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the trial judge was mere dictum, and did not purport to decide any equal protection issue.

The Missouri Supreme Court could have disposed of appellant's argument in a much more straightforward manner simply by noting that not all sexual psychopaths are treatable. There is a rational basis for committing treatable sexual psychopaths, while subjecting nontreatable sexual psychopaths to the ordinary criminal process. Hence, it is consistent with equal protection to vest discretion in the trial judge to determine whether a given sexual psychopath is, in fact, treatable.⁴¹ Of course, the validity of such an argument would rest on two premises: (1) that the trial judge actually considers treatability in his decision whether to commit, and (2) that treatment is actually forthcoming to those who are committed.

Thus, while the court was correct in rejecting the particular argument raised, its reasoning was nebulous and unsatisfactory. It is also disturbing that the court is willing to cite cases from the 1950's as settling all constitutional issues. Courts nationwide are grappling with the complex questions surrounding the rights of the mentally deficient. The Missouri Supreme Court, by failing to do the same, has merely deferred the problems to the future.

MICHAEL W. RHODES

DOMESTIC RELATIONS—ENFORCEMENT OF MAINTENANCE AND SUPPORT ORDERS BY CONTEMPT PROCEEDINGS—IMPRISONMENT FOR DEBT

*State ex rel. Stanhope v. Pratt*¹

A marriage dissolution decree required relator to make monthly maintenance payments to his ex-wife through the circuit court clerk. Re-

41. Similarly under § 211.071, RSMO 1969, juvenile courts have discretion to remove a juvenile offender from the special juvenile system and certify him for prosecution under the general criminal law. When this provision was challenged as denying equal protection to a juvenile certified for prosecution, the Missouri Supreme Court upheld the classification as rationally distinguishing between those juveniles who "may be reclaimed through reformatory measures" and those who are likely to be incorrigible. *State ex rel. Boyd v. Rutledge*, 321 Mo. 1090, 1102, 13 S.W.2d 1061, 1066 (En Banc 1929). The Missouri Supreme Court has noted that the theoretical basis for the sexual psychopath statute is similar to that of the Juvenile Code. *State ex rel. Sweezer v. Green*, 360 Mo. 1249, 1253, 232 S.W.2d 897, 900 (En Banc 1950).

1. 533 S.W.2d 567 (Mo. En Banc 1976).

lator failed to make the payments, and the prosecuting attorney filed a contempt motion pursuant to section 452.345² of the new dissolution statute.³ At the conclusion of the hearing, respondent judge found relator guilty of contempt and threatened to impose a sixty-day jail sentence, suspended subject to relator's compliance with the maintenance order.⁴ Entry of judgment was delayed to enable relator to seek a writ of prohibition from the Missouri Supreme Court.⁵

Relator argued that imprisonment for contempt for failure to comply with the court's maintenance order is imprisonment for debt in violation of the Missouri constitution,⁶ and that section 452.345 which authorizes such contempt proceedings is therefore unconstitutional. The supreme court held that trial courts are empowered to imprison for contempt in appropriate cases to enforce maintenance and support orders. Such attachment is not imprisonment for debt within the meaning of the constitutional prohibition, and section 452.345 is therefore constitutional.⁷

Prior Missouri law was based upon *Coughlin v. Ehler*⁸ which held that an order to pay alimony was simply an order to pay money. Imprisonment for failure to pay was unconstitutional as imprisonment for debt. The obligee was, in effect, a judgment creditor with all the remedies available to judgment creditors,⁹ but the courts were denied contempt proceedings as a remedy for enforcement.¹⁰

Coughlin was gradually eroded by subsequent analogous decisions of the appellate courts¹¹ and by state legislation.¹² With the enactment of the

2. Section 452.345, RSMO (1973 Supp.), provides in part:

4. If a party fails to make required payment, the circuit clerk shall send . . . notice of the arrearage to the obligor. If payment of the sum due is not made to the circuit clerk within ten days . . . , the circuit clerk shall certify the amount due to the prosecuting attorney. The prosecuting attorney shall, with the consent of the obligee, promptly initiate contempt proceedings against the obligor.

3. §§ 452.300-.415, RSMO (1973 Supp.).

4. Imprisonment is commonly used in civil contempt cases. The contemner is either held until he purges himself of contempt, or, less often, he may be given a definite sentence that is then suspended on condition that he comply with the court's order. Dobbs, *Contempt of Court: A Survey*, 56 CORNELL L. REV. 183, 267-68 (1971).

5. Prohibition is not an appropriate remedy for review of contempt judgments relating to failure to pay maintenance or support. State *ex rel.* McCurley v. Hanna, 535 S.W.2d 107, 109 (Mo. En Banc 1976).

