

VII. ENFORCEMENT OF ALIMONY

A divorce court has authority to enforce its decree by equitable and legal means. Divorce and separate maintenance are considered to be “in the nature of Chancery suits.” Richmond v. Richmond, 18 Tenn. 342 (1837).

In Tennessee courts in divorce and support proceedings sit as courts of equity. Hoyle v. Wilson, 746 S. W. 2d 665, 671 (Tenn. 1988) citing Kizar v. Bellar, 241 S. W. 2d 561 (1951) and Mayer v. Mayer, 532 S. W. 2d 54, 58 (Tenn. App. 1975).

The Tennessee, Supreme Court has held that “divorce proceedings are tried according to the forms of Chancery and for all intent are Chancery proceedings.” Ballard v. Ballard, 455 S.W. 2d 592, 593 (Tenn. 1970).

In Jones v. Jones, 486 S. W. 2d 927 (1972) the Court of Civil Appeal at page 931 stated:

The original proceeding is one of divorce, as such, it and all subsequent proceedings thereunder are inherently equitable in nature even though the matter is tried in Circuit Court, it is yet a Chancery matter. In hearing matters of this nature, the Circuit Judge is clothed with all the powers of a Chancellor and the matter is tried as a Chancery matter and governed by the rules of the Equity Court. Broch v. Broch, 1932 164 Tenn. 219, 47 S.W. 2d 84; Kizer v. Bellar, (1951) 192 Tenn. 540, 241 S.W. 2d 561.

Some relevant statutory provisions are as follows:

T.C.A. § 36-5-121(a) **Decree for Support of Spouse** - In any action for divorce, legal separation or separate maintenance, the court may award alimony to be paid by one spouse to or for the benefit of the other, or out of either spouse's property, according to the nature of the case and the circumstances of the parties. The court may fix some definite amount or amounts to be paid in monthly, semimonthly or weekly installments, or otherwise, as the circumstances may warrant. Such award, if not paid, may be enforced by any appropriate process of the court having jurisdiction including levy of execution. Further, the order or decree shall remain in the court's jurisdiction and control, and, upon application of either party, the court may award an increase or decrease or other modification of the award based upon a showing of a substantial and material change of circumstances; provided, that the award is subject to modification by the court based on the type of alimony awarded, the terms of the court's decree or the terms of the parties' agreement.

T.C.A. § 36-5-102. **Portion of spouse's estate decreed to spouse entitled to alimony or support – Maintenance of minor custodial parent** - In cases where the court orders alimony or child support in accordance with § 36-5-101 and 36-5-121, the court may decree to the spouse who is entitled to such alimony or child

support such part of the other spouse's real and personal estate as it may think proper. In doing so, the court may have reference and look to the property that either spouse received by the other at the time of the marriage, or afterwards, as well as to the separate property secured to either by marriage contract or otherwise.

T.C.A. § 36-5-103. **Enforcement of decree for alimony and support** – (a)(1) In addition to the remedies in part 5 of this chapter, the court shall enforce its orders and decrees by requiring the obligor to post a bond or give sufficient personal surety under § 36-5-101(f)(2) to secure past, present and future support, unless the court finds that the payment record of the obligor parent, the availability of other remedies and other relevant factors make the bond or surety unnecessary.

(2) The court may enforce its orders and decrees by sequestering the rents and profits of the real estate of the obligor against whom such order or decree was issued, if such obligor has any, and such obligor's personal estate and chooses in action, and by appointing a receiver thereof, and from time to time causing the same to be applied to the use of the obligee and the children, or by such other lawful means the court deems necessary to assure compliance with its orders, including, but not limited to, the imposition of a lien against the real and person property of the obligor.

Legal process of execution and garnishment may be utilized.

EXECUTION

After a money judgment is entered, it may be enforced by execution. T.C.A. § 26-1-103. Generally, the judgment needs to be final before execution but T.C.A. § 26-1-206(a) authorizes accelerated execution if the defendant is about to fraudulently dispose of, conceal or remove the defendant's property to endangering plaintiff's debts.

