce decree as being a statutory judgment at law, the divorcing court still retains powers which are equitable in nature.<sup>47</sup> Therefore, the trial courts are allowed to qualify their modifications upon certain conditions. In *State ex rel. Couplin v. Hostetter*,<sup>48</sup> the court granted a modification of an earlier alimony decree upon the condition that all back alimony then due be paid before a certain date. Recently, in *Link v. Link*,<sup>49</sup> the discretion of imposing a condition in a custody proceeding was also sanctioned. In that case, the trial court had refused to hear the modification proceeding until the ex-husband brought his alimony and child support payments up to date. The appellate court approved, but did caution the use of the latter proceeding, saying that it should be used "only after sufficient inquiry has been made into the status of the child to satisfy the court that the child's best welfare will not be prejudiced."<sup>50</sup>

## II. CHILD SUPPORT

In a situation where there has been a divorce with custody of children going to the wife, and the decree fails to grant child support, the wife has two remedies available.<sup>51</sup> The first remedy is based upon the husband's common law duty and obligation to support his minor children.<sup>52</sup> The wife is entitled, through an independent action, to recover for expenses already incurred.<sup>53</sup> The second remedy is dependent upon the alimony and child support statute, in that the wife may proceed in the divorce case, by motion or otherwise, to obtain an order providing

44. § 452.075, RSMo 1959.

45. *Jourdan v. Jourdan*, *supra* note 39; *Shapiro v. Shapiro*, 238 S.W.2d 886 (St. L. Ct. App. 1951).

46. *Ibid.*

47. *Franklin v. Franklin*, 283 S.W.2d 483 (Mo. 1955) (en banc); *State ex rel. Couplin v. Hostetter*, *supra* note 2; *Arnold v. Arnold*, 222 S.W. 996 (Mo. 1920) (en banc).

48. *Supra* note 2.

49. 262 S.W.2d 318 (St. L. Ct. App. 1953), *rev'd on other grounds*.

50. *Id.* at 320.

51. *Kelly v. Kelly*, 329 Mo. 992, 47 S.W.2d 762 (1932) (en banc).

52. *Lodahal v. Papenberg*, 277 S.W.2d 548, 550 (Mo. 1955); *Kelly v. Kelly*, *supra* note 51, at 998, 47 S.W.2d at 764.

53. *Lodahal v. Papenberg*, *supra* note 52, at 551; *Kelly v. Kelly*, *supra* note 51, at 1000, 47 S.W.2d at 765.

for future support.<sup>54</sup> The two remedies are not in the alternative but are coterminous, and their use will depend upon the facts in the particular case.<sup>55</sup>

In *Roberts v. Roberts*,<sup>56</sup> the wife was granted custody of the child in a divorce proceeding. The decree did not provide for child support, and the wife prayed for an order modifying the original decree so that it would include child support. The trial court granted her forty dollars per month. The husband appealed, claiming that a modification of the decree must be based upon a change in circumstances and that all parties admitted there had been none. The appellate court upheld the lower court on the ground that the relief was really of the second type mentioned above. It was stated that the relief prayed for was not in reality a motion to modify, "but [was] a motion, ancillary to the main cause, requesting that the court determine as an original adjudication that which should have been adjudged at the outset."<sup>57</sup>

The common law obligation of the husband is limited to expenses incurred for necessities, which include food, lodging, clothing, medical attention, tuition and school books.<sup>58</sup> Beyond these, "in nearly every family some comforts in excess of the strict necessities of life are enjoyed and treated as necessities."<sup>59</sup>

### A. The Child Support Statute<sup>60</sup>

#### 1. Purpose

The basic considerations behind the adoption of Missouri's child support act have been stated by the Missouri Supreme Court as follows:

[T]he apparent purpose of the [child support] statute is to provide a mode of procedure for obtaining maintenance of the child and for determining in advance the extent of the common-law obligation of the father, as well as to provide the means of enforcing the obligation. The simplified statutory procedure (enacted in the public welfare and looking to the security of the child during infancy) is designed to obviate the expense and delay of independent actions.<sup>61</sup>

#### 2. Factors in Determining Child Support

A trial court applies the same balancing factors in determining child support as are applied in determining permanent alimony; i.e., "health, age, needs, obligations, dependents, income and the capacity to produce income of parties."<sup>62</sup>

54. *Lodahal v. Papenberg*, *supra* note 52, at 551; *Kelly v. Kelly*, *supra* note 51, at 1001, 47 S.W.2d at 766.

