# PERIODIC SUPPORT PAYMENTS IN DIVORCE DECREES AS LIENS

Although it is quite common in divorce actions for the court to order support payments to be made at regular intervals, and it is not unusual for payments to be in default under such an order, Iowa law says very little on the matter of whether such a decree is a lien upon the property owned by the party ordered to make such support payments.[1]

An analysis of the law in the states which have given a greater consideration to the problem than has been given it by the Iowa courts indicates that conflicting decisions exist.[2] A compilation of these decisions shows the various ways the problem—of whether a divorce decree ordering periodic payments for support is a lien —has been treated.

There are three possible approaches to the solution: 1. That such a decree creates an automatic lien; 2. That such a decree creates a lien anytime there is a sum certain due; 3. That such a decree never creates a lien.[3]

The approach a particular jurisdiction follows is dependent upon the legal theory that it may be able to apply. Normally a lien will not exist under a decree for periodic payments for support unless it is declared to exist by a statute or unless the decree itself specifically states the order for periodic support payments is to be a lien. Applicable statutes are of three general types: the statute that declares an award for alimony to be a lien the same as any other money judgment; the statute that expressly authorizes the state courts to declare that a decree for alimony and support shall constitute a lien; and the type of statute that is present in a majority of states including Iowa—the judgment lien statute. It is necessary, in states using a judgment lien statute, for the courts to find that a decree ordering periodic payments for support falls within the intent of that statute. In the latter case, another doctrine affects the problem—the principle giving the equity courts an inherent power to declare the existence of a lien when they order support payments to be made.[4]

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[1] The *Iowa Title Standards III*, 3 DRAKE L. REV. 87, 88 (1954), raises the question which this article intends to elaborate upon and supplement in discussing a recent Addenda to the Iowa Title Standards, published by the Iowa Title Standards Committee, which had a comment on whether an installment alimony and support judgment constitutes a lien upon real estate for future unpaid installments and which decided that the problem was not a proper subject for a title standard at the present time.

[2] Note, 33 IOWA L. REV. 703 (1949); 79 A.L.R. 252; 169 A.L.R. 641.

[3] Note, 33 IOWA L. REV. 703 (1949).

[4] 79 A.L.R. 252; 169 A.L.R. 641.

These are the legal and theoretical bases upon which the three possible approaches are founded. Even so, perhaps the argument of policy with its two conflicting facets is the greater influence in determining which one of the three positions is to be adopted. One facet is the desirability to refrain from encumbering land with liens, and therefore to keep the title merchantable; the other—that the party decreed to receive support payments should have security for that support.

It is not the purpose here to discuss the situation in the states other than Iowa; nor is it the present purpose to analyze the problems of liens in connection with alimony or support decrees for a specified amount, payable either in a lump sum or by installments. The scope of this article is further limited by the removal of questions concerned with actual and constructive notice.

There are at least six typical situations where a default of support payments could raise the question of a lien:

1. A divorce decree providing for periodic support payments is handed down against *A* and the decree does not specify that it creates a lien against the property *A* owns. *A* conveys his property to *B* and at the time of the conveyance *A* has not defaulted on any of the periodic support payments. Subsequent to *A's* conveyance to *B*, *A* defaults on some of the support payments. Is there a lien upon the land conveyed to *B* by virtue of the decree against *A*?

2. A divorce decree providing for periodic support payments is handed down against *A* and the decree does not specify that it creates a lien against the property *A* owns. *A* fails to make some of the support payments, and after he has so failed, *A* conveys his property to *B*. Is there a lien upon the land conveyed to *B* by virtue of the decree against *A*?

3. A divorce decree providing for periodic support payments is handed down against *A* and the decree does not specify it creates a lien against the property *A* owns. *A* fails to make some of the support payments. Is there a lien upon the land that *A* owns by virtue of the decree against *A*?

4. A divorce decree providing for periodic support payments is handed down against *A* and the decree specifies that it creates a lien against the property *A* owns. *A* conveys his property to *B* and at the time of the conveyance *A* has not defaulted on any of the periodic support payments. Subsequent to *A's* conveyance to *B*, *A* defaults on some of the support payments. Is there a lien upon the land conveyed to *B* by virtue of the decree against *A*?