The writ of execution may be issued against non-exempt goods, chattels, lands and tenements of the judgment debtor. T.C.A. § 26-2-102 et seq. and § 26-2-301, et seq. set forth exemptions to executions.

Tennessee Rules of Civil Procedure Number 69 provides that the process to enforce a judgment for the payment of money shall be a writ of execution in aid of the judgment or execution, the judgment creditor or successor in interest may take discovery of any person in any manner provided by rules or statutes. T.R.Civ.P. 69.

Monies received by a Tennessee resident from the State of Tennessee, or any subdivision or municipality of Tennessee as pension is exempt from execution, attachment or garnishment other than an order for assignment of support issued under

T.C.A. § 36-5-501. If a case is being enforced under Title IV-D, income assignment may issue against Tennessee Public Pension.

GARNISHMENT

Garnishment proceedings are purely statutory. General Truck Sales v. Simmons, 343 S.W.2d 884 (1961). Statutes creating the proceeding and giving it direction are found at T.C.A. § 26-2-201, et seq. The statutes provide that all property, debts, and effects of the defendant in the possession of the garnishee or under control of the garnishee are liable to satisfy the plaintiff's judgment. T.C.A. § 26-2-201. Property, debt, and effects include real estate, choses in action, judgments and money or stocks in the incorporated company. T.C.A. § 26-2-201.

Under T.C.A. § 26-2-204 the garnishee may be required to answer under oath statutory enumerated questions and such other questions put to the garnishee by the court of the judgment creditor.

T.C.A. § 26-2-216 provides a formula for the calculation of the amount to be withheld on a wage garnishment for alimony, child support and other debts.

Equitable enforcement includes the following:

INJUNCTION

Tennessee Rules of Civil Procedure Number 65.07 provides exception in handling domestic relation cases. Restraining order or injunction "may be issued upon such terms and conditions and remain in force for such time as shall seem just and proper to the judge to whom application therefore is made, and the provisions of this rule shall be followed only insofar as deemed appropriate by such judge."

In enforcing decrees for alimony probably the most frequently entered injunction restrains the defendant from transferring, mortgaging, removing or disposing of property. An injunction to perform may be used to enforce decrees of the court. Inman, Gibson's Suits in Chancery, 7th Ed 1988 § 301. William H. Inman in a footnote in Gibson's § 305 states, "The preferred practice is to incorporate the injunction in the decree."

SEQUESTRATION

T.C.A. § 21-1-801 **Sequestration** - If the Court sees proper in the first instance, or if upon issuance of the attachment, the delinquent cannot be found, a writ of sequestration may issue against the estate of such delinquent, to compel obedience to the decree.

For information on sequestration and powers and duties of sequestration See, §§ 311, 312, 313 of Gibson's Suits in Chancery, Seventh Edition 1988.

RECEIVER

T.C.A. § 29-1-103 **Receiver pending litigation** – The courts are all vested with power to appoint receivers for the safekeeping, collection, management, and disposition of property in litigation in such court, whenever necessary to the ends of substantial justice, in like manner as receivers are appointed by courts of Chancery.

If the obligor fails to pay alimony as ordered by the court and especially in actions for support where the land is charged with the support, a receiver may be appointed. (See, T.C.A. § 36-5-103).

SPECIFIC PERFORMANCE

Courts of Chancery have inherent power to enforce their orders and decrees and can exercise such powers against the person or property of the party in default. Lehman v. Lehman, LEXIS 2718 (Ct. App 1984) citing from Gibson's Suits in Chancery, 6th Edition.

CONTEMPT

Contempt of Court may be classified as direct or indirect. Direct contempt is based upon acts committed in the presence of the court and may be summarily addressed. Indirect contempt is based upon acts or omissions not committed in the presence of the Court and may be dealt with only after the accused has been given notice and an opportunity to respond to the charges at a hearing. Lecroy - Schemel v. Cupp, 2000 Tenn. App. LEXIS 525, Thomasson v. Thomasson, 755 S.W. 2d 779.

