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Lack of Due Process in Virginia Contempt Proceeding For Failure to Comply With Order For Support and Alimony

LACK OF DUE PROCESS IN VIRGINIA CONTEMPT PROCEEDING FOR FAILURE TO COMPLY WITH ORDER FOR SUPPORT AND ALIMONY

At common law a husband had a legal duty[1] to support his wife and children.[2] Today in Virginia failure to support one's family is not simply a violation of a legal duty, it is a criminal act,[3] carrying a penalty of up to twelve months at hard labor for the delinquent husband.[4] The wife, however, without resorting to this criminal action, can effectuate the same result in a civil proceeding before a divorce court.[5]

Generally, in a proceeding for divorce in Virginia, the wife includes in her petition a prayer for support and alimony.[6] The court issues the requested order[7] and retains jurisdiction over the parties.[8] Upon the husband's failure to comply with the court order, the court is given the

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[1] The language "legal duty" used for nonsupport actions connotes a higher degree of obligation than the phrase "legal obligation". *See* Noyes v. Hubbard, 64 Vt. 302, 23 A. 727 (1892). This is one of the early legal fictions surrounding alimony and support and it allowed the court to imprison the husband for his failure to comply with a duty rather than his non-payment of a debt.

[2] Eaton v. Davis, 176 Va. 330, 338, 10 S.E.2d 893, 897 (1940).

[3] VA. CODE ANN. § 20-61 (Cum. Supp. 1968). Nonsupport is like any other criminal proceeding in that anyone may institute the prosecution. Institution is usually by the wife, but not limited to her. After the petition is filed by the interested party, the state takes over the prosecution. *See* VA. CODE ANN. § 20-64 (1960).

[4] VA. CODE ANN. § 20-61 (Cum. Supp. 1968).

[5] The divorce court has the power to include in its decree for divorce an order for support and alimony. VA. CODE ANN. § 20-107 (Cum. Supp. 1968). If a previous nonsupport verdict under § 20-61 has been rendered against the present defendant, such verdict shall be vacated upon the inclusion in the divorce decree of an order for support and alimony. VA. CODE ANN. § 20-79 (a) (1960). The language of § 20-79(a) indicates that the existence of the two "verdicts" would be double jeopardy. This clearly shows the equality of the two results. The divorce court also has the power to punish under § 20-61 upon conviction of contempt of the court's support order. VA. CODE ANN. § 20-115 (1960).

[6] Divorce suits are instituted just as any other suit in equity—by bill of complaint. VA. CODE ANN. § 20-99 (Cum. Supp. 1968). However, it should be noted that the specific request for alimony is not necessary. The court can award alimony under its general power granted in VA. CODE ANN. § 20-107 (1960).

[7] VA. CODE ANN. § 20-107 (1960).

[8] *Id.* at § 20-108. *See* Gloth v. Gloth, 154 Va. 511, 153 S.E. 879 (1930) (divorce *a mense et thoro*); Eaton v. Davis, 176 Va. 330, 10 S.E.2d 893 (1940), (divorce *a vinculo*).

power[9] to "convict" [10] him of contempt and punish him accordingly,[11] or sentence him to hard labor under the nonsupport statute,[12] but in no event shall the imprisonment exceed twelve months.[13] It is the purpose of this comment to show the inherently criminal nature and the resulting failure of due process of this Virginia divorce procedure where the court has included an order for support and alimony.

Clearly the divorce court's use of the contempt conviction to punish the husband has criminal results.[14] But to determine the inherently criminal nature of the Virginia divorce proceeding as is relevant to due process, it is essential to study the logic behind several recent decisions of the Supreme Court of the United States, requiring procedural safeguards in juvenile proceedings,[15] and the right to a jury trial for serious misdemeanors[16] and criminal contempts.[17] In each of these decisions,

[9] VA. CODE ANN. § 20-113 (Cum. Supp. 1968) provides: "The court, when it finds the respondent has failed to perform the order of the court concerning the support of the child or payment of alimony . . . may proceed to deal with the respondent as provided in . . . § 20-115. . . ." VA. CODE ANN. § 20-115 (1960) provides: "[U]pon conviction of contempt of court in failing or refusing to comply with any order or decree for support, maintenance and alimony. . . ."