6. MO. CONST. art. I, § 11 provides: "That no person shall be imprisoned for debt, except for nonpayment of fines and penalties imposed by law."

7. State *ex rel.* Stanhope v. Pratt, 533 S.W.2d 567, 575 (Mo. En Banc 1976).

8. 39 Mo. 285 (1866), *overruled*, 533 S.W.2d 567, 574 (Mo. En Banc 1976).

9. Nelson v. Nelson, 282 Mo. 412, 422, 221 S.W. 1066, 1069 (En Banc 1920).

10. Partney v. Partney, 442 S.W.2d 117 (St. L. Mo. App. 1969); Davis v. Broughton, 382 S.W.2d 219 (Spr. Mo. App. 1964); Harrington v. Harrington, 233 Mo. App. 390, 121 S.W.2d 291 (K.C. Ct. App. 1938); *Ex parte* Kinsolving, 135 Mo. App. 631, 116 S.W. 1068 (St. L. Ct. App. 1909). All of the above *overruled*, 533 S.W.2d 567, 574 (Mo. En Banc 1976).

11. State v. Davis, 469 S.W.2d 1 (Mo. 1971) (imprisonment for criminal

Missouri Divorce Reform Act,¹³ trial courts were specifically empowered for the first time to enforce payment of maintenance and support by contempt proceedings. The Missouri Bar Family Law Committee, which proposed the contempt provision to the legislature, apparently hoped the new procedure would spawn a test case.¹⁴

The *Stanhope* court expressly overruled *Coughlin* and the appellate court cases that followed it.¹⁵ In recognizing imprisonment for contempt as a constitutional remedy for the enforcement of maintenance and support orders, Missouri law is now in conformity with the other forty-nine states and the District of Columbia.¹⁶ The frequently expressed rationale is that an order to pay maintenance is something more than an ordinary debt or money judgment: it is an order to the obligor to perform a public as well as a marital duty; a duty enforced by imprisonment if necessary to prevent the obligee from becoming a public charge or dependent upon the charity of relatives and friends.¹⁷

The *Stanhope* court was careful to limit the application of this "rather drastic remedy." First, before ordering imprisonment, trial courts should be "convinced" that the obligor is "financially able" to make the required payment *or* that he has "intentionally and contumaciously" placed himself in a position so that he could not comply (emphasis added).¹⁸ The practical effect of this requirement is unclear. Virtually all courts would agree that imprisonment for contempt is inappropriate when the obligor is neither able to pay nor guilty of voluntarily creating the inability for the purpose of avoiding payment; but the limits of judicial discretion beyond this narrow common ground are not uniformly defined.

It can be argued that *Stanhope* authorizes trial courts to punish by

contempt for nonsupport); *Zeitinger v. Mitchell*, 244 S.W.2d 91 (Mo. 1951) (imprisonment for contempt for nondelivery of funds due an estate); *State v. Taylor*, 335 Mo. 460, 73 S.W.2d 378 (En Banc 1934) (imprisonment for fraudulently passing an insufficient funds check to pay past due account); *Ex parte Fuller*, 330 Mo. 371, 50 S.W.2d 654 (En Banc 1932) (imprisonment for contempt for nondelivery of goods and proceeds to receiver); *In re Knaup*, 144 Mo. 653, 46 S.W.151 (1898) (imprisonment for contempt for nondelivery of bonds); *Ex parte Fowler*, 221 Mo. App. 325, 273 S.W. 195 (K.C. Ct. App. 1925) (imprisonment for contempt for nondelivery of funds to administrators); *Ex parte Devoy*, 208 Mo. App. 550, 236 S.W. 1070 (St. L. Ct. App. 1921) (imprisonment for contempt for nondelivery of possession of house to receiver).

12. § 559.353, RSMO 1969 (criminal nonsupport statute); § 454.240, RSMO 1969 (as part of Uniform Reciprocal Enforcement of Support Law, empowers courts to punish for contempt when acting as responding state); § 476.110, RSMO 1969 (empowers trial courts to punish for criminal contempt those in wilful disobedience of their orders).

13. §§ 452.300-415, RSMO (1973 Supp.). See statute quoted note 2 *supra*.

14. Ruhland, *Maintenance and Support*, 29 J. MO. B. 516, 518 (1973).

15. 533 S.W.2d at 574.

16. *Id.* See Schoenlaub, *Use of Contempt Powers in the Enforcement of Alimony and Support Decrees*, 23 J. MO. B. 396 (1967).