5. A divorce decree providing for periodic support payments is handed down against *A* and the decree specifies that it creates a lien against the property *A* owns. *A* fails to make some of the support payments, and after he has so failed, *A* conveys his property to *B*. Is there a lien upon the land conveyed to *B* by virtue of the decree against *A*?

6. A divorce decree providing for periodic support payments is handed down against *A* and the decree specifies that it creates a lien against the property *A* owns. *A* fails to make some of the support payments. Is there a lien upon the land that *A* owns by virtue of the decree against *A*?

Because of their basic similarity, the second and third situations will be combined together to simplify discussion, as will the fifth and sixth situations.

The Iowa court recently clarified its position on cases of *Type 1* when it decided *Slack v. Mullenix*,[5] a case similar factually in many respects to the *Type 1* hypothetical. A divorce decree ordered *A* to pay weekly child support payments to the clerk of court until each child reached his majority or became married. After the decree, *A* acquired ownership of real estate. *A* conveyed the said support payments; and, after the conveyance to *B*, *A* defaulted on these weekly child support payments. *B* contracted to sell the lots to *C*. *C* made a down payment, then refused to complete the contract on the grounds that the title wasn't merchantable because the decree against *A* created a lien against the property. The issue of whether or not an automatic lien existed was raised by an action, brought against *A's* wife and children, to quiet *B's* title. It was held that an installment alimony or support money decree did not create an automatic lien upon real estate for future unpaid installments; and, that a lien did not exist where there was no default in payments at the time the defendant conveyed his property to a third person—the default occurring afterwards. This ruling makes it clear that Iowa will not place a lien upon the real estate of the person ordered to make support payments under the first hypothetical situation.

If the court were to find that a lien arose under the divorce decree, when the decree did not specify that it was to be a lien, it had to use the Iowa judgment lien statute.[6] The Iowa court relied upon a general rule for judgment liens, from *Corpus Juris Secundum*, in determining whether or not the decree in question qualified as a judgment lien.[7] That general rule stated several requisites for a judgment lien; the judgment must be final, subsisting, and rendered by a duly constituted court; the judgment must be for the payment of a definite and certain amount of money; and the judgment must be capable of collection by execution on the property of the judgment debtor. The Iowa court found the element requiring the judgment to be for the payment of a definite and certain amount of money to be the element which was missing in this instance.

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[5] 66 N.W.2d 99 (Iowa 1954).

[6] IOWA CODE § 624.23 (1954): "Judgments in the supreme or district court of this state, or in the circuit or district court of the United States within the state, are liens upon the real estate owned by the defendent at the time of such rendition, and also upon all he subsequently may acquire, for the period of ten years from the date of the judgment." This is the Iowa judgment lien statute. It was cited in the advance sheets as Section *624.3*, Code, 1954.

[7] 49 C.J.S., JUDJMENTS, § 458: "As a general rule, in order to create a judgment lien, there must be a judgment which is final, valid, and subsisting, rendered by a duly constituted court for the payment of a definite and certain amount of money which may be collected by execution on property of the judgment debtor."

The Iowa court used as a basis for so deciding: (1) an absence of a sum due at the time the land was conveyed from *A* to *B;* and, (2) an absence of any method of determining, at that time, what amount, if any, would eventually be due. Without mentioning the most obvious contingency preventing such a determination—the fact that a default in the support payments may never occur—the Iowa court mentioned the other contingencies that would prevent the determination of a sum certain. These were death, remarriage of the parties, possible modification of the decree, and possible marriage of the children before they reach their majority.

The court also ruled that the present issue had never been directly decided in any previous Iowa decision. In doing so it recognized the position, supported by prior Iowa cases,[8] that the court could make such an award a lien against the husband's realty by specifying it to be a lien in the decree.[9]

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[8] The Iowa court has long allowed a divorce decree to specifically make the awards under it liens upon the realty of the party decreed to pay the awards. *Byers v. Byers,* 21 Iowa 268 (1866), recognized the courts right to do this under what is now IOWA CODE § 598.14 (1954), even though no such decree was involved. In *Hemenway v. Wood,* 53 Iowa 21, 3 N.W. 794 (1879), such a lien was enforced and its validity was not challenged because it had not been properly objected to in the lower court to raise the issue. In *Luedecke v. Luedecke,* 195 Iowa 507, 192 N.W. 515 (1923), a divorce decree specified that the award for alimony was to be a lien and the question of the power of the court to make such an order wasn't even raised.

