Criminal Contempt in Matrimonial Actions
By Joel R. Brandes

A failure to comply with a custody or visitation order, an order directing payment of maintenance and child support, a temporary restraining order, or other lawful order in a matrimonial action, as in any other action, may result in a finding of criminal contempt of court where the court finds that there has been willful disobedience to its lawful mandate.

Criminal contempt is an offense against public justice. The purpose of criminal contempt is to vindicate the authority of the court. (Jud. Law §750) No showing of prejudice to the rights of a party to the litigation is needed since the right of the private parties to the litigation is not the controlling factor. (Rolon v. Torres, (121 A.D.3d 684, 993 N.Y.S.2d 348 (2d Dep't 2014)). Fines for criminal contempt must be paid into the public treasury, not to the petitioner. (*see* Judiciary Law § 791; Kozel v. Kozel 161 A.D.3d 700, 78 N.Y.S.3d 68 (1 Dept., 2018)). In People ex rel. Lohaus v. Lohaus (19 A.D.2d 549, 240 N.Y.S.2d 1021 (2 Dept. 1963)) where the Appellate Divison found that the defendant-husband violated the parties custody order and was found guilty of a criminal (rather than a civil) contempt, it held that the fine of $100 should be paid to the Commissioner of Finance of Westchester County instead of to the attorney for the benefit of the plaintiff-relator.

Judiciary Law §750(1) provides, in part, that a court of record has the power to punish for criminal contempt, a person guilty of any of the following acts, …: 1. Disorderly, contemptuous, or insolent behavior, committed during its sitting, in its immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority. 2. Breach of the peace, noise, or other disturbance, directly tending to interrupt its proceedings. *3. Willful disobedience to its lawful mandate*. 4. Resistance willfully offered to its lawful mandate …(Jud. Law §750(1)).(emphasis supplied)

Applications to punish the accused for a contempt specified in Judiciary Law §750 may be made by notice of motion or by order to show cause, and are be made returnable at the term of the supreme court at which contested motions are heard, or of the county court if the supreme court is not in session. (Jud. Law §750).

The court can summarily punish an accused for criminal contempt under Judiciary Law §750 where the conduct is committed in the presence and hearing of the court. The offender may be immediately apprehended and punished, without further examination or proof, because the court, having personally observed the offense, needs no further explanation.

A criminal contempt, committed in the immediate view and presence of the court, may be punished summarily. When not committed in the immediate view and presence

of the court, the party charged must be notified of the accusation, and have a reasonable time to make a defense. (Beninati v. Beninati 181 A.D.2d 434, 580 N.Y.S.2d 346 (1st Dept. 1992)).

In Beninati v. Beninati (181 A.D.2d 434, 580 N.Y.S.2d 346 (1st Dept. 1992) the Appellate Division held that the defendant received sufficient notice of being held in criminal contempt where the order to show cause contained an unequivocal notice that the purpose of the hearing was to punish the defendant for contempt and that any failure to appear would result in arrest and imprisonment based on a flagrant refusal to comply with pendente lite order of the trial court.

Criminal contempt can be premised upon uttering an obscenity in the court's presence. In Frierson v. Goldston, (9 A.D.3d 612, 779 N.Y.S.2d 670 (3d Dep't 2004)), the petitioner filed petitions seeking to modify custody and a petition alleging a family offense. At a court appearance, Family Court noted that the psychiatric evaluation of the petitioner raised concerns and, directed the petitioner to sign a release and confidentiality waiver. After the next appearance, his attorney sought permission to withdraw, Family Court inquired whether the petitioner had signed the release and learned he had not. Petitioner advised the court that he wanted to withdraw his petitions. Family Court marked his petitions withdrawn and found him in contempt for refusing to sign the release, as well as for interrupting the court and for uttering an obscenity as he was being removed from the courtroom. He was sentenced to 60 days in jail. The Appellate Division held, inter alia, that Family Court erred in finding him in criminal contempt. It noted that criminal contempt can be premised upon, among other things, “[d]isorderly, contemptuous, or insolent behavior” committed in the court's presence. As acknowledged by the petitioner, his uttering of an obscenity in the court's presence following a ruling with which he disagreed provided a basis for a finding of contempt. However, the record did not support a finding of criminal contempt for the petitioner's failure to sign the release regarding his psychiatric treatment. The petitioner's mental health was a relevant consideration injected into the proceedings by the petitioner. By seeking custody or increased visitation, the petitioner effectively waived his privilege regarding such information rendering any written waiver or consent unnecessary. However, it was error for Family Court to resort to the contempt statute when other remedies were available. There was no support in the record for the court's finding of contempt emanating from the petitioner's essentially pro se attempts to justify his refusal to sign the release and evidence that the defendant's disobedience of the pendente lite order was willful.