17. See, e.g., *West v. West*, 126 Va. 696, 699, 101 S.E. 876, 877 (1920).

18. 533 S.W.2d at 575.

imprisonment for contempt those obligors who default on their maintenance and support obligations, a finding of financial inability to comply notwithstanding, if the evidence discloses that the inability was willfully created.¹⁹ However, contempt proceedings are civil and thus remedial in nature.²⁰ Such contempt orders compel obedience to the courts' orders rather than vindicate the courts' authority by inflicting punishment. Consequently, it is held that the contemner must be able to purge himself of the contempt by compliance.²¹ To the extent, therefore, that this approach allows imprisonment as mere punishment in the absence of ability to pay, it seems inconsistent with the avowed purpose of the remedy which is to collect accrued maintenance or support.

A more fruitful and moderate interpretation would involve broadening the concept of financial ability beyond present means to overall *capacity* to comply. It has long been the rule in Missouri that in determining the proper amount of the original maintenance or support award, courts will accept evidence of past income and reasonable prospects for future earnings, as well as evidence of present income, to establish capacity to pay.²² Under this view, trial courts would disallow a defense of present inability when, as in *Stanhope*, the evidence reveals both a voluntary reduction of income for the purpose of avoiding payment and an ability to earn more in the future.²³ The courts' ability to enforce their maintenance and support orders would consequently be strengthened by extending their reach to the indolent and disingenuous who are capable of satisfying their obligations but lack the immediate monetary resources.²⁴

19. Although there is language in the opinion seemingly authorizing courts to "punish by imprisonment for contempt" in such cases, few jurisdictions appear ready to extend judicial discretion that far. *But see* *Barclay v. Barclay*, 184 Ill. 471, 475-76, 56 N.E. 821, 822 (1900); *Cannon v. Cannon*, 34 Tenn. App. 568, 573, 241 S.W.2d 435, 437 (1951).

20. *Teefey v. Teefey*, 533 S.W.2d 563, 566 (Mo. En Banc 1976).

21. *See* *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418 (1911); *Mechanic v. Gruensfelder*, 461 S.W.2d 298 (St. L. Mo. App. 1970).

22. *Richardson v. Richardson*, 524 S.W.2d 149, 153 (Mo. App., D. St. L. 1975); *Fugate v. Fugate*, 510 S.W.2d 705, 706 (Mo. App., D.K.C. 1974); *Rutlader v. Rutlader*, 411 S.W.2d 826, 829 (K.C. Mo. App. 1967); *Weiss v. Weiss*, 392 S.W.2d 646, 647 (St. L. Mo. App. 1965); *Lampman v. Lampman*, 367 S.W.2d 28, 30 (St. L. Mo. App. 1963); *McCarthy v. McCarthy*, 329 S.W.2d 236, 241 (St. L. Mo. App. 1959).

23. The *Stanhope* court found, *inter alia*, that relator had accepted the responsibility of a new wife and child a mere thirty-one days after the divorce, bidden on and maintained a lesser paying job when he had the ability and capacity to earn more, and taken a greatly exaggerated number of personal leaves without explanation totaling twenty percent of his employable time and thereby reducing his earnings. 533 S.W.2d at 570.

24. Although courts cannot force recalcitrant obligors to work to capacity, they can disallow a defense of inability when appropriate. Note that in determining overall capacity to pay, trial courts run the risk of jailing one who is genuinely unable to comply. However, this may be more a theoretical than practical problem since an expression of willingness to obey is often sufficient to avoid confinement.

The dissent took the view, followed in a few jurisdictions,²⁵ that for the purpose of civil contempt proceedings to compel payment of accrued maintenance or support, *present* lack of means is a complete defense, notwithstanding the fact that past failure to pay was inexcusable. Because this is civil contempt, the contemner must, at the time cited, be able to purge himself of the contempt by the performance of some act *then* and *there* within his power.²⁶ *Coughlin* would therefore be limited by the dissent to cases in which the obligor does not have the money for the required payment in his immediate possession or control. It is unlikely, however, that trial courts will accept the dissent's restrictions. Such an approach weakens the effectiveness of the remedy by ignoring both the reasons for and the permanency of the present inability, limiting the courts' reach to those with the requisite cash reserves.²⁷

A further question raised by *Stanhope* involves clarification of the circumstances under which Missouri courts are likely to make a finding of financial ability to comply. The hodgepodge of case and statutory law in other jurisdictions provides no clear set of standards. Indeed, the courts appear jealous of their discretion and reluctant to limit it with rigid guidelines.²⁸ Nevertheless, some recurrent patterns emerge. The courts are less likely, for example, to allow a defense of present inability when it appears that there has been material income such that some payments could have been made and were not,²⁹ there has been a refusal to work and earn to capacity,³⁰ or the present inability has resulted from obligations incurred by remarriage.³¹ All of these factors influenced the *Stanhope* court.³²

As to the quantum of evidence necessary to establish financial inability,

See Dobbs, *Contempt of Court: A Survey*, 56 CORNELL L. REV. 183, 267-69, 272 (1971).

