Montana Law Review

Volume 14
Issue 1 *Spring 1953*

Article 11

January 1953

Periodical Alimony or Support Decrees as Liens Per Se on Realty

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The only Montana decision concerned with injury to an unborn child is the case of *Hosty v. Moulton Water Co.*[45] This case has been cited in support of the proposition that recovery cannot be had for the death of an unborn child, at the suit of the mother.[46] A careful reading of the opinion leaves considerable doubt that this question was fully considered. The complaint charged that, through negligence of the defendant, plaintiff was so injured and mentally disturbed that, being pregnant, she lost her child and became sick, and on that account suffered great pain and injury. The defendant filed a general and special demurrer, the latter for uncertainty. The trial court sustained both demurrers, and plaintiff did not amend. The trial court then ordered judgment against the plaintiff "upon the merits" and entered judgment dismissing the complaint. On appeal, the Montana Supreme Court ruled that the special demurrer was properly sustained, but did not pass upon the merits because of the uncertainty of the complaint. The District Court judgment was affirmed, but modified by striking the words "upon the merits" from the judgment.

However, the Montana Code[47] contains a provision identical to the California statute cited above, declaring an unborn child to be an existing person, so far as necessary for its interests in the event of its subsequent birth. This statute has never been construed by the Montana Court. But in view of the present day decisions on this problem, and the construction placed on the identical provision by the California Court, it is likely that the question will be decided in favor of recovery when it arises in Montana.

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PERIODICAL ALIMONY OR SUPPORT DECREES AS LIENS PER SE ON REALTY

This comment considers the effect in Montana of a properly docketed decree for permanent periodic alimony or support payments automatically becoming a lien on real property of the husband. Alimony payments in gross, temporary alimony payments, and decrees providing in themselves for the imposition of a lien as security, are not included within this discussion.

The rule expressed in most states is that, although the court may create a lien on the defendants' real estate as part of the

[45]39 Mont. 310, 102 P 568 (1909).
[46]10 A.L.R. (2d) *Death* § 2, p. 640.
[47]R.C.M. 1947, § 64-103.

decree for periodic payments, a decree without this command does not impose such a lien automatically.[1] The argument most frequently advanced for this view appears in *Mansfield v. Hill,* where the Court said:

> "The provision of the divorce decree for future monthly payments by defendant until further order of the court, being for an indefinite time and amount not yet accrued, is not a definite liability or a judgment for a specific sum which may become a lien upon his property."[2]

Other states have reached the opposite conclusion on the theory that without this automatic lien the decree would be ineffectual to insure those payments to which the wife and children are legally and morally entitled.[3]

Montana is apparently in accord with the minority view. In *Raymond v. Blancgrass*[4] defendants unlawfully converted 150 sheep from plaintiff's husband prior to plaintiff's separate maintenance decree for periodic support payments. Plaintiff brought this action in equity to recover and apply the value of the sheep to past due support payments. The Court said she failed to state a cause of action in that she had an adequate remedy at law.[5] But during discussion of the matter Chief Justice Brantly stated:

> "While decrees in equity often extend to and cover matters entirely beyond the purview of judgments at law, they are nevertheless judgments within the defini-

[1]Jones v. Jones, 204 Ark 654, 163 S.W. (2d) 528 (1942); Yager v. Yager, 7 Cal. (2d) 213, 60 P.(2d) 422 (1936); Robinson v. Robinson, 154 Fla. 464, 18 So. (2d) 29 (1944); Wallace v. Wallace, 189 Ga. 220, 5 S.E. (2d) 580 (1939); Masters v. Masters, 249 Ill. App. 252 (1928); Rosenberg v. American Trust & Sav. Bank, 86 Ind. App. 552, 156 N.E. 411 (1927); Trunkey v. Johnson, 156 Kan. 804, 137 P.(2d) 186 (1943); Campbell v. Trosper, 108 Ky. 602, 57 S.W. 245 (1900); Marshall v. Marshall, 164 Md. 107, 163 A. 874 (1933); Harris v. Worsham, 164 Miss. 74, 143 So. 851 (1932); Tureck v. Tureck, ...Mo. App....., 207 S.W. (2d) 780 (1948); Gray v. Gray, 44 N.D. 89, 176 N.W. 7 (1919); Olin v. Hungerford, 10 Ohio 268 (1840); Bussey v. Bussey, 148 Okla. 10, 296 P. 401 (1931); Mason v. Mason, 148 Ore. 34, 34 P.(2d) 328 (1934); Swanson v. Graham, 27 Wash. (2d) 599, 179 P.(2d) 288 (1947).

[2]56 Ore. 400, 107 P. 47, (rehearing) 108 P. 1007 (1910).