[10] VA. CODE ANN. § 20-115 (1960). The word "convicted" connotes a criminal prosecution.

[11] VA. CODE ANN. §§ 18.1-292 to 18.1-295 (1960). Note that § 18.1-293 limits the punishment that can be issued by courts not of record to ten days. Thus a Juvenile and Domestic Relations Court must proceed under § 20-61 in order for a twelve-month sentence to be legal.

[12] VA. CODE ANN. § 20-61 (Cum. Supp. 1968). *See* note 13 *infra.*

[13] VA. CODE ANN. § 20-115 (1960) provides: ". . . Upon conviction of any party for contempt of court in failing or refusing to comply with any order or decree for support, maintenance or alimony, the court *may* commit and sentence such party to a work house, city farm or work squad, or the state convict road force, at hard labor, as provided for in §§ 20-61 and 20-62, for a fixed or indeterminate period or until the further order of the court, in no event however for more than twelve months. . . ." (emphasis added).

[14] The language used in § 20-115, "upon conviction of any party for contempt of court in failing or refusing to comply with an order or decree . . .," is clearly the language of the criminal contempt statute [§ 18.1-292(5)]. If the court sentences the husband under the contempt statute, the punishment is clearly criminal in that it is "to vindicate the dignity of the court." Local 333B, United Marine Div. v. Com., 193 Va. 773, 71 S.E. 2d 159 (1952).

If the court, instead of sentencing the husband to prison, may under § 20-115 sentence him to hard labor under § 20-61 (the criminal nonsupport statute), the punishment is also criminal.

[15] *See In Re* Gault, 387 U.S. 1 (1967).

[16] *See* Duncan v. Louisiana, 391 U.S. 145 (1968).

[17] *See* Dyke v. Taylor Implement Co., 391 U.S. 216 (1968); Bloom v. Illinois, 391 U.S. 194 (1968).

the Supreme Court looked not at the type of proceeding instituted, but at the possible term of commitment to determine the procedural rights to which the defendant was entitled.[18] In essence, the Supreme Court refused to find a justification for procedural laxity in statutory[19] and socio-legal[20] labels. Applying this "term of commitment" test to the Virginia divorce proceedings, it becomes obvious that the proceeding is of such a fundamentally criminal nature as to require the appropriate due process guarantees afforded in a criminal contempt prosecution.[21]

In analyzing numerous Virginia divorce cases, it becomes a matter of conjecture as to whether the defendant is being punished civilly or criminally.[22] It appears that the Virginia Supreme Court of Appeals

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[18] The procedural safeguards outlined in *Gault* are only effective when the juvenile has a possibility of commitment. *In Re* Gault, 387 U.S. 1 (1967). In *Duncan*, the court noted that a defendant was entitled to a jury trial in his prosecution for a misdemeanor, where the possible term of commitment was two years. Duncan v. Louisiana, 391 U.S. 145 (1968). In *Dyke*, the court said that for criminal contempt, where there is a possibility of being sentenced for a term of more than six months, a jury trial is required. Dyke v. Taylor Implement Co., 391 U.S. 216 (1968). *Bloom* varies slightly from *Dyke* in that *Dyke* involved contempt under a statute which had a fixed maximum sentence, whereas in *Bloom* there was no maximum. The court in *Bloom* said that if the defendant is actually sentenced to more than six months in jail, he is entitled to a jury trial. Bloom v. Illinois, 391 U.S. 194 (1968). The rationale behind all of these decisions is that when a human being may have his freedom restricted, he is entitled to certain procedural safeguards.

[19] The term "misdemeanor" in *Duncan* was meaningless because the defendant was sentenced to two years in jail.