An act of contempt is a willful or intentional act that offends the court and its administration of justice. T.C.A. § 29-9-102, Graham v. Williamson, 164 S.W. 781, 782 (1914).

Contempt may be civil or criminal depending upon the action taken by the court to address the contempt.

A criminal contempt is punitive in nature, and the proceeding is “to vindicate the authority of the law and the court as an organ of society.” Shiflett v. State, 400 S.W. 2d 542, 543 (1966).

Rule 42(b) of the Tennessee Rules of Criminal Procedure requires that a criminal contempt be presented on notice, which “shall state the time and place of hearing, allowing a reasonable time for preparation of the defense and shall state the essential facts constituting the criminal contempt charged and describe it as such.” Tenn. R. Crim. Proc. 42(b).

Criminal contempts are crimes in the ordinary sense of the word and constitutional rights available to the accused of criminal acts are also available to persons charged with criminal contempt. Cottingham v. Cottingham, 193 S.W. 3d 531.

Hoyle v. Wilson, 984 S.W.2d 898 (Tenn. 1998) held that due process was not violated when a private attorney who represents the beneficiary of a Court order in a civil case prosecutes a criminal contempt action for a violation of that order.

The burden of proof in criminal contempt is proof beyond a reasonable doubt. Constitutional rights attach and defendant does not have to make testimony.

Civil contempt occurs when a person refuses or fails to comply with a court order and a contempt action is brought to enforce a private right. Black v. Blount, 938 S.W. 2d 394, 398 (Tenn. 1996), Howell v. Howell, 2006 Tenn. App. LEXIS 435.

Punishment for civil contempt is designed to coerce compliance with the Court’s order and is imposed at the insistence and for the benefit of the private party who has suffered a violation of his or her rights. Doe v. Bd. of Professional Responsibility of the Supreme Court of Tennessee, 104 S.W. 3d 465 (2003).

The burden of proof in a civil contempt case is by clear and convincing evidence. Inability to perform is an affirmative defense. The burden of proof is on the contemnor

to show inability to pay. Richmond v. Barksdale, 688 S.W. 2d 86 (1984), Kienlen v. Kienlen, 2007 Tenn. App. LEXIS 425.

After a finding of civil contempt, the Court has several remedies available depending on the facts of the case. The Court can sentence the contemnor to jail to compel performance of a court order. T.C.A. § 29-9-104(a). This remedy is available only when the individual has the ability to comply with the order at the time of the contempt hearing. T.C.A. § 29-9-101. Going v. Going, 256 S.W. 890, 899 (Tenn. 1923). T.C.A. § 36-5-103(c) provides in pertinent part that “the plaintiff spouse may recover from the other spouse reasonable attorney fees incurred in enforcing any decree for alimony....” In civil contempt attorney fees may be awarded. Clarkson v. Clarkson, 2007 Tenn. App. LEXIS 647.

In criminal contempt T.C.A. § 29-9-103 delineates the punishment. Award of attorney fees is not included in T.C.A. § 29-9-103. Attorney fees are generally not authorized in criminal contempt. Ashford v. Benjamin, LEXIS 785 (Ct. App. 1995) Butler v. Butler, LEXIS 749 (Ct. App. 1995).

USE OF QUALIFIED DOMESTIC RELATIONS ORDERS TO ENFORCE JUDGMENTS FOR ALIMONY ARREARAGE

The federal ERISA law permits assignment of a portion of an employee’s pension benefits to a spouse as child support, alimony payments, or marital property rights. Under ERISA, a Qualified Domestic Relations Order is defined as a “judgment, decree, or order (including approval of a property settlement agreement),” which “is made pursuant to a State Domestic Relations Order” that provides child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant. ERISA § 206(d)(3)(B).

A little known aspect of this statute is that it can be used to collect a judgment for alimony arrearage. In cases where there are retirement funds available, a party may request that the court enter a Qualified Domestic Relations Order to award the aggrieved party a portion of the retirement funds sufficient to satisfy all or a portion of the arrearage.