[3]Westmoreland v. Dodd (CCA) 2 F.(2d) 212 (1924); Davis v. Davis, 228 Iowa 764, 292 N.W. 804 (1940); Harrington v. Grieser, 154 Neb. 685, 48 N.W.(2d) 753 (1951); Warren v. Warren, 92 N.J.Eq. 334, 112 A. 729 (1921); Buffalo Savings Bank v. Hunt, 118 N.Y. Supp. 1021 (1901); Lynn v. Lynn, 76 Pa. Super. Ct. 444 (1921); Beesley v. Badger, 66 Utah 194, 240 P. 458 (1925); Bray v. Landergren, 161 Va. 699, 172 S.E. 252 (1934); Holcomb v. Holcomb, 122 W.Va. 293, 8 S.E. (2d) 889 (1940).

[4]36 Mont. 449, 93 P. 648 (1908).

[5]The Court interpreted the husband's right of action against the defendants as subject to execution.

> tion of the statute . . . and, so far as they award in any case a recovery of money, they are in nowise different from judgmnts at law. In legal effect there is no distinction. . . . When properly docketed they become liens upon the real estate of the debtor. They are enforced by execution just as are judgments in legal actions . . . An order directing the payment of money is *pro hac vice* a judgment, and may be enforced by execution . . . even if the statute did not contain this provision, the court would adopt the most appropriate process. . . . And it cannot be doubted that the execution would be most effective and appropriate."

The *Blancgrass* dictum plainly points out that Montana's equity decrees awarding recovery of money become a lien on real estate in the same manner as judgments at law.

The *Blancgrass* case is cited and supported by *Decker v. Decker*[6] and later by *Lewis v. Lewis*[7] where the Courts both recite the proposition that a lien is automatically imposed on the realty of defendant when the decree is properly docketed, just as judgments at law.

The most recent case on this question is *Lay v. District Court*[8] where Chief Justice Adair said:

> "There are various means of enforcing orders directing the payment of support money in actions for divorce. The most common are: (a) By requiring the husband to give security for enforcement of the payments ordered. Sec. 5775, Rev. Codes of 1935 . . . ; (b) by contempt proceedings . . . ; (c) *by execution, as in the case of other money judgments* (*Raymond v. Blancgrass,* 36 Mont. 449, at page 458, . . . *Decker v. Decker,* 56 Mont. 338, . . . and (d) by invoking the police power of the state to punish the parent for willfully failing, refusing or neglecting to support his child. . . ." (Italics supplied).

Assuming as established that a Montana alimony or separation decree for the payment of money does create a lien *per se,* the next pertinent inquiry is as to the character of this lien and the quantum of the husband's real property encumbered thereby.

The *Blancgrass* decision stated in effect that so far as equity decrees award a recovery of money, they are treated the same as judgments at law, and similarly become liens upon the real estate. Therefore, for purpose of determining the extent of real

[6] 56 Mont. 338, 185 P. 168 (1919).
[7] 109 Mont. 42, 94 P.(2d) 211 (1939).
[8] 122 Mont. 61, 198 P.(2d) 761 (1948).

property included under the lien in question, it would seem reasonable to rely upon Montana's statute pertaining to judgments at law which provides:

> ". . . from the time of filing, the judgment becomes a lien upon all real property of the judgment debtor, not exempt from execution, in such county, owned by him at the time, or which he may afterward, and before the lien expires, acquire. The lien continues for six years, unless the judgment be previously satisfied."[9]

Speculation on the nature of this lien primarily stems from *Raymond v. Blancgrass* coupled with the subsequent case of *Lewis v. Lewis.*[10] The unsettled dicta of these cases opens the door to several positions that Montana might take regarding the extent of the lien imposed:

(1.) The broadest interpretation of the Montana decisions permits a lien attaching at the time the decree is docketed and covering payments due and to become due. Chief Justice Brantly leaves this inference in the *Blancgrass* case when he states:

> "The plaintiff, then, by the recovery of her judgment against her husband, became his creditor for the amount adjudged to be due her at the time of its entry, *and also for the amounts accruing thereon from month to month,* and occupied toward him the position of any other creditor." (Italics supplied).

This unique position is held by several states.[11]

Later the Montana Supreme Court, in *Lewis v. Lewis,*[12] casually attempted to qualify the liberal *Blancgrass* statement in saying, by way of dictum:

> "However, it would seem that the lien would be for only the accrued and unpaid installments, and not for such installments as might thereafter accrue."

Examining the dicta of these cases together would reasonably seem to allow the next two additional characterizations of the lien.

