

Contempt of Court – A Remedy of First Resort
By Joel R. Brandes

Domestic Relations Law § 245 authorizes a spouse to make an application under Judiciary Law §756, to punish his or her spouse for civil contempt, if he or she defaults in paying any sum of money required by a judgment or order. Civil contempt is punishable by imprisonment and/or fine, and since 2016 has become a remedy of first resort. For that reason, it can be very effective to enforce financial awards in matrimonial actions. However, a contempt finding will be reversed when an accused spouse is denied his constitutional rights.

The requirements for a finding of contempt under the Domestic Relations law are different than those under the Family Court Act because "the two statutes are different". (Matter of Powers v Powers, 86 N.Y.2d 63, 629 N.Y.S.2d 984 (1995)). Unlike Domestic Relations Law § 245, a respondent is prima facie presumed in a hearing under Family Court Act § 454 to have sufficient means to support his or her spouse and children under the age of 21 (Family Ct Act § 437). For purposes of Family Court Act § 454, failure to pay support as ordered itself constitutes "prima facie evidence of a willful violation" (Family Ct Act § 454 (3)(a)). Thus, proof that the respondent has failed to pay support as ordered alone establishes the petitioner's direct case of willful violation, shifting to the respondent the burden of going forward. (Matter of Matter of Powers v Powers, supra) (Family Court contempt proceedings and defenses are discussed in Brandes, Enforcement of Support Orders by Contempt of Court, NYLJ October 21, 2021, P.3, Col.1)

Under the Domestic Relations Law once the movant establishes a knowing failure to comply with a clear and unequivocal mandate, the burden shifts to the alleged contemnor to refute the movant's showing, or to offer evidence of a defense, such as an inability to comply with the order. (Mollah v Mollah, 136 AD3d 992, 993 26 N.Y.S.3d 298 (2d Dept.,2016).

Procedures for adjudication of civil contempt must comport with the due process standards mandated for all civil proceedings. In civil contempt proceedings, due process is met by the clear and convincing standard. (Addington v. Texas, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979)).

The power to punish a party to an action for civil contempt is found in Judiciary Law §753 (A)(3), which provides, in relevant part: "A court of record has power to punish, by fine and imprisonment, or either, a neglect or violation of duty, or other misconduct, by which a right or remedy of a party to a civil action or special proceeding, pending in the court may be defeated, impaired, impeded, or prejudiced, in any of the following cases: ... 3. A party to the action or special proceeding ... for any other disobedience to a lawful mandate of the court".

In contrast, the power to punish for criminal contempt is found in Judiciary Law § 750 (A)(3). It provides, among other things, that a court of record has the power to punish a person guilty of “[w]illful disobedience to its lawful mandate” for criminal contempt.

Although the same act may be punishable as both civil and criminal contempt, the element which elevates contempt from civil to criminal is the level of willfulness with which the conduct is carried out. (*McCormick v Axelrod*, 59 N.Y.2d 574, 466 N.Y.S.2d 279, 283 (1983))

Criminal contempt requires proof beyond a reasonable doubt that a party willfully violated a court order. (*Michaelson v. United States*, 266 U.S. 42, 66). A ‘willful’ disobedience is criminal contempt, while a mere disobedience, by which the right of a party to an action is defeated or hindered, is treated otherwise.” (*People ex rel. Stearns v. Marr*, 181 N.Y. 463, 74 N.E. 431_(1905)). Knowingly failing to comply with a court order gives rise to an inference of willfulness which may be rebutted with evidence of good cause for noncompliance. (*Rolon v. Torres*, 121 A.D.3d 684, 993 N.Y.S.2d 348 (2d Dep’t 2014))

To find that civil contempt has occurred in a given case,” it must be determined that a lawful order of the court, clearly expressing an unequivocal mandate, was in effect. It must appear, with reasonable certainty, that the order has been disobeyed. Moreover, the party to be held in contempt must have known the court's order, although the order doesn't need to be served upon the party. Finally, prejudice to the right of a party to the litigation must be demonstrated” Civil contempt is established, regardless of the contemnor's motive, when disobedience of the court's order “defeats, impairs, impedes, or prejudices the rights or remedies of a party.” (*El-Dehdan v El-Dehdan*, 26 N.Y.3d 19, 19 N.Y.S.3d 475, 485 (2015)).