55. *Lodahal v. Papenberg*, *supra* note 52, at 551; *Kelly v. Kelly*, *supra* note 51, at 1003, 47 S.W.2d at 767.

56. 292 S.W.2d 596 (Spr. Ct. App. 1956).

57. *Id.* at 598.

58. *Josey v. Forde*, 338 S.W.2d 14 (Mo. 1960); *Gately Outfitting Co. v. Vinson*, 182 S.W. 133 (K.C. Ct. App. 1916).

59. *Gately Outfitting Co. v. Vinson*, *supra* note 58, at 134.

60. § 452.070, RSMo 1959.

61. *Lodahal v. Papenberg*, *supra* note 52, at 551.

62. *Smith v. Smith*, 350 Mo. 104, 164 S.W.2d 921 (1942); *Ballew v. Ballew*, 288 S.W.2d 24 (K.C. Ct. App. 1956); *Sellars v. Sellars*, 274 S.W.2d 509, 513 (Spr. Ct. App. 1955).

In *Sellars v. Sellars*,<sup>63</sup> the Springfield Court of Appeals gave recognition to the fact that a father's financial ability may not be sufficient to satisfy the needs of both the children and the father. The circuit court had awarded the wife eighty dollars per month child support. The court admitted that eighty dollars was certainly not in excess of the children's needs. The amount was so inconsistent with the husband's income (he had earned only 1,500 dollars in 1952), however, that an enforcement of the award would probably have destroyed his incentive and defeated the purpose to be accomplished.<sup>64</sup> The appellate court, acting de novo, reduced the support decree to fifty dollars per month.

In determining the husband's ability to pay, a court will look to his financial worth, including his real and personal property. This point was made quite clear in *Wonneman v. Wonneman*.<sup>65</sup> The wife, in a proceeding for modification<sup>66</sup> of child support, was awarded an increase from 120 dollars per month to 200 dollars per month. One of the grounds upon which the husband appealed was the failure of the wife to show that his income was sufficient to justify the increase. The court admitted that, from the husband's testimony, his *income* would be insufficient to withstand the increase. But current income is only one part of a man's financial worth. The husband had disclosed that he had a total net worth of approximately 58,000 dollars. The court stated that as long as he was primarily liable for the support of his children, and had property sufficient to meet their needs, then the children

should not be deprived of a decent home and adequate support. . . . [I]t is better that [the children] be properly maintained and educated during their tender years than to be left an inheritance preserved at the expense of their present needs and comfort.<sup>67</sup>

#### B. *Incidents of a Money Judgment*

Child support judgments and alimony judgments are treated in the same fashion.<sup>68</sup> Therefore, what was earlier said concerning alimony is applicable here. In *Sisco v. Sisco*,<sup>69</sup> a distinction was argued at the trial level, but was discarded on appeal. The trial court granted modification of a child support decree after the ten year judgment statute had run.<sup>70</sup> The decision surmised that the trial court's theory of jurisdiction was that of continuing control during the minority of the children. The appellate court said that the power to modify "implies something in existence to be changed or altered,"<sup>71</sup> and refused to accept an analogy be-

63. 274 S.W.2d 509 (Spr. Ct. App. 1955).

64. *Id.* at 513.

65. 305 S.W.2d 71 (St. L. Ct. App. 1957).

