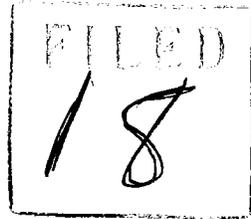


CRIMINAL LAW: Construing Section 4420, H. B. 117, passed
PROSECUTING ATTORNEYS: by the 64th General Assembly relative to
 failure to support minor children.

December 16, 1947

Honorable Clyde E. Combs
Prosecuting Attorney
Barton County
Lamar, Missouri



Dear Sir:

This will acknowledge receipt of your request for an opinion which reads as follows:

" As prosecuting attorney of Barton County I would like to have the opinion of your office on the following question:

"In January 1946 the wife of a resident of this county obtained a divorce from him. The decree awarded the care, custody and control of a minor daughter to the wife. Today the local representative of the Social Security department was in my office to determine whether or not any action could be taken under Section 4420 as amended for abandonment and failure or refusal to support or provide for wife and children- penalty-evidence required. It was very questionable in my mind whether or not this action could be maintained against the husband for his failure or refusal to support said minor child when no support money was granted or mentioned in the decree and the wife at the present time has the sole care, custody and control of said child under said decree.

"The local Social Security office was informed by a state officer that this action could be maintained and the mother and child, who are at the present time receiving compensation under the ADC program, could be withdrawn from the rolls by the Social Security Department. The mother would not cooperate in any action taken.

"In considering Section 4420 as amended and in examination of the cases thereunder, a grave doubt

is raised in my mind as to whether or not under the circumstances as related above it could be said that the father had either failed or refused to contribute to the maintenance of the child 'without good cause.'

"Since it is quite evident that the Social Security office intends to place the burden of a decision in this matter directly on the shoulders of the different prosecuting attorneys in the State I would appreciate an opinion from your office as to the applicability of the criminal statutes to a situation of this kind, and an opinion of your office as to whether or not the provisions of the above section could be enforced under the circumstances as above outlined."

The 64th General Assembly repealed Section 4420 and enacted in lieu thereof Section 4420 in House Bill No. 117, which became effective on September 10, 1947, and reads:

"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." (Underscoring ours).

The foregoing enactment practically follows Section 4420, R. S. Mo. 1939, with the following exception, that the 64th General Assembly added that portion that is underscored. So it is not difficult to determine just what the 64th General Assembly was attempting to do when it repealed Section 4420, R. S. Mo. 1939 and enacted in lieu thereof Section 4420, supra. The purpose of the enactment was to place the burden on a father to support his minor children and it is no longer an excuse or a valid defense for the father to claim that some corporation, relative or other individual is adequately supporting his minor children and therefore he is relieved of that responsibility. We think it is no secret that the Division of Welfare in this state to a great extent was responsible for the enactment of Section 4420, supra, as passed by the 64th General Assembly. Too many time applications for aid to dependent children were filed and approved because, under the law in effect at that time, if a husband was not even living at home but merely separated from his wife and failed to support his minor children, the Division of Welfare could not reject the application for aid. As the law now reads, under the foregoing enactment, a father can no longer shift this responsibility upon the state or anyone else.

The facts stated in your request present a little different picture. In the instant case a divorce was granted and we assume that the wife instituted proceedings for said divorce. However, that is not of great importance except in rare instances. At any rate, the court granted the divorce and gave custody and control of a minor daughter to the wife. There was no mention in the decree of maintenance or support money for the minor child. The wife has filed an application for aid to dependent children and is now receiving such aid. Furthermore, the Division of Welfare is about to remove them from the roll and suggests that you commence prosecution under Section 4420 against the father for failing to support his minor child. You also mention the fact that the mother will not cooperate in such prosecution.

In view of the recent enactment by the 64th General Assembly, namely Section 4420, supra, we are of the opinion that it is definitely the duty and responsibility of the husband and father to support this minor child even though the court did not require him to support said child under the decree of divorce. In *Allen v. Allen*, 226 App. 822, l.c. 823, 47 S. W.(2d) 254, the court held that it was mandatory upon a court to make an order touching alimony and maintenance and so holding, said:

"The statute (sec. 1355) says that when divorce is adjudged, the court shall make such order touching the alimony and maintenance of the wife as from the circumstances shall be reasonable and proper; that the court may decree alimony pending the suit 'where the same would be just.' The plain terms of the statute evidence legislative intent that upon rendition of decree of divorce in favor of the wife, it is the mandatory duty of the court to make an order touching the alimony and maintenance of the wife. (*Griffith v. Griffith*, 180 S. W. 411; *Stark v. Stark*, 115 Mo. App. 436, 44.)"

Also see *Robinson v. Robinson*, 268 Mo. 703, 186 S. W. 1032, wherein the court held that the lower court, in granting a divorce, not only has authority but should make suitable provisions for support of any minor children. We are not familiar with the facts in this case at the time of the granting of the divorce. It is possible that at that time no provision for the support of this minor child was made because the mother was able to provide adequate support. Furthermore, it is possible that conditions are now different, if so, there is nothing to prevent the mother requesting the court to modify its decree and provide for maintenance and support for said minor child. In *Kelly v. Kelly*, 329 Mo. 992, l.c. 999, the court said:

"The divorce statutes of this state and other states generally (9 R. C. L. 484, sec. 299; 19 C. J. 341) provide that the divorce court shall, when a divorce is granted, make such orders touching the care, custody and maintenance of the minor children as is reasonable, and may, on application of either party make such alterations thereof as may be proper from time to time (Sec. 1355, R. S. Mo. 1929), and may review any order or judgment in that respect (Sec. 1361, R. S. 1929).

