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Divorce--Financial Inability to Meet Maintenance Order--Husband's Default as Affecting Right to a Hearing to Modify Future Installments

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instead leaves him as free as at common law to refuse service to any person at his own whim.

The majority opinion of the Court accepted neither of these views, ignored the Delaware statute, and proceeded to decide the broader questions of constitutional law set forth in the first part of this comment. It is a policy of the Supreme Court that when a case can be decided on either of two grounds, one involving a constitutional question and the other a question of statutory interpretation, the Court will decide only the latter.[17] In view of the possibility that Justice Stewart may have been correct in the interpretation of the state court's actions, the appropriate procedure would seem to have been to require the Delaware Supreme Court to state more clearly its construction of the Delaware statute. This could possibly have resulted in avoidance of the broader issues determined by the majority opinion in the *Burton* case.

Robert Lawson

DIVORCE—FINANCIAL INABILITY TO MEET MAINTENANCE ORDER—HUSBAND'S DEFAULT AS AFFECTING RIGHT TO A HEARING TO MODIFY FUTURE INSTALLMENTS—The trial court granted the wife an absolute divorce, custody of a minor child and maintenance money. The husband filed for a modification of that part of the judgment relating to maintenance, alleging financial inability. The order over-ruling the motion provided that the husband, who subsequently defaulted, purge himself of contempt by paying arrearages. On appeal, the contention was that the trial court erred in summarily dismissing the husband's petition to modify the judgment without first hearing proof of changed financial conditions. *Held:* Reversed. Where the husband was not in contempt of court at the time of filing an amended petition to modify a maintenance order, although he might have become delinquent before the hearing was held, he should have been afforded a hearing with the opportunity to adduce evidence on the question of financial ability. *Knight v. Knight,* 341 S.W.2d 59 (Ky. 1960).

The Court in this case recognized the not infrequent need for revision of decrees and orders issued in divorce proceedings. This comment, in accordance with the principal case, advocates a rule allowing a hearing to modify maintenance orders as to future install-

[17] See Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936).

ments,[1] even where the petitioner is in default at the time his petition is filed.

An order for maintenance or child support is an open-end judgment. That is, the order is always subject to modification when the need arises,[2] since the court's jurisdiction over the child is a continuing one. Allowance of money for the support of children "is subject to the control of the chancellor. . . ."[3] An indication of the right to a hearing is found in the court's interpretation of Ky. Rev. Stat. § 403.070,[4] which provides that after a final judgment a court may hear evidence of changed conditions and revise maintenance orders, if necessary. Further indication of such a right is found in an early Kentucky case which allowed modification without using the statute as a basis on which to grant the hearing.[5] Because it is important to allow hearings to modify, courts retain divorce cases on the docket, or if taken off the docket, redocket them for the purpose of changing orders as to children.[6] Many states have statutes expressly providing for hearings to modify such orders.[7]

In conjunction with the right to have hearings to modify support orders arises the problem of limitations. Reasonably, a man who was

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[1] That a petitioner is entitled to a hearing to modify past due installments is not suggested here. The general rule adopted in the majority of American jurisdictions places these installments beyond the courts' modifying power because such installment payments for alimony or maintenance become vested when due. Annots., 94 A.L.R. 331, 332 (1935), 6 A.L.R.2d 1277, 1284 (1949). The justification urged for the minority rule is that suits for maintenance are equitable and the court has the authority to apply equitable principles, even as to past due installments. Franklin v. Franklin, 171 F.2d 12 (D.C. Cir. 1948). 2 Vand. L. Rev. 475 (1949). Kentucky follows the general rule. Whitby v. Whitby, 306 Ky. 355, 208 S.W.2d 68 (1948).

[2] Grounds for modification of maintenance or support orders usually appear in the form of changed conditions, financially or physically, of the divorced father, or in the increased financial needs of the child.

[3] Ball v. Ball, 206 Ky. 532, 267 S.W. 1081 (1925).

[4] Knight v. Knight, 341 S.W.2d 59, 60 (Ky. 1960). Ky. Rev. Stat. § 403.070 (1960) [hereinafter cited as KRS] provides: "At any time . . . [after final judgment], upon the petition of either parent, the court may revise any of its orders as to the children, having principally in view in all such cases the interest and welfare of the children." See Spencer v. Spencer, 312 S.W.2d 360 (Ky. 1958); Beutel v. Beutel, 305 Ky. 683, 205 S.W.2d 489 (1947).

It should be noted that KRS 403.070 appears to be directed toward the jurisdiction of a court, not vesting a "right" in the husband to a hearing.

[5] Davis' Adm'r v. Cincinnati, N. O. & T. P. Ry. Co., 172 Ky. 55, 188 S.W. 1061 (1916).

[6] Middleton v. Middleton, 218 Ky. 398, 291 S.W. 359 (1927). Such power to redocket and modify is not limited to the term at which the judgment is entered. Hatcher v. Hatcher, 312 Ky. 568, 228 S.W.2d 461 (1950). Even agreements between the parents concerning maintenance of children which have been incorporated into the divorce judgment cannot deprive a court of jurisdiction to modify such a judgment as to children. Bishop v. Bishop, 238 Ky. 702, 38 S.W.2d 657 (1931).