In *Millisack v. O'Brien,* 223 Iowa 752, 273 N.W. 875 (1937), a decree for periodic payments for support specified that a default on such payments was to constitute a lien. However, here the decree also specified that the clerk of court was to enter a judgment when such default occurred, a default occurred but the clerk failed to enter judgment; it was held that no judgment existed and hence there was no lien until the clerk did enter judgment. (Upon the latter point this case can be clearly distinguished from the problem described in the second hypothetical situation.)

Other cases recognizing the right of the court to specify that a decree for alimony or support creates a lien are *Russell v. Russell,* 4 G. Greene 26, 61 Am. Dec. 112 (Iowa 1853); *Abey v. Abey,* 32 Iowa 575 (1871); and *Davis v. Davis,* 228 Iowa 764, 292 N.W. 809 (1940).

None of these cases, with the exception of *Millisack v. O'Brien, supra,* which can be distinguished, handle the problem of decrees specifying liens for support and alimony. These are cases involving lump sum or gross sum payments.

[9] Other issues presented in *Slack v. Mullenix,* 66 N.W.2d 99 (Iowa 1954), were: who had the right to the support money under the divorce decree—the wife or the children; and, could the vendees, who had contracted to purchase the land, be ordered to specifically perform their contract. It was held that the mother was entitled to the child support award as against the claims of the children, even though no lien existed in this case. It was further held—using the rule that where time is not made the essence of the contract and where the defect of the vendor's title can be cured before time for decree in his specific performance action, the court will allow the vendor to do what is necessary to cure the title and then order the decree of specific performance—that the vendors were entitled to a specific performance against the vendees. The latter holding raises the question as to whether or not a vendee receives merchantable title if he must bring a court action to clear the title.

Prior to this case it had been suggested that Iowa might be heading down a road that would lead her to recognize all types of alimony and support decrees as judgment liens and place her in the position of recognizing such a decree as an automatic lien upon the property of the person ordered to pay support.[10] That direction was indicated primarily by some dicta of the Iowa court in *Davis v. Davis*,[11] but which it refused to follow in the more recent *Slack* case.[12] However, the position is now confused, for the opinion of the *Slack* case failed to consider the entire scope of the problems presently discussed and therefore it failed to lay down a clear-cut rule that could be applied to the other five possible situations which have been previously enumerated.

The two positions which the *Slack* case indicates Iowa will recognize—the position of finding the alleged general rule of judgment liens applicable, and the position of allowing the courts to specifically make the awards in divorce decrees liens—appear to conflict when they are applied to the other hypothetical situations in an attempt to reach solutions to those cases. The Iowa court has not as yet attempted to establish a relationship between these two conflicting principles, but has merely recognized they both exist in this area of law.

Although there is nothing in the opinion of *Slack v. Mullenix* which stipulates that the court will rely upon the judgment lien test in future cases, until the court refuses to apply the test its application must be anticipated. The uncertainty of predicting results with this test stems from the question as to whether the two distinct positions, mentioned above, will be applied in all cases; or, whether the first will be applied in some cases and the latter in others. Usually where a general rule exists exceptions also exist, and this possibility increases the uncertainty of results under the *Slack* case.

Applying the reasoning of the *Slack* case to the second hypothetical situation—where the divorce decree providing for the support payments does not specify a lien exists and *A* defaults before he conveys his real estate to *B*—the following conclusions can be drawn. A sum certain is due (the support payments upon which *A* has defaulted) and this fact eliminates the objection to the existence of a lien so far as the alleged general rule for judgment liens is concerned. However, the decree fails to specify that a lien exists and so the final disposition of this type of case turns upon the question of whether it is necessary for the decree to

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10 Note, 33 IOWA L. REV. 703, 709 (1949).