This statutory remedy inheres in the court granting the divorce and gives it a continuing power and jurisdiction to enforce in favor of the wife the husband's duty to support his minor children. It is now the settled law that this remedy by ancillary procedure in the divorce case and court is available to the divorced wife in all cases, whether the divorce court at the time of granting the decree exercised its power in this respect or not, or exercised it in part only by awarding the custody of the children to the wife but without any provision for their support. (Robinson v. Robinson, 268 Mo. 703, 709; Laumeier v. Laumeier, 308 Mo. 201; Shannon v. Shannon, 97 Mo. App. 119; Robinson v. Robinson, 168 Mo. App. 639, affirmed in 268 Mo. 703; 14 Cyc. 811; 19 C. J. 352, 357, citing Missouri cases, and 359.)"

All the decisions hold that the power of the circuit court to modify its orders touching on maintenance of minor children only ceases upon the children reaching majority. (See Kelly v. Kelly, 329 Mo. 992, 47 S. W.(2d) 762; Thornton v. Thornton, 221 Mo. App. 1199, 2 S. W.(2d) 821.) The law is well established in this state that notwithstanding the fact the court in a divorce action awards to the wife custody of any minor children with no provision made for their support the duty remains with the father to support said minor child. In Keller v. St. Louis 152 Mo. 596, l. c. 601, a suit was brought for damages for injury to a minor child. The suit was instituted by the mother. At that time the father was living but the father and mother were divorced and the court had given the custody of said minor child to the wife. The sole question presented in the case was whether the wife could maintain said action. The court after a very thorough discussion, said at l. c. 601:

"It follows then, that as the duty of supporting the child was not transferred by the decree to the mother, it still remained with the father--and as the right to the services of the child rests upon the duty to support, the right of action in this case is in him, and not in the plaintiff, and can not be maintained by her. The judgment of the circuit court will therefore have to be, and is reversed."

Also in Kelly v. Kelly, supra, l.c. 998, will be found another well-reasoned decision wherein the court finally said:

"We find that practically all the case law and text writers agree that in case a divorce is granted to the parents and the custody of the minor children is awarded to the wife with no provision made in the decree for their support, the duty and obligation of the husband and father to support his minor children remains as at common law, although he is deprived of their custody. (19 C.J. 354; Biffle v. Pullam, 114 Mo. 50, 54; Keller v. St. Louis, 152 Mo. 496; Bennett v. Robinson, 180 Mo. App. 56; Viertel v. Viertel, 212 Mo. 562, 576; Meyers v. Meyers, 91 Mo. App. 151, 155; Gallion v. McIntosh, 8 S. W.(2d) 1076; Robinson v. Robinson, 268 Mo. 703, 709; Lukowski v. Lukowski, 108 Mo. App. 204, 209; La Rue v. Kempf, 186 Mo. App. 57, 66; Seely v. Seely, 116 Mo. App. 362; Robinson v. Robinson, 168 Mo. App. 639, 644; Winner v. Chucart, 202 Mo. App. 176.)"

"In Biffle v. Pullam, 114 Mo. 50, 54, this court said: 'In case of a divorce in which the custody of the children is awarded to the wife, and provision is not made for their support out of the property of the husband, he still remains liable for their support. (2 Bishop's New Work on Marriage, Divorce & Separation, secs. 1210, 1221, 1222 and 1223.)'"

In view of the foregoing statutory provisions and decisions, certainly the husband is not relieved of supporting his minor children. This is true even if the court granting the divorce decree failed to provide for maintenance and support of such minor children, it is his duty to support said children at all times until they reach majority.

We believe, under the facts stated in your request, that for failure to support his minor daughter the father is subject to prosecution under Section 4420, supra, enacted by the 64th General Assembly. It is no excuse that aid for dependent children is now being furnished said minor child or that any other corporation or individual may be assisting in the support of such minor child. Similar situations have arisen in several counties, and

on numerous occasions the prosecuting attorneys, upon conferring with the father, informing him of the law and his duty under said law, have been able to correct such conditions. The mere fact that the wife is unwilling to cooperate in such prosecution will not, in our opinion, prevent prosecution, providing you can obtain sufficient evidence to support said prosecution. We believe that you can probably obtain other evidence to justify prosecuting this father, such as the testimony of the social workers who visited the home and who have first-hand information as to the financial status surrounding this case, the written application filed by the mother for aid to dependent children and possibly evidence introduced by the written application filed by the mother for aid to dependent children, and possibly others in the neighborhood familiar with such conditions. Of course, the sufficiency of the evidence to support such a charge is a matter for your determination.

CONCLUSION

We are of the opinion that the father of this minor child, under facts stated in your request, is responsible under the law for her support, this is true even though she may be receiving some support from other sources and for failure to support such child he is liable to prosecution under Section 4420, supra. Provided, of course, that you can obtain sufficient evidence that he is not supporting said child. We believe this is possible because the social workers who have visited in the home should have information as to the financial conditions and income in the home as well as the application for aid to dependent children which may disclose important facts relating thereto. There is a possibility that you may obtain information of other persons having such knowledge.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

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