The movant bears the burden of proving the civil contempt by clear and convincing evidence. (*Cassarino v. Cassarino*, 149 A.D.3d 689, 50 N.Y.S.3d 558 (2d Dep’t 2017)).

On a motion to punish a defaulting spouse for civil contempt in failing to pay, a hearing is required only if the papers in opposition raise a factual dispute as to the elements of civil contempt, or the existence of a defense. (*Savas v. Bruen*, 139 A.D.3d 736, 30 N.Y.S.3d 673 (2d Dep’t 2016)).

Since the 2016 amendment contempt has become a remedy of first resort, rather than a remedy of last resort.

Until September 29, 2016, Domestic Relations Law §245 provided, in relevant part that “where a spouse in an action for divorce... defaults in paying any sum of money as required by the judgment or order directing the payment thereof, *and it appears presumptively, to the satisfaction of the court, that payment cannot be enforced*

pursuant to section two hundred forty-three or two hundred forty-four of this chapter or section fifty-two hundred forty-one or fifty-two hundred forty-two of the civil practice law and rules, the aggrieved spouse may make application pursuant to the provisions of section seven hundred fifty-six of the judiciary Law, to punish the defaulting spouse for contempt,...(Laws of 1980, Ch. 281, effective July 19, 1980; Laws of 1985, Ch. 809). (emphasis supplied)

Domestic Relations Law §245, was amended in 2016 (Laws of 2016, Ch. 365, §1, effective September 29, 2016). The amendment removed the requirement of demonstrating presumptively, to the satisfaction of the court that payment cannot be enforced pursuant to Domestic Relations Law §243, Domestic Relations Law §244, CPLR 5241, or CPLR 5242. An application for contempt may now be "made without any previous sequestration or direction to give security or any application for enforcement by any other means."

An application to punish for civil contempt may be commenced by notice of motion, or by an order to show cause. The application must be noticed, heard, and determined in accordance with the procedure for a motion on notice except as provided CPLR 5250. Unless otherwise ordered by the court, the moving papers must be served no less than ten and no more than thirty days before the time at which the application is noticed to be heard. The application to punish for contempt must contain on its face a notice that the purpose of the hearing is to punish the accused for a contempt of court, and that such punishment may consist of fine or imprisonment, or both, according to law together with the following legend printed or type written in a size equal to at least eight point bold type: Warning: Your Failure To Appear In Court May Result In Your Immediate Arrest And Imprisonment For Contempt Of Court. (Judiciary Law § 756).

The Court does not have jurisdiction to punish a party for contempt without the required notice and warning. (*Barreca v. Barreca* 77 A.D.2d 793, 430 N.Y.S.2d 739 (4 Dept. 1980). In *Cappello v. Cappello* (274 A.D.2d 538, 712 N.Y.S.2d 41(2 Dept. 2000)) the application was jurisdictionally defective where the application for the contempt order was oral, on insufficient notice, and lacked the required statutory warning.

A respondent in a civil contempt proceeding is entitled to the assignment of counsel upon a finding of indigence (see *Argersinger v Hamlin*, 407 US 25 (1972)).

Judiciary Law §770 provides that on the return of an application for civil contempt, the court must inform the accused that he or she has the right to assistance of counsel. When it appears that the accused is financially unable to engage counsel, the court may in its discretion assign counsel to represent the accused. The Appellate Division has held that this provision should be read as requiring the court to "make a choice once indigency is found: either retain the power to punish the offender with a term of imprisonment by assigning counsel, or surrender that power by proceeding without assignment of counsel." (*Holmes v Holmes*, 89 A.D.2d 921, 454 N.Y.S.2d 22 (2 Dept., 1982)).