[20] The term *parens patriae* should not serve to deprive a juvenile of his fundamental constitutional rights.

[21] (A) Reasonable notice and opportunity to be heard (only applies to contempt not in face of the court). Cook v. United States, 267 U.S. 517, 537 (1925).

(B) Confrontation of witnesses and right to be represented by counsel. *In Re* Oliver, 333 U.S. 257, 273 (1948).

(C) Presumption of innocence. United States v. Fleischman, 399 U.S. 349, 363 (1950).

(D) Right to envoke the privilege against self incrimination. Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 444 (1911).

(E) Proof beyond a reasonable doubt. Michaelson v. United States, 266 U.S. 42, 66 (1924).

(F) Right not to be subjected to double jeopardy. *In Re* Bradley, 318 U.S. 50, 51-52 (1943).

(G) Right to a trial by jury where there is a possibility of a maximum sentence in excess of six months. Dyke v. Taylor Implement Co., 391 U.S. 216 (1968).

Although the Virginia contempt statute sets out no maximum punishment, the punishment for contempt of an alimony decree is limited in § 20-115 to a maximum of twelve months, which satisfies the *Dyke* requirement.

[22] "The imprisonment is not ordered simply to enforce the payment of the money,

has placed primary emphasis on the traditional criminal contempt power of equity to punish for "disobedience of the court order," [23] but the court never fails to add that in sentencing the husband, the divorce court is enforcing a legal right between the parties,[24] which is the traditional function of civil contempt.[25] This two-pronged argument, so deeply imbedded in Virginia case law,[26] has its foundation in historical precedent and stare decisis rather than sound judicial logic.

The Virginia General Assembly by statute has set out the elements of criminal contempt, giving the courts summary power of enforcement.[27] Clearly the "conviction of contempt of court in failing or refusing to comply with any order or decree for support, maintenance and alimony" is an element under the Virginia criminal contempt statute.[28] Therefore, under no circumstances should the husband's punishment for failure to obey the support decree be considered civil contempt.

The second prong of the argument so often used by the Virginia

but to punish for the wilful disobedience of a proper order of a court of competent jurisdiction." West v. West, 126 Va. 696, 699, 101 S.E. 876, 877 (1920). Clearly this is criminal contempt. *See* VA. CODE ANN. § 18.1-292 (1960).

In a later case the court used the above language in answer to defendant's defense of imprisonment for a debt. Edden v. Edden, 188 Va. 511, 516, 50 S.E. 2d 397, 400 (1948). Then later in the same opinion the court answered the defendant's defense of the statute of limitations on misdemeanors as follows: "Clearly the statute has no application to the present proceeding, for it is not a criminal prosecution. . . . The purpose of the present proceeding is to enforce the rights of a private party, the appellee wife, and is, therefore a civil and not a criminal contempt proceeding." *Id.* at 523, 50 S.E. 2d at 403. Clearly *West* is criminal contempt. How can a court in one paragraph say a proceeding is criminal, and in the next paragraph say it is to enforce the rights of the parties—that is, civil contempt?

In another case the Virginia court offered an interesting compromise by saying: "While the proceedings for contempt is [sic] *quasi* criminal, and the guilt of the defendant must be shown beyond a reasonable doubt. . . ." Branch v. Branch, 144 Va. 244, 249, 132 S.E. 303, 305 (1926).

See also Lindsey v. Lindsey, 158 Va. 647, 652, 164 S.E. 551, 553 (1932); Eaton v. Davis, 176 Va. 330, 338, 10 S.E. 2d 893, 897 (1940).

[23] This is by way of construing the following language from the leading Virginia case on point: "The imprisonment is . . . to punish for the willful disobedience of a proper order of a court of competent jurisdiction." West v. West, 126 Va. 696, 699, 101 S.E. 876, 877 (1920). *See also* VA. CODE ANN. § 18.1-292 (5) (1960).