66. The right of modification is based upon the same statutory language as is alimony; § 452.070, RSMo 1959.

67. *Wonneman v. Wonneman*, *supra* note 65, at 79.

68. *Sisco v. Sisco*, *supra* note 29.

69. *Ibid.*

70. § 516.350, RSMo 1959.

71. *Sisco v. Sisco*, *supra* note 29, at 288.

tween custody decrees and support decrees. Custody proceedings are not subject to section 516.350, and as to them a court would have continuing jurisdiction and power to modify. But, since a support decree is subject to the statute and the judgment is "conclusively presumed to be paid,"<sup>72</sup> there is nothing left to be modified. "To modify a dead thing would be a useless act, and so modification will not be in this situation, neither as to alimony nor as to support and maintenance."<sup>73</sup>

### C. Modification

#### 1. Change in Child's Condition

Modification of a child support decree is theoretically based upon the same statutory provisions as is alimony.<sup>74</sup> The requirement of a changed condition must be present, but in this area the courts usually have had little difficulty in finding the change. In *Papenberg v. Papenberg*,<sup>75</sup> for instance, it was said that any increase in the needs of the children is a sufficient change in condition. However, the basis for finding the change in needs is worthy of note. In the *Papenberg* case the trial court had refused to modify. On appeal, the court said:

At [the time of decree] she was an infant three years old. At the present time Marilyn Gay is sixteen years of age, attending school and, no doubt, taking part in other activities outside the home which call for a larger expenditure for clothes and other incidentals. The cost of living has increased materially since the rendition of the original decree. These changed conditions would justify an increase in the allowance . . . .<sup>76</sup>

In *Wonneman v. Wonnemann*,<sup>77</sup> the court again mentioned that the children's advanced ages and the increased cost of living would require an increase in payments. It would seem, then, that as long as the children are growing up, with their living expenses increasing, there has been a sufficient change of condition. Therefore, in most cases, time alone will be all that is necessary to bring about the necessity of a modification.

#### 2. Effect of Military Service on Child Support

A mother has been receiving child support payments for her minor son. Then the son enters the military service. What effect should this have upon the mother's right to child support? In *Swenson v. Swenson*,<sup>78</sup> the wife sought execution on her husband's property for child support payments which had accrued while the son was in the service. The Kansas City Court of Appeals reversed the lower court

72. § 516.350, RSMo 1959.

73. *Sisco v. Sisco*, *supra* note 29, at 288.

74. §§ 452.070, .110, RSMo 1959.

75. 289 S.W.2d 468 (St. L. Ct. App. 1956).

76. *Papenberg v. Papenberg*, *supra* note 75, at 470. The appellate court refused to reverse, however, because the wife had failed to produce evidence of the husband's financial ability.

77. *Supra* note 65.

78. 227 S.W.2d 103 (K.C. Ct. App. 1950).

and sustained the husband's motion to quash the execution. The wife had argued that the court's original decree was in full force until modified by the court pronouncing it.<sup>79</sup> The appellate court pointed out that when the boy entered the military service he became emancipated, and that the emancipation "severed the filial relationship as completely as if [the child] had become of age."<sup>80</sup> Therefore, while the relationship was severed, so was the father's obligation.

The problem arose again in 1959, in *Schaffer v. Security Fire Door Co.*<sup>81</sup> In this case the wife admitted that she had no right to payments for child support while the boy was in the service (assuming *Swenson v. Swenson* to be the law), but requested relief on other grounds. The St. Louis Court of Appeals, however, refused to accept the wife's concession, stating:

If we accept her concession, we would be holding that a court has jurisdiction to modify retroactively accrued installments of child support. We do not believe such jurisdiction exists.<sup>82</sup>

The court then proceeded in detail to argue that courts have no right to tamper with a wife's vested property interest. But, because of the conflict with the *Swenson* case, the court certified the question to the supreme court for re-examination.