It is the court's responsibility to advise a pro se respondent of the right to counsel of his choosing, or assigned counsel where appropriate, before the commencement of a hearing or other proceedings. A person subject to possible contempt and imprisonment has an absolute right to counsel and if he appears *pro se*, he is entitled to be advised of this right. (*Hickland v Hickland*, 56 A.D.2d 978, 980, 393 N.Y.S.2d 192 (3 Dept., 1977)).

A contempt finding will be reversed where a respondent is denied the right to counsel (*Ullah v. Entezari-Ullah*, 40 A.D.3d 201, 836 N.Y.S.2d 18 (1st Dep't 2007)). A respondent is denied his right to counsel when he is not informed of his right to the assistance of counsel on the return of the contempt application. The court must conduct an inquiry to determine whether the respondent should be appointed counsel as an indigent after he requests counsel. Failure to hold a hearing is reversible error. (*Gifford v. Gifford*, 223 A.D.2d 669, 637 N.Y.S.2d 430 (2d Dep't 1996)). In *Holmes v Holmes*, (89 AD2d 921 (2d Dept., 1982)) an order finding the defendant in contempt and directing his incarceration was reversed where the court failed to determine whether he had the wherewithal to retain counsel.

Defense of inability to pay

The inability to pay the amount ordered to be paid is a defense to contempt under Domestic Relations Law § 246(3). It provides, in part, that any person may assert his financial inability to comply with the directions contained in an order or judgment made or entered in an action for divorce, as a defense in a proceeding instituted against him under Domestic Relations Law § [245](#) or under the judiciary law to punish him for his failure to comply with such directions.

Defense of Lack of subject matter jurisdiction

An order or judgment made by a court without subject matter jurisdiction is void ab initio, for all purposes, including the power to hold a person in contempt for violating it. (See *People ex rel. Lower v. Donovan*, 135 N.Y. 76, 31 N.E. 1009 (1892)). If the court does not have subject-matter jurisdiction or of the parties, its order is void and can be attacked collaterally. (*Hughes v Cuming*, 165 N.Y. 91, 58 N.E. 794 (1900)). On the other hand, a lawful order of a court must be obeyed even if erroneously made, so long as the court had jurisdiction, and the order is not void on its face, (see *Ketchum v. Edwards*, 153 N.Y. 534, 47 N.E. 918 (1897); *Wolstencroft v. Sassower*, 212 A.D.2d 598, 623 N.Y.S.2d 7 (2d Dep't 1995)).

Waiver and oral agreement by a recipient spouse to receive less

It has been held that an oral agreement by a recipient spouse to receive less than the amount of maintenance awarded, which is not approved by the court, is not a defense to that spouse's motion to punish the defaulting spouse for contempt for failure

to pay the amount ordered. (*Kruger v. Kruger*, 279 A.D. 808, 109 N.Y.S.2d 779 (2d Dep't 1952); see *Glickman v. Glickman*, 194 A.D. 100, 185 N.Y.S. 421 (2d Dep't 1920)).

Lapse of time and Laches

The power of the Supreme Court to punish a spouse for contempt for nonpayment of support is not limited because of the lapse of time since the commission of the contempt, and the delay, even of several years' duration, does not estop enforcement by a contempt order against a defaulting former spouse. (*Goodman v. Goodman*, 202 N.Y.S.2d 897 (Sup 1959); *Hayes v. Hayes*, 74 Misc. 533, 134 N.Y.S. 482, affirmed 208 N.Y. 600, 102 N.E. 1104.)