Qualified Domestic Relations Orders can be used to access qualified pensions, profitsharing, stock bonus plans and church plans that elect to be covered under the minimum participation rules. ERISA permits the entire accrued benefit to be awarded if the court so orders in cases where the judgment is equal to or greater than the accrued benefit. IRC § 414(p)(3); ERISA § 206(d)(3)(D).

USE OF TITLE IV-D CONTRACTORS

Tennessee participates in the federally-funded child and spousal support program created by Title IV-D of the Social Security Act, 42 U.S.C. 651, et seq.

In order to receive federal funds under Title IV-D, Tennessee is required to implement a plan for “spousal and child support” that must meet numerous requirements including enactment of law improving child support enforcement effectiveness. To this end federal law requires that the states have enacted among other things procedures through which “liens arise by operation of law against real and personal property for amounts of overdue support by a noncustodial parent who resides or owns property in the state.”

Tennessee has enacted law through which a lien will arise by operation of law, against all real and personal property for overdue support owed by the obligor in child or spousal support cases enforced by the Tennessee Department of Human Services or its contractors under Title IV-D.

T.C.A. § 36-5-901(a)(1) reads as follows:

T.C.A. § 36-5-901. Liens for child support arrearages - In any case of child or spousal support enforced by the department of human services or its contractors under Title IV-D of the Social Security Act in which overdue support is owed by an obligor who resides or owns property in this state, a lien shall arise by operation of law against all real and personal property, tangible or intangible, then owned or subsequently acquired by the obligor against whom the lien arises for the amounts of overdue support owed or the amount of penalties, costs or fees as provided in this chapter. The personal or real property, tangible or intangible, of the obligor that is subjected to the lien required by this part shall include all existing property at the time of the lien's perfection, or acquired thereafter, even if a prior order for overdue support or arrears only specifies a certain amount of overdue support or arrears that was owed by the obligor at the time of such order.

T.C.A. § 36-5-901(a)(2) defines “overdue support”

(2) “Overdue support” is defined, for purposes of this part, as any occasion on which the full amount of ordered support for or on behalf of a minor child, or for a spouse or former spouse of the obligor with whom the child is living to the extent spousal support would be included for the purposes of 42 U.S.C. § 654(4), is not paid by the due date for arrears as defined in § 36-5-101(f)(1) unless an income assignment is in effect and the payer of income is paying pursuant to § 36-5-101(g). “Overdue support” shall include all amounts of support that are in arrears as defined in § 36-5-101(f)(1) and that remain unpaid by the obligor at the time the lien is perfected or that become due as arrears subsequent to the perfection of the lien.

Services from the Title IV-D contractor or from the Tennessee Department of Human Services (DHS) are not automatic. Request must be made. Procedurally this is usually done in writing through a letter or on a form provided by DHS or its contractor. In Tennessee a lien for overdue child support and alimony may be perfected in two (2) ways. The Department of Human Services may record or file the lien “in the appropriate place for the filing of a judgment lien or security interest in the property.” T.C.A. § 36-5-901(b)(1)(A). In addition to the notice perfected by appropriate filing a lien may be perfected by sending notice of lien “by any appropriate means, including by any automated means by the commission of any authorized representative of the department. T.C.A. § 36-5-901(b)(1)(B).

The department has broad power for enforcement of liens:

T.C.A. § 36-5-904. **Enforcement of liens** – In cases where there is an arrearage of child or spousal support in a Title IV-D child support case or in which a lien arises pursuant to § 36-5-901, the department is authorized, without further order of a court, to secure the assets of the obligor to satisfy the current obligation and the arrearage by:

- (1) Intercepting or seizing periodic or lump-sum payments or benefits due the obligor:
 - (A) From a state or local agency;
 - (B) From judgments of any judicial or administrative tribunal, settlements approved by any judicial or administrative tribunal, and lottery winnings;
- (2) By attaching or seizing assets of the obligor or other person or entity held in financial institutions as defined in § 36-5-910;
- (3) By attaching public and private retirement funds; and
- (4) By imposing liens in accordance with § 36-5-901, and, in appropriate cases, by forcing the sale of the obligor’s legal or equitable interest in property and by distribution of the proceeds of such sale.