11 228 Iowa 764, 773, 292 N.W. 804, 808 (1940), where the court said: "The fact that judgment was entered for the awards would in itself make them liens upon any real estate owned by him (the husband)." However, the divorce decree specifically made the awards liens and the court, previous to the quoted dicta, had ruled that the trial court had the power to hand down such a decree.

12 *Slack v. Mullenix*, 66 N.W.2d 99, at 101 (Iowa 1954), expressly declares the statement quoted in footnote 11 to be dictum.

specify the existence of a lien—this is a question not answered in the *Slack case*.[13]

Similarily applying the reasoning of the *Slack* case toward the fourth hypothetical situation results in the same type of uncertainty. (The third hypothetical is eliminated from this discussion because it is parallel to the second hypothetical so far as the *Slack* case holding is concerned.) Here the divorce decree providing for support payments has specified it is to be a lien upon the realty of *A* but *A has* conveyed his property to *B* before he defaults on the periodic support payments. No sum certain was due at the time *A* conveyed the land to *B* and at that time, because of the contingencies, it was impossible to tell the amount that eventually will be due under the decree for periodic support payments therefore, the same objection to a lien is present as was present in the *Slack* case. The decree did provide that the periodic support payments would be a lien upon *A's* property. However, unless such a decree over-rides the general judgment lien rule requiring a sum certain to be due,[14] the general rule for judgment liens as applied in the *Slack* case would prevent the enforcement of such a lien.

One further possibility is to say the effect of a divorce decree for periodic support payments, where the decree specifies such payments to be a lien, is the same as a mortgage—the grantee, *B*, taking subject to a lien which would allow an execution only upon a failure to make the future payments. The judgment lien rule conflicts with this theory for the latter requires a definite and certain amount of money which can be collected by execution on property of the judgment debtor as a necessity in creating a judgment lien. If it controls, at the time a definite and certain amount of money became owing under the support order, the alleged judgment debtor no longer owned the property involved and the case is placed outside the judgment lien rule.

It is easier to anticipate the results in the fifth hypothetical situation than it is with the previous situations that have been mentioned. Here, a divorce decree providing for periodic support payments specifies a lien exists; *A* has defaulted on the support payments; and after the default *A* has conveyed his property to *B*. Using the reasoning of the *Slack* case, a lien can be found to exist. A sum certain is due (the support payments upon which *A* has

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[13] As a practical suggestion, due to the present uncertainty in this area, perhaps a title examiner, upon noticing the existence of a decree for periodic support payments, should recommend an affidavit be obtained from the wife stating no defaults exist at the time of the conveyance to the grantee. Suppose the wife refuses to give an affidavit because there is a default—should she then request that the clerk of court enter such default? Suppose the clerk refuses to enter the default—is it necessary for the wife to petition the court to order the entry of a default or should the judge order such an entry without a petition?

[14] See note 4 *supra*.

defaulted) and this fact eliminates the objection to the existence of a lien so far as the alleged general rule of judgment liens is concerned. Furthermore, the decree provided that the periodic support payments would be a lien.

The sixth hyopthetical situation is eliminated from this discussion, as was the second situation, because it is parallel to the fifth hypothetical so far as the *Slack* holding is concerned.

When does the statute of limitations start to run on the lien if one exists? This problem is a subject in itself. The Iowa judgment lien statute says "Judgments . . . are liens upon the real estate owned by the defendant at the time of such rendition, and all he may subsequently acquire for a period of ten years from the date of the judgment."[15] When is the date of the judgment? Is it the date the decree is handed down or is it the date a default in support payments occurs? Does the ten year limitation of the judgment lien statute even apply if a lien is established by virtue of the divorce decree specifying the existence of a lien? The answers to these questions depend in part upon what the Iowa court will eventually decide with the problems previously raised —as yet there is no indication to a solution.

Perhaps a better method of handling the *Slack* case would have been realized had the Iowa court based its decision upon a policy approach rather than upon technical rules of law. By using such an approach—resolving the dilemma of insuring support as opposed to aiding merchantability of title—a more satisfactory result would have been reached, for it would have allowed a much clearer anticipation of the results the Iowa court will later conclude on the yet unanswered questions.

The hope that the law would be clarified by the decision of *Slack v. Mullenix* was not fulfilled completely.

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[15] IOWA CODE § 624.23 (1954).