Termination of action

The right to enforce payment of maintenance pendente lite by contempt proceedings ends when the action in which it was awarded is terminated by settlement, abandonment, discontinuance, or dismissal of the complaint, (*Polizotti v. Polizotti*, 305 N.Y. 176, 111 N.E.2d 869 (1953)). or after the entry of a final judgment in the action. (*Prothers v. Prothers*, 283 A.D. 747, 127 N.Y.S.2d 923 (2d Dep't 1954); *Mittman v. Mittman*, 263 A.D. 384, 33 N.Y.S.2d 211 (1st Dep't 1942)). However, a contempt order made during a matrimonial action survives the subsequent entry of a final judgment and can be enforced by commitment for failure to comply with it after the action is dismissed. (*Ross v. Ross*, 9 A.D.2d 922, 195 N.Y.S.2d 168 (2d Dep't 1959)).

Punishment for Civil and Criminal Contempt

The punishment for criminal contempt for wilful disobedience to a lawful mandate under Judiciary Law § 750 may be by fine, not exceeding one thousand dollars, or by imprisonment, not exceeding thirty days, in the jail of the county where the court is sitting, or both, in the discretion of the court. Where a person is committed to jail, for the non-payment of a fine, imposed under Judiciary Law §751, he must be discharged at the expiration of thirty days. Where he is also committed for a definite time, the thirty days must be computed from the expiration of the definite time. (Judiciary Law §751)

The power of the court to punish a civil contempt is limited by Judiciary Law § 774 (1) which provides, among other things, that where the misconduct consists of an omission to perform an act or duty, which is still in the power of the offender to perform, (such as payment of alimony, maintenance, distributive awards or special relief in matrimonial actions or counsel fees in a divorce case) he shall be imprisoned only until he has performed it.

Civil Rights Law §72 limits the length of imprisonment for nonpayment of alimony, maintenance, distributive awards, or special relief in matrimonial actions or counsel fees in a divorce case to 3 months for a default of less than \$500 and to 6 months for a sum of \$500 or over. But, under the provisions of the Domestic Relations Law, where the judgment or order in a matrimonial action directs maintenance or

support to be paid in periodic installments, the fact that a spouse has been punished for one default does not save him or her from punishment for failure to pay subsequent installments. He or she may be punished as often as he or she defaults in paying the different installments. For this purpose, the defaulting spouse may be proceeded against under the same order, in the same manner, and with the same effect as though such installment payment was directed to be made by a separate and distinct order. (Domestic Relations Law §245).

Any term of imprisonment for civil contempt must first be conditioned upon the defendant's failure to pay all arrears within a specified time. (*Stempler v Stempler*, 200 A.D.2d 733, 607 N.Y.S.2d 111 (2 Dept., 1994)). He must be given an opportunity to purge the contempt.

If an actual loss or injury has been caused to a spouse by reason of civil contempt, a fine sufficient to indemnify the aggrieved party must be imposed upon the offender and when collected paid to the aggrieved party. (Jud. Law §772). Where it is not shown that an actual loss or injury has been caused by the contempt a fine may be imposed and paid to the aggrieved party, not to exceed the amount of the complainant's costs and expenses, plus \$250 (Jud. Law §773).

A conditional money judgment that is tantamount to a fine is not authorized by Judiciary Law §§ 751 and 773. (*Corrado v. Corrado*, 18 A.D.3d 599, 795 N.Y.S.2d 616 (2d Dep't 2005)).

Where an actual loss has been caused by civil contempt, the aggrieved party is entitled to recover the amount of the loss, and the reasonable costs and expenses in proving the amount of the loss and the contempt. (*Jamie v. Jamie*, 19 A.D.3d 330, 798 N.Y.S.2d 36 (1st Dep't 2005)). Since October 12, 2010, Domestic Relations Law §238 authorizes a court to award counsel fees in a contempt proceeding under Domestic Relations Law §§ 245, or 246. (Laws of .2010, Ch. 329, § 2, effective October 12, 2010.)

Conclusion

Contempt can be an effective remedy of first resort. However, when a spouse is imprisoned for contempt a provision in a judgment or order that requires the payment of money by one spouse for the support of the other "is suspended and inoperative so far as punishment for contempt is concerned during the period in which the defaulting spouse is imprisoned." (Domestic Relations Law § 247)

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