[7] See 2 Vernier, American Family Laws § 95, Table LII (1932, Supp. 1938). Annot., 6 A.L.R.2d 1277, 1288 (1949).

not in default at the time he filed his petition should be entitled to a hearing as to future installments notwithstanding any default during the prolonged pendency of the petition. The decision in the principal case is limited to this exact situation. But what as to the husband who was in default at the time of filing the petition for a modification hearing? This is the question the court in the *Knight* case attempted to answer, stating:

> In conclusion we summarize (1) that at the time the petition for modification was filed appellant was not in default and (2) even if he was in default, he is entitled to produce evidence, if any he has, to show that he is unable to meet the requirements of the decree.[8]

Statement (2) is dictum, and with this dictum the court expressly purported to overrule two earlier Kentucky cases which required one to purge himself of contempt before being granted a hearing.[9] The first, *Campbell v. Campbell*,[10] involved a judgment for child support which the husband did not pay. The divorced mother caused execution to issue on the judgment and the husband filed a petition seeking an injunction against the sheriff to prevent levy of execution. In the *Campbell* case it was held that a party was in contempt of court in not complying with its orders and such party was not entitled to be heard until he should be purged of contempt.[11] In the second case, *Whitby v. Whitby*, the court stated that "the judgment debtor must pay all past due installments, thus purging himself of contempt, before the court will entertain a motion to modify the judgment in respect to future installments."[12] These cases did not squarely meet the issue facing the court in the principal case. The right to a hearing was, in both instances, only a collateral issue. The *Whitby* case can be distinguished further from the principal case: in the former the husband was able to meet the judgment and in the latter, the order was allegedly impossible to meet.

The justification for allowing a hearing to modify is found in the word "impossible." Default in good faith indicates a need for revision as to future installments. When a petitioner pleads inability, as did the husband in the principal case, and such inability is not in bad faith,[13]

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[8] Knight v. Knight, 341 S.W.2d 59, 62 (1960).

[9] "The parts of the opinions in the Campbell and Whitby cases which indicate that a party is not entitled to a hearing in court until he has purged himself of contempt by reason of failure to make installment payments are overruled." *Ibid.*

[10] 223 Ky. 836, 4 S.W.2d 1112 (1928).

[11] *Id.* at 838, 4 S.W.2d at 1113.

[12] 306 Ky. 355, 357, 208 S.W.2d 68, 69 (1948).

[13] "To have purged himself of contempt for his failure to comply with the court's orders he must have made it clearly appear, not only that he was unable

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the court should recognize the reasonableness in allowing a hearing to modify. A modification here would arrest the default at an early stage in the installments, thereby preventing an accumulation of debt impossible to pay. To require a petitioner to purge himself of contempt is unrealistic when his reason for non-compliance is as valid at the time of application as it would be at a later date when he had purged to the satisfaction of the court. A court should grant a hearing concerning the modification of future installments when the petitioner pleads inability or impossibility, regardless of the time of default.

There are several courses of action open to the courts: they may ignore completely the fact that petitioner is in default; they may base granting the hearing on mere default as opposed to contempt;[14] they may grant a hearing and make relief conditional upon the payment of past due installments;[15] or they may continue to require purgation. A court would not abuse its discretionary power if it granted a hearing concerning the modification of future installments where the petitioner satisfactorily shows inability to comply with the order.[16] To require a petitioner to "purge" himself before filing a petition to modify would in effect hold him in contempt without allowing him the chance to prove his good faith.[17]

While the court in the *Knight* case does not hold that the petitioner is entitled to a hearing without purgation, its utterance by way of dictum will probably have the same effect.

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to comply therewith, but also that his inability was not caused by his own neglect or misconduct." Hembree v. Hembree, 208 Ky. 658, 271 S.W. 1100, 1101 (1925). See also Roper v. Roper, 242 Ky. 658, 47 S.W.2d 517 (1932)(dictum).

[14] Courts could allow a hearing where the petitioner is merely in default unintentionally, and refuse such where the petitioner has been adjudged in contempt for intentional failure to pay installments. This method would require a consistent application of the meanings of "default" and "contempt" to the facts of each case. Annots., 6 A.L.R.2d 835, 837, 845 (1949).

[15] This is perhaps the most practical solution. By granting the hearing an accumulation of debt would be prevented. The conditional nature of the relief would protect the divorced mother and the child. See Ryerson v. Ryerson, 194 Minn. 350, 260 N.W. 530 (1935), where the court granted modification and suspended a sentence of contempt on condition that the divorced father would pay the past due installments. See also Brummer v. Brummer, 6 N.J. Super. 401, 69 A.2d 38 (1949), where the court made reconsideration of the petition to modify an alimony order conditional upon payment of past due installments. Annot., 6 A.L.R.2d 835, 839 (1949).

[16] "The trial court is vested with broad discretion in matters of this kind and this Court will not interfere unless that discretion is abused." Somerville v. Somerville, 339 S.W.2d 940 (Ky. 1960).

[17] Williams v. Williams, 12 N.J. Misc. 641, 174 Atl. 423 (1934).