(2.) A less liberal view is taken by some courts in that the lien attaches and secures the installments at the time they respec-

[9]R.C.M. 1947, § 93-5712.
[10]*Supra,* note 7.
[11]Westmoreland v. Dodd, (CCA) 2 F.(2d) 212 (1924); U.S. v. Spangler, 94 F. Supp. 301 (1950), (good criticism of this type lien); Lynch v. Rohan, 116 Neb. 820, 219 N.W. 239 (1928); Buffalo Savings Bank v. Hunt, 118 N.Y. Supp. 1021 (1909); Bray v. Landergren, 161 Va. 699, 172 S.E. 252 (1934); Gain v. Gerling, 109 W.Va. 241, 153 S.E. 504 (1930).
[12]*Supra,* note 7.

tively fall due in the future.[13] At first glance, the general judgment lien statute[14] providing for a lien to attach "from the time of filing," might appear to exclude this theory. However, it can reasonably be reconciled by regarding each accrued installment as a judgment taking effect as of the date due[15] and construing the statute to mean the "judgment" becomes a lien when entered only for the amount then due, but attaching to future installments as they mature from time to time. Also there is no conflict with the *Lewis* case dictum (supra) because the lien never secures an *un*accrued installment.

(3.) Finally, construing the cases in their most limited sense, the lien would attach upon entry of the decree and only payments due at that time would be secured.

Limitation of action upon the liens under consideration presents the next problem. In holding that the lien created by the trial court *in its decree* was such as to defeat a suit to quiet title, the Arizona Supreme Court stated:

> "It was urged most strenuously on oral argument that the effect of such a judgment is to tie up all of the plaintiff's property so that he cannot dispose of it or handle it in any manner, and that such incumbrance may continue indefinitely. It is doubtless true that such may be the effect of the judgment."[16]

California has a statute[17] similar to Montana's[18] allowing the court, in its discretion, to require encumbrance of certain property to secure payments. Their courts interpret the statute of limitations pertaining to ordinary judgment liens as not applying to this special discretionary lien.[19]

However, the lien dealt with in this discussion is not one which is specially created by the court but one which the decree imposes *per se*. The lien in question must draw its efficacy from the general judgment lien statute and consequently would, in any event, seem to be limited by the 6 year statutory period.[20] This would mean that the broadest lien, which includes all past and future payments, and also the most limited lien, covering only payments due when the decree is docketed, would be enforceable

[13]Warren v. Warren, 92 N.J.Eq. 334, 112 A. 729 (1921); Lynn v. Lynn, 76 Pa. Super Ct. 444 (1921); Openshaw v. Openshaw, 105 Utah 574, 144 P.(2d) 528 (1943).
[14]*Supra*, note 9.
[15]McKee v. McKee, 154 Kan. 340, 118 P.(2d) 544 (1941).
[16]Schuster v. Schuster, 33 Ari. 279, 264 P. 100 (1928).
[17]Calif. Civil Code § 140.
[18]R.C.M. 1947, § 21-140.
[19]Gaston v. Gaston, 114 Cal. 542, 46 P. 609 (1896).
[20]*Supra*, note 9.

for a maximum of 6 years from the date of entry. Under the theory that a lien doesn't arise until an installment becomes due, however, it would follow that the six year statutory period would date from the time each future installment payment matured.

The propositions covered, as yet, have not been considered directly by the Montana Supreme Court and so the character of these liens is largely left to speculation.

Broadly interpreting the Montana cases as creating an *immediate* lien at the time of docketing for accrued *and unaccrued* installments has the obvious effect of imposing a flaw upon the marketable title which would be difficult, and in some cases prohibitive in costs, to erase. But, as a result of Montana's uncertainty, the only safe position for attorneys and title insurance companies is to allow for the broadest interpretation of the cases and codes and consequently treat the lien in question as encumbering the property for all past and future installments from the date of entry for the statutory period of 6 years.

The necessity for such an oppressive lien, in the opinion of this writer, has little foundation in view of a Montana Code provision allowing the court, in its decree or subsequent thereto, to require the husband to furnish security for payment of future installments.[21] Liens upon real estate have been interpreted as "security" within the purview of this statute.[22]

At most, the limited construction of the lien securing merely payments due upon entry of decree would include only costs, attorneys fees, and possibly the first installment.

The better view, in this writer's opinion, would be the construction allowing the lien to include each future installment *as it becomes due.* This would give a certain amount of protection to the wife and children and, at the same time, permit the unhindered conveyance of clear title merely by payment of the installments accrued at the moment of transfer.

This question is constantly arising and Montana's equivocal position necessarily results in the expense, burden, and lost time incident to reasonable professional caution. Clarifying legislation or judicial interpretation would be desirable.

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[21] *Supra*, note 18, providing: "The court or judge may require the husband to give reasonable security for providing maintenance or making any payments required under provisions of this chapter, and may enforce the same by appointment of a receiver, or by any other remedy applicable to the case."
[22] *Supra*, note 7.