Supreme Court cannot properly find a party in criminal contempt for perjury based on testimony in Family Court. In Ritchie v. Ritchie, (184 A.D.3d 1113, 125 N.Y.S.3d 798 (4th Dep't 2020)), the Appellate Division agreed with the mother that “the court erred in sua sponte directing her to pay a $2,500 fine to the [f]ather for her perjury in this matter ... and if the fine is not permitted by law, [directing that] ... the fine [be converted] into an award of damages.” The court did not state whether it was

sanctioning the mother for frivolous conduct or civil or criminal contempt. The court summarily punished the mother by sanctioning her after it determined that she committed perjury during her testimony before a Judicial Hearing Officer in Family Court with respect to the temporary order of protection and during her testimony at the hearing on the petition before the Supreme Court. It pointed out that assuming, arguendo, that perjury would support a finding of contempt, the court could not properly find the mother in criminal contempt based on her testimony in Family Court, nor could the court summarily punish the mother for civil or criminal contempt based on that testimony, since it occurred out of the court's immediate view and presence. Insofar as the order could be deemed to sanction the mother for civil or criminal contempt that occurred in the presence of the Supreme Court, because due process requires that the contemnor be afforded an opportunity to be heard at a meaningful time and in a meaningful manner, and the court failed to provide notice that it was considering finding the mother in contempt or an opportunity to be heard thereon, the court erred in imposing the sanction. Moreover, the court had no authority to sanction the mother on the ground that she engaged in frivolous conduct. Assuming, arguendo, that sanctions for frivolous conduct may be based on a party's perjury, it held that the regulation permitting the imposition of such sanctions specifically provides that it shall not apply to proceedings in the Family Court commenced under article 8 of the Family Court Act (22 NYCRR §130-1.1(a)). This matter was commenced in Family Court under Article 8 of the Family Court Act, and therefore no such sanction was authorized.

The element which serves to elevate a contempt from civil to criminal is the level of willfulness with which the conduct is carried out. Criminal contempt must be proved beyond a reasonable doubt, while civil contempt requires proof with reasonable certainty. (McCormick v. Axelrod, 59 N.Y.2d 574, 466 N.Y.S.2d 279, 453 N.E.2d 508 (1983), order amended, 60 N.Y.2d 652, 467 N.Y.S.2d 571, 454 N.E.2d 1314 (1983); N.A. Development Co. Ltd. v. Jones, 99 A.D.2d 238, 472 N.Y.S.2d 363 (1st Dep't 1984)).

To establish a finding of criminal contempt, the moving party must show, beyond a reasonable doubt, (1) the existence of a lawful mandate of the Court, (2) that the alleged contemnor was aware of the mandate, and (3) that the alleged contemnor willfully violated the mandate. (See Jud. Law §750; see also Gomes v. Gomes, 106 A.D.3d 868, 965 N.Y.S.2d 187 (2d Dep't 2013)). 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).

An essential element of criminal contempt is willful disobedience. 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. In Rolon v. Torres, (121 A.D.3d 684, 993 N.Y.S.2d 348 (2d Dep't 2014)), the Appellate Division held that in a criminal contempt proceeding, proof of guilt must be established beyond a reasonable doubt. An essential element of criminal contempt is willful disobedience. 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.

A 'willful' disobedience is criminal contempt, while 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)).