The supreme court sidestepped the issue. The court stated that since the wife in her brief had unequivocally conceded she was not entitled to payment while her son was in the army, there was no question of law to be determined.<sup>83</sup> To make sure that their decision was not interpreted as supporting either side of the question, the court added:

Our acceptance or recognition of the limitation voluntarily placed by respondent on her claim does not constitute an approval or disapproval of any case deciding whether the father is liable for payment to his former wife for the support of their minor son while that son is in the military service.<sup>84</sup>

The solution to this problem will probably depend upon whether the court feels that the emancipation, operating by itself, should relieve the father's duty. In considering the question, however, it should be noted that the allowance of such payments is difficult to justify in view of the purpose of the statutory award. Payments granted to the wife while she is not supporting the child serve no public interest, and give no security to the child.

#### D. Making Payments to the Child

In *Steckler v. Steckler*,<sup>85</sup> the Springfield Court of Appeals answered, for the first time in Missouri, the question as to whether a father may credit, against his ex-wife, support payments made directly to the child. The father alleged that

79. *Nelson v. Nelson*, 282 Mo. 412, 221 S.W. 1066 (1920) (en banc).

80. *Swenson v. Swenson*, *supra* note 78, at 106.

81. 326 S.W.2d 376 (St. L. Ct. App. 1959).

82. *Id.* at 379.

83. *Schaffer v. Security Fire Door Co.*, 332 S.W.2d 860 (Mo. 1960).

84. *Id.* at 861.

85. 293 S.W.2d 129 (Spr. Ct. App. 1956).

his daughter had complained to him that she was not getting support from the mother, and that he began paying the money directly to the daughter. The case seems to be on sound footing in deciding that there should be no credit.<sup>86</sup> The court stated that such a procedure would create turmoil, and would allow the father to dictate the manner in which expenditures would be made.

In the court's discussion in the *Steckler* case it was mentioned that if the wife were to consent to the payments or expenditures, then the husband could receive a credit against the amount owing,<sup>87</sup> and that "there could be cases where the consent might be implied from the circumstances."<sup>88</sup> This may have been the problem in *Groeller v. Groeller*.<sup>89</sup> The divorce decree there awarded custody of the two minor children to the wife, and ordered the husband to pay twenty-five dollars per week for child support. The facts showed that the husband had been paying only twenty dollars per week in cash. After eight years, the wife brought garnishment proceedings in aid of execution. In the husband's motion to quash the garnishment proceeding he alleged that, in addition to paying the twenty dollars cash each week, he had also paid for the children's necessary clothing and medical expenses. After a hearing on the husband's motion, the garnishment was quashed.

The St. Louis Court of Appeals reversed the trial court, holding that there was no evidence that the wife,

either expressly or *impliedly*, consented to the reduction of the weekly sum ordered by the court and no evidence to show that she, either expressly or *impliedly*, consented to the manner in which respondent took care of the children's needs for medical care and clothing.<sup>90</sup> (Emphasis added.)

Yet the husband testified at the hearing that the wife would leave the children with him nearly every Friday, and pick them up on Monday; that when the children were sick the wife would bring them to him; and that he averaged approximately 500 dollars per year on expenditures for them. In view of the above testimony it is arguable that the trial court may have determined that consent could be implied from the actions of the wife, and that the appellate court should have deferred to these findings.

The appellate court stated that the husband had created the wife's needs by withholding the five dollars each week; and, if the husband could not afford the payments, his legal remedy should have been through a motion for modification.<sup>91</sup> But does not the wife also have a legal remedy for enforcing her rights? And when she takes the children, in need of clothing and medical care, to their father, does not she *impliedly* consent to the aid which he gives?

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86. See 22 Mo. L. Rev. 94 (1957).

87. *Steckler v. Steckler*, *supra* note 85, at 134.

88. *Supra* note 85, at 135.

89. 346 S.W.2d 545 (St. L. Ct. App. 1961).

90. *Id.* at 549.

91. *Id.* at 547.