Title 36, Chapter 5, part 9 provides for exceptions from sale, which are similar to exemptions from executions.

In all Title IV-D child or spousal support cases where there is periodic payment of alimony the order or decree of the court shall provide that payment must be made to the central collection and disbursement unit as provided by § 36-5-116

T.C.A. § 36-5-121(e). The clerk of court, The Department of Human Services or its Title IV-D contractor may issue income assignment order.

FOREIGN SUPPORT ORDERS, JUDGMENTS, AND DECREES IN TENNESSEE

The Uniform Interstate Family Support Act (“UIFSA”) provides procedure and jurisdiction for domesticating foreign judgments, decrees, or orders involving support in Tennessee. T.C.A. § 36-5-2001, et. al. (2007). Under Section 2601 of that Act, a registering party must file with the trial court of the county with jurisdiction the following documents and information:

- (1) A letter of transmittal to the tribunal requesting registration and enforcement;
- (2) Two (2) copies, including one (1) certified copy, of all orders to be registered, including any modification of an order;
- (3) A sworn statement by the party seeking registration or a certified statement by the custodian of the records showing the amount of any arrearage;
- (4) The name of the obligor and, if known:
 - (A) The obligor's address and social security number;
 - (B) The name and address of the obligor's employer and any other source of income of the obligor; and
 - (C) A description and the location of property of the obligor in this state not exempt from execution; and
- (5) The name and address of the obligee and, if applicable, the agency or person to whom support payments are to be remitted.

After the judgment, order or decree is filed and named as a foreign decree, the registering court will notify the non-registering party of the status of registration, as well as, mailing a copy of the decree and all documents and information filed. T.C.A. § 36-5-2605(a) (2007). The registering court should also inform the non-registering party of his or her ability to contest the enforcement of such order and consequences for failure to do so. T.C.A. § 36-5-2605(b) (2007). Failure to challenge the registration or enforcement

within twenty (20) days of the notice of registration will confirm the order by operation of law. T.C.A. § 36-5-2606(a)(b) (2007).

Registration of the order, decree, or judgment does not afford the registering court unlimited enforcement powers. Without the registering party following the proper Tennessee procedures for enforcement of a court order, a court does not yet have jurisdiction to impose equitable liens on the non-compliant party's property. Pickern v. Pickern, 2005 LEXIS 178, No. E2004-02038-COA-R3-CV (Tenn. App. Ct. 2005). Notice alone is not sufficient for the non-registering party to be held in contempt for non-compliance with the order; a petition for civil contempt must still be filed. Id.

Income-withholding statements are similar to the foreign support decrees. See, T.C.A. § 36-5-2501 (2007). A party may send an income-withholding statement to the obligor's employer without first registering the statement with Tennessee. T.C.A. § 36-5-2501 (2007). No registration is necessary if the obligor does not contest the income-withholding statement. T.C.A. § 36-5-2507 (2007). The employer shall comply with the foreign order as if it were issued by Tennessee. T.C.A. § 36-5-2502 (2007). If, however, the obligor chooses to challenge the income-withholding statement, he or she should do so in the same manner he or she would if the withholding statement were not foreign – via T.C.A. § 36-5-3604. T.C.A. § 36-5-2506. In so challenging, the obligor shall give notice of contest to a support enforcement agency providing service to the obligee, each employer who has received an income-withholding order, and the person or agency designated to receive payments, and in the case of no person or agency, the obligee. Id.

After sending out the notice of contest, the obligor should register the income-withholding statement within twenty (20) days of his or her employer's receipt, following the same T.C.A. § 36-5-2601 procedures to register a foreign support orders. Pursuant to T.C.A. § 36-5-501(b)(1)(A), "in all cases in which the court has ordered immediate income assignment, the clerk of the court, or the department of human services or its contractor in Title IV-D cases, shall immediately issue an income assignment to an employer once the employer of an obligor has been identified."