In Simens v. Darwish, (100 A.D.3d 527, 954 N.Y.S.2d 80 (1st Dep't 2012)), the Appellate Division held that the fact that a party does not comply with a court order does not, in and of itself, constitute criminal contempt. Where the defendant asserts that he did not willfully disobey the court order in that he believed, in good faith, that the order did not prohibit him from taking the challenged actions, the court must hold a hearing to determine whether the disobedience was willful. Moreover, there Supreme Court failed to apply the correct standard of proof when it held that criminal contempt had been demonstrated by "clear and convincing evidence." Criminal contempt must be proven beyond a reasonable doubt.

Judiciary Law § 751 (1) provides that except as provided in subdivisions (2), (3) and (4), (which are not relevant to this discussion) punishment for a contempt specified in 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. (See Rolon v. Torres, 121 A.D.3d 684, 993 N.Y.S.2d 348 (2d Dep't 2014)).

Where a person is committed for contempt, the particular circumstances of his offense must be set forth in the mandate of commitment. A mandate, punishing a person summarily for contempt committed in the immediate view and presence of the court, is reviewable by a proceeding under CPLR Article 78. (Jud. Law § 752).

Where the punishment for contempt is based on a violation of an order of protection issued under criminal procedure law §§ 530.12 or 530.13, imprisonment may be for a term not exceeding three months. (Jud Law § 751 (1)).

Where a person is committed to jail for the non-payment of a fine imposed under Judiciary Law § 751 (1)) 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. (Jud Law § 751 (1)).

The punishment for criminal contempt in a matrimonial action, as in any civil action, is limited by the Judiciary Law. A court has the power to punish for criminal contempt specified in Judiciary Law § 750, by a fine, not exceeding one thousand dollars, by imprisonment, not exceeding thirty days, or both. (see Judiciary Law §§ 751 [1]; 753 [A]).

The Supreme Court exceeds its authority when it fashions a remedy not contemplated by the Judiciary Law. (Pitterson v Watson, 299 A.D.2d 467, 750 N.Y.S.2d 317 (2 Dept., 2002)). For example, the Court does not have authority under the

Judiciary Law to impose a sentence that includes community service and psychiatric treatment for either civil or criminal contempt. (Data-Track Account Services, Inc. v. Lee 17 A.D.3d 1115, 796 N.Y.S.2d 206 (4 Dept. 2005)). Moreover, it is error to impose a daily criminal contempt fine of $1,000 instead of a one-time criminal contempt fine of $1,000. (Kozel v. Kozel 161 A.D.3d 700, 78 N.Y.S.3d 68 (1 Dept., 2018)). In Corrado v. Corrado (18 A.D.3d 599, 795 N.Y.S.2d 616 (2 Dept. 2005)) the Supreme Court, granted the plaintiff's motion to hold the defendant in contempt for failing to comply with certain provisions of the divorce judgment requiring him to maintain life insurance policies and conditionally awarded the plaintiff a money judgment in the sum of $48,000. The Appellate Division modified the order by deleting the provision conditionally awarding the plaintiff a money judgment of $48,000; It held that the Supreme Court's award of the conditional money judgment, which was tantamount to a fine, was not authorized by Judiciary Law §§ 751 and 773.

Conclusion

Where the record is completely devoid of any indication of the contemptuous acts that gave rise to the judicially imposed penalty for contempt, the failure to specify whether the contemnor was guilty of civil or criminal contempt requires reversal. In situations where the contemptuous acts are well documented, the failure to label the adjudication as civil or criminal contempt does not warrant the same result. Where the record supports the Supreme Court's conclusion of a willful violation of its order, the Appellate Division may exercise its authority to modify the contempt order to delineate specifically that the contemnor was guilty of criminal contempt. Bowie v. Bowie, 182 A.D.2d 1049, 1051, 583 N.Y.S.2d 54 (3d Dept.,1992)).

Joel R. Brandes practices matrimonial law in New York City concentrating on appeals. He is the author of the twelve-volume treatise, Law and the Family New York, 2022-2023 Edition, and Law and the Family New York Forms, 2022 Edition (five volumes), both published by Thomson Reuters, and the New York Matrimonial Trial Handbook (Bookbaby). He can be reached at joel@nysdivorce.com or at his website at www.nysdivorce.com.