25. See, e.g., *Sears v. Sears*, 43 N.M. 142, 145, 87 P.2d 434, 436 (1939); *Snook v. Snook*, 110 Wash. 310, 313-15, 188 P. 502, 503 (1920).

26. 533 S.W.2d at 576.

27. Much of the disagreement between the majority and dissent stemmed from the trial court's failure to clearly state whether its finding of present ability referred to payment of the arrears, the next installment, or both. As a result, relator did not know exactly what was required to purge himself of contempt. If imprisonment for civil contempt is designed to coerce payment, then it would seem that the contempt order should clearly specify the amount contemner must pay and at what intervals.

28. See generally Dobbs, *Contempt of Court: A Survey*, 56 CORNELL L. REV. 183 (1971).

29. See, e.g., *Lusty v. Lusty*, 70 Idaho 382, 385, 387, 219 P.2d 280, 282-83 (1950); *Bailey v. Bailey*, 77 S.D. 546, 549, 95 N.W.2d 533, 533-35 (1959).

30. *Kelly v. Kelly*, 137 F.2d 254 (D.C. Cir. 1943); *Wohlfort v. Wohlfort*, 116 Kan. 154, 163, 225 P. 746, 750 (1924).

31. *Kephart v. Kephart*, 193 F.2d 677, 680 (D.C. Cir. 1951), *cert. denied*, 342 U.S. 944 (1952); *Kelm v. Kelm*, 83 Colo. 277, 279, 263 P. 716, 717 (1928); *State ex rel. Brown v. Brown*, 31 Wash. 397, 405, 72 P. 86, 88-89 (1903).

32. See note 23 *supra*.

Missouri law is unsettled.³³ In most jurisdictions the problem is addressed by placing the burden of proof as to inability on the obligor.³⁴ The movant need not aver ability to pay; a prima facie case of contempt is made by showing both the order for the payment of maintenance or support and the default.³⁵ At least one jurisdiction, however, places the burden on the obligee.³⁶

The other major limitation imposed by *Stanhope* on the use of contempt proceedings to enforce payment of maintenance and support would allow trial courts to require that the person seeking the contempt order exercise "reasonable efforts" to collect by the "conventional remedies available"³⁷ before entering the contempt order.³⁸ Perhaps the most promising method of collection is the new statutory remedy provided by section 452.350, RSMo 1973 Supp.,³⁹ which empowers trial courts to order an assignment of part of the obligor's future earnings or other income to the obligee. Payments may be made directly to the obligee from the obligor's employer or other payor. This not only provides a reasonably effective method for collecting the arrears, but it also gives the obligee some assurance of regular and adequate future installments. It is suggested that this remedy be considered first when collection of maintenance or support is a problem. If the obligor should refuse to execute the assignment, imprisonment for contempt might well prove the appropriate means of coercing compliance.⁴⁰

Finally, the practitioner should keep in mind that contempt proceedings need not be brought under section 452.345.⁴¹ The Missouri Supreme

33. In *Teefey v. Teefey*, 533 S.W.2d 563, 567 (Mo. En Banc 1976), a companion case to *Stanhope*, the Missouri Supreme Court declined to decide the burden of proof as to financial inability to comply.

34. *Ex parte Risner*, 67 Cal. App. 2d 806, 155 P.2d 667 (1945); *Garza v. Fleming*, 323 S.W.2d 152 (Tex. Civ. App. 1959); see *Annot.*, 53 A.L.R.2d 591, 607 (1957).

35. This rule is based upon the practical proposition that the facts as to ability to pay are peculiarly within the obligor's own knowledge. In many jurisdictions there is, in addition, a presumption that in fixing the amount of maintenance or support to be paid, the court fully investigated and came up with a reasonable figure.

36. *Wright v. Wright*, 132 Neb. 619, 623, 272 N.W. 568, 570 (1937).

37. Enforcement by execution has been the most frequently used method of collection. See 2 W. NELSON, *DIVORCE AND ANNULMENT* §§ 16.40-.56 (2d rev. ed. 1961).

38. 533 S.W.2d at 576.

39. Section 452.350, RSMo (1975 Supp.), provides in part:

The court may order the person obligated to pay support or maintenance to make an assignment of a part of his periodic earnings or other income to the person entitled to receive the payments or to the circuit clerk as trustee for such person The payor shall withhold from such earnings or other income the amount specified in the assignment and shall transmit the payments to the person specified in the order

40. 533 S.W.2d at 577.

41. Contempt proceedings are available under § 452.345 RSMo (1975 Supp.),