[24] *See* cases cited note 22 *supra.*

[25] *See* Local 333B, United Marine Div. v. Com., 193 Va. 773, 71 S.E. 2d 159 (1952).

[26] *See* cases cited note 21 *supra.*

[27] VA. CODE ANN. § 18.1-292 (5) (1960).

[28] *Compare* VA. CODE ANN. § 20-115 (1960) *and* the language of *West*, ". . . to punish for the wilful disobedience of a proper order of a court . . .", *with* VA. CODE ANN. § 18.1-292 (5) (1960).

divorce courts in justifying their sentencing procedure is that in sending the husband to jail, they are merely enforcing the rights of the party litigants.[29] To strengthen this argument, the Virginia courts maintain that the husband has a legal duty to support his family, and it is within the power of the divorce courts to enforce this duty by contempt proceedings.[30] Unfortunately, this argument is no longer tenable. Failure to support one's family in Virginia today is a crime;[31] it is no longer merely a legal duty.[32] Therefore, the divorce courts are not merely enforcing the rights of the party litigants; they are punishing the husband for a crime against the state, as well as coercing him into paying support money. The legal duty owed by the husband carries criminal sanctions; therefore, the duty is not simply one of civil liability, but by statute has become a form of criminal responsibility.[33] What this means to the husband who fails to support his family is that he can be sentenced up to twelve months at hard labor in a "purely" civil proceeding, without rights constitutionally guaranteed him in the ordinary criminal contempt prosecution.[34]

To rectify this situation, the divorce court has an alternative—to give the husband the applicable constitutional guarantee of due process that he would be entitled to in a criminal contempt prosecution,[35] or to keep the proceeding entirely civil by imprisoning him until he obeys the decree.[36] In the latter, by giving him the keys to his own cell,[37]

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[29] *See* cases cited note 22 *supra.*

[30] *Id.*

[31] VA. CODE ANN. § 20-61 (Cum. Supp. 1968).

[32] *See* Eaton v. Davis, 176 Va. 330, 10 S.E. 2d 893 (1940). *Compare Eaton with* VA. CODE ANN. § 20-61 (Cum. Supp. 1968).

[33] To make a comparison between assault and battery and a nonsupport proceeding may at first appear ridiculous, but it is not. If *X* strikes *Y*, he is subject to a criminal prosecution as well as civil liability. Yet if *Y* proceeds against *X* in tort for battery and is given a judgment against *X*, *X* will not be imprisoned for his failure to pay. On the other hand, if *H* and *W* are husband and wife, and *W* institutes a divorce proceeding against *H* and receives a decree or order for support, *H* can be sentenced to twelve months in jail or at hard labor for failure to pay the ordered support.

[34] *See* cases cited note 21 *supra.*

[35] *Id.*

[36] A provisional sentence makes the contempt civil. *In Re* Nevitt, 117 F. 448, 461 (8th Cir. 1902). *Nevitt* was upheld in Shillitani v. United States, 384 U.S. 364 (1966). *Shillitani* added that the provisional sentence alone makes the contempt civil, but a condition precedent to the court's ability to hold the defendant in prison is that there must be in existence during the imprisonment a method by which the contemnor may purge himself.

It should be noted that a recent California case considered the possible application of *Duncan, Dyke* and *Bloom* to civil contempt. Pacific Telephone and Telegraph Co.

the divorce court can properly sentence for civil contempt and still maintain respect for its decrees.

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v. Superior Court, 72 Cal. Rptr. 177 (Cal. Ct. App. 1968). The court held that they were not applicable because civil contempt is a "petty offense" not requiring a jury trial within the meaning of *Duncan, Dyke* and *Bloom. Id.* at 179. California, however, has a contempt statute, like Virginia's, set out in its Code of Civil Procedure, not its Penal Code.

[87] *See In Re* Nevitt, 117 F. 448 (8th Cir. 1902); Shillanti v. United States, 384 U.